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The Meaning of "Investment": ICSID's *Travaux* and the Domain of International Investment Law

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Tribunals have sharply curtailed the categories of investment eligible for protection under international investment law's keystone treaty, the ICSID Convention. This Article urges them to reverse that trend and recognize that ICSID has jurisdiction over any plausibly economic asset or activity.

Tribunals' sudden constriction of what constitutes "investment" arises in the first instance from a widespread historical misunderstanding. Commentators have commonly acted as though the Convention's omission of a definition for "investment" amounts to a wholesale delegation of the question to arbitral tribunals for case-by-case lawmaking. That premise is mistaken. The Convention's travaux *demonstrate that the drafters adopted a clear—and extremely broad—meaning of "investment." It is not that all parties agreed on this broad understanding from the start. Rather, the broad definition was part of a compromise reached after long and contentious negotiations over what that definition should be. The other element of the compromise was a series of opt-out provisions by which states could narrow the Convention's capacious baseline definition on an individual basis.*

The historical arrangement properly reflects the deference that international tribunals owe to state autonomy. This Article suggests three reasons for tribunals to respect a state's decision to extend ICSID protection to a given category of enterprise. First, the historical approach retains policy flexibility in a pluralist world occupied by diverse state actors with shifting policy preferences. Second, it delegates economic decisions to political entities that generally have a comparative advantage in both expertise and legitimacy. Third, it recognizes that the operative legal term is meant to facilitate state action, not to restrain state autonomy. This Article therefore argues that international tribunals should respect the ICSID framework as it was originally established: an adaptable vehicle with the capacity to satisfy many states' preferences and the flexibility for individual states to change their investment policies over time.

INTRODUCTION

In early 1999, Congolese forces burst into a Kinshasa law firm, dragged its employees off for indefinite detention, and shut down the American owner's business, sealing the premises. This wartime assault on a thriving local enterprise squarely violated a longstanding treaty between the United States and Congo. The treaty provided a direct cause of action against the Congolese government by the cleaned-out foreign investor, Patrick Mitchell.

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But when a tribunal at the International Centre for the Settlement of Investment Disputes ("ICSID") finally resolved Mitchell's case, his claims were flatly rejected. The problem was not that he had filed his claim too late, nor that he had failed to submit sufficient evidence to prove the expropriation. Rather, the tribunal rejected Mitchell's claims because it decided that his firm—funded by foreign capital, owned and run by a foreign citizen, and located in Kinshasa for years—was not a foreign "investment," despite clear language in the U.S.-Congo-Kinshasa treaty identifying it as such.[1] This determination shut him out of ICSID, an institution established precisely to allow foreign nationals to enforce their rights under international investment treaties. The destruction of Mitchell's business went unremedied.

This dramatic incident from a war-torn country seems extraordinary. But in fact it is the very embodiment of what renowned jurist Mohamed Shahabuddeen calls "a titanic struggle" over the future of international investment law.[2] That system rests on what is often referred to as a grand bargain, in which capital-importing states guarantee reasonable treatment to foreign investors in exchange for their contribution of resources and effort to the local economy. This bargain is premised on a normative commitment to the promotion of transnational business, both to spur public economic development and to expand private investment opportunities. The empirical assumption is that states can encourage international investment by linking together a two-part structure: (i) substantive rights for foreign investors against the sovereign governments of the countries where they do business; and (ii) an effective, reliable process for enforcing those rights.[3] This two-part substance-process structure forms the core architecture of international investment law as it exists today.

ICSID, a multilateral treaty institution with an exceptionally effective track record of adjudication and enforcement, has been a key mechanism for enforcing international investment law's substantive provisions. The great majority of countries around the world belong to ICSID, which serves as the forum for ad hoc arbitration panels that adjudicate treaty disputes between states and individual foreign investors. When a host country expropriates a factory, repudiates a utility concession agreement, gerrymanders regulations to shut down a business venture, or denies even-handed justice in its domestic court system, foreign investors can bring claims before an ICSID tribunal seeking redress for the violations of their rights under international law.

1. Treaty between the United States of America and the Republic of Zaire Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Zaire, art. I(c), Aug. 3, 1984, S. Treaty Doc. No. 99-17 [hereinafter U.S.-Congo-Kinshasa BIT] (Investment means "every kind of investments . . . including equity . . . ; and includes: tangible and intangible property, including all property rights . . . ; a company or . . . interests in a company or interests in the assets thereof; . . . licenses and permits issued pursuant to law . . . ; [and] . . . any right conferred by law or contract, and any licenses and permits pursuant to law."). Zaire became the Democratic Republic of the Congo in 1997.

2. Malaysian Historical Salvors v. Malaysia, ICSID Case No. ARB/05/10, Decision on Annulment, ¶ 62 (Apr. 16, 2009) [hereinafter Malaysian Historical Salvors II] (Shahabuddeen, dissenting).

3. The accuracy of this assumption continues to be debated. *See infra* note 243.

Access to ICSID, however, depends entirely on the existence of a legally cognizable investment. Unless an asset or economic activity constitutes an "investment" under Article 25 of the ICSID Convention, it is not subject to ICSID jurisdiction. A recent and dramatic shift in tribunals' approach to determining *which* forms of economic activity constitute investments has therefore cast this framework into uncertainty. Historically, tribunals took a highly deferential approach to this question, respecting without serious scrutiny states' ex ante decisions to bring all kinds of economic enterprise under the protection of the ICSID umbrella. In a major change of course over the past half-decade, however, a new line of cases has taken a far more restrictive view, imposing a strict definition of "investment" that threatens to exclude any economic activity outside the context of productive infrastructure like the archetypal widget factory or coal mine. This restrictive approach has rapidly become dominant among the tribunals that guard ICSID's gates.

If it holds, this new baseline would do real damage to the international investment regime. It appears that wide-ranging categories of economic activity—from service businesses and time-limited contracts to any commercial ventures not directed at a country's physical infrastructure—might fall outside the new definition. While other options exist for enforcing investment commitments when the ICSID doors are shut, these alternatives are only partially adequate: they are not available in all cases, and their enforcement mechanisms are not equivalent to ICSID's. Removing ICSID jurisdiction over these categories of enterprise thus compromises the credibility of states' promises to protect them.

This brewing threat to investment law's grand bargain is rooted in two misunderstandings: one historical and one theoretical.

Drawing on extensive new research into primary sources from the four-year drafting history of the ICSID Convention, this Article demonstrates that the restrictive approach squarely contradicts the historical arrangement. Until now, commentators have commonly assumed that like-minded delegates at the drafting convention were forced to leave "investment" undefined because of their inability, as a practical drafting matter, to formulate a single, clean definition. The historical evidence demonstrates that this assumption is simply incorrect. Rather, the decision to leave "investment" open-ended had a specific meaning as part of a crucial compromise of a long-raging dispute.

Throughout the lengthy negotiation process, two blocs of countries clashed repeatedly over the scope of ICSID jurisdiction. A group led by developed countries advocated wide-open jurisdiction over any foreign enterprise, while a group dominated by developing countries pushed to strictly limit ICSID review to narrow categories of economic activity. The jurisdictional maximalists eventually won out, but only after making an important concession. In exchange for a definition of "investment" that would extend jurisdiction to any plausibly economic asset or activity, the Convention created a set of opt-out mechanisms that individual countries could use to tailor the forms of investment eligible for protection in their particular cases. The restrictive approach to ICSID jurisdiction ignores this history and this structural tradeoff. And its adherents seem unaware of what is in some ways an even more embarrassing historical problem: the three core criteria employed by the restrictive approach were explicitly considered and *rejected* during the drafting process.

The historical compromise made good theoretical sense. In all cases where the restrictive definition has practical bite, states have promised investors that a given category of enterprise will be secured by the ICSID guarantee. This Article suggests three reasons why tribunals should defer to state commitments of this nature. First, the historical approach maximizes policy flexibility in a pluralist world occupied by diverse state actors with shifting policy preferences. Second, it delegates economic decisions to political entities that have a comparative advantage in both expertise and legitimacy. Third, the underlying legal norm of "investment" is meant to facilitate state action, not to protect a vulnerable constituency by restraining state autonomy. Each of these rationales suggests that tribunals should respect the promises a state makes to foreign investors.[4] While the notion of deference is not without problems in cases where state governments are inept or corrupt, requiring tribunal deference to state commitments on this particular question raises fewer problems in the run of cases than vesting decisional power in tribunals.

The analysis outlined above is neither purely theoretical nor (I hope) merely academic. As explained in Part III.D, it should also be doctrinally decisive under the Vienna Convention on the Law of Treaties. The term "investment" is a quintessentially "ambiguous" term justifying "[r]ecourse [to] . . . the preparatory work of the treaty and the circumstances of its conclusion."[5] And the advantages of deference in a scheme aimed at promoting economic development suggest that the historical approach best effectuates the "object and purpose" of the ICSID Convention.[6] The only element of black letter Vienna Convention analysis that requires pause is the ques-

4. To be clear, the bare invocation of deference cannot alone resolve the issue. There typically remains a diachronic problem of *which* state decision to defer to: the up-front adoption of a broad ICSID policy, or the midstream litigation decision to resist the implications of that policy when a particular case threatens financial repercussions. For reasons elaborated in Part III.C, deference is properly directed to a state's ex ante policy decision as a competent and autonomous actor capable of binding itself, rather than to its ex post attempt to walk back from that commitment in an adversarial context. To do otherwise unwinds not only the foundational principle of *pacta sunt servanda*, but also threatens to make the very act of promising impossible, at least within the gray zone of current Article 25 doctrine.

5. Vienna Convention on the Law of Treaties, art. 32, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. The ICSID *travaux* should also guide tribunal decision-making for the independent reason that the historical evidence clearly "establish[es]" that "the parties . . . intended" a "special meaning" for investment, which should therefore be given effect. *Id.* art. 31(4).

6. *Id.* art. 31(1).

tion of subsequent state practice. And even that is at worst ambiguous: while some states contest the broad definition of "investment" when they face liability in particular cases, at the policymaking stage they are adopting vastly capacious definitions of "investment." As argued below, it is the latter rather than the former that should predominate in state practice analysis.

Given the history of the ICSID Convention and a proper respect for state autonomy, tribunals should treat the definition of "investment" under the Convention as encompassing any plausibly economic activity or asset. The only exceptions to this rule should come where states' definitions of investment are so disconnected from meaningfully economic activity as to be absurd.[7] This secures the basic ICSID framework as it was intended: an adaptable vehicle with maximal flexibility for individual states to change their investment policies over time and maximum capacity to satisfy many states' preferences at any single point in time. Governments that want to extend investment guarantees to a broad range of foreign activities are free to do so; governments that prefer to restrict their ICSID exposure can tailor it as narrowly as they like. For all practical purposes, the "investment" screen of the ICSID Convention should have no bite: I am not aware of a single pending or concluded case that should be—or should have been—excluded on this ground.

The Article proceeds as follows. Part I describes the structure of the international investment regime, outlines the two clashing approaches to the definition of "investment," and explains what is at stake in this conflict. Part II explains the key discoveries uncovered by extensive new research into the drafting process of the ICSID Convention. It makes the historical case that "investment" was intended to encompass any plausibly economic activity or asset. Part III argues that this historical arrangement makes good policy sense and proposes an initial framework for thinking about deference to state autonomy in at least this arena of international adjudication. Part IV steps back to reconsider the investment law regime as a whole, suggesting that the jurisdictional turmoil points to a more deeply seated problem: investment law's lack of a calibrated system of deference to state regulatory decision-making.

7. This approach does not remove all ambiguity at the margins, and I discuss various test cases in the Conclusion. But the continuing existence of theoretical ambiguity in some conceivable applications does not vitiate the contribution made here. The fundamental point of this Article is that tribunal inquiry on the question of "investment" should shift radically toward respecting state commitments and away from skeptical scrutiny of whether any particular form of economic activity should "really" count as an investment.

I. The Regime of International Investment Law

A. *The Architecture of the Regime*

The regime of international investment law is best understood as two interlocking pieces: substantive protections for foreign investors combined with remedial procedures to enforce those protections. Understanding why ICSID is so central to this structure requires first understanding the substantive protections that it enforces.

1. *Substantive Protections*

Substantive protections for foreign investors have long existed both in treaties and in customary international law as an aspect of the treatment states were obliged to provide each others' citizens more generally. The substantive rights under these original sources of law, however, were severely undercut by a variety of restrictive doctrines and jurisdictional rules.[8] The central substantive element of the investment regime as it exists today, therefore, is the bilateral investment treaty ("BIT"), an innovation first introduced in the 1950s that rapidly became the dominant component of international investment law.[9] While there are some important multilateral treaties that include similar sets of substantive guarantees, often as part of a broad free trade accord, this article will for convenience simply use "BITs" as shorthand for all investment treaties.[10]

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8. In particular, investors' only recourse was typically to petition their home government for assistance; unless the host state agreed to arbitrate treaty disputes, investors could not bring direct claims themselves under international law. Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. Davis J. Int'l L. & Pol'y 157, 159–61 (2005).

9. *See generally, e.g.*, Rudolf Dolzer & Margarete Stevens, Bilateral Investment Treaties 1–18 (1995). Over the last 20 years, there has been explosive growth in the number of BITs, with the total number rising from fewer than 500 in the late 1980s, UNCTAD, World Investment Report 1996, at 147 (1996), to more than 2,600 in 2008, UNCTAD, World Investment Report 2009, at 33 (2009).

It is striking to note how unanticipated this development was by the drafters of the ICSID Convention, at least initially. Memorandum of the Meeting of the Committee of the Whole (Dec. 18, 1962), *in* 2 History of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 59 (1968) [hereinafter 2 History] (General Counsel Aron Broches) (suggesting that the "situation in which a government . . . made a general statement that it would submit to arbitration a defined class of disputes with all comers" was "hardly ever likely to obtain"). Many expected that most ICSID proceedings would adjudicate rights under domestic law, whether based on specific contracts with a host state or on broader investment promotion legislation. *See, e.g.*, *id. But see, e.g.*, Consultative Meeting of Legal Experts, Addis Ababa (Dec. 16–20, 1963), *in* 2 History, *supra*, at 273–75 (discussion regarding "bilateral [investment] agreements" that "provide for appeals for arbitration by a national of one State in relation to the other State").

10. *See, e.g.*, North American Free Trade Agreement, U.S.-Can.-Mex., art. 1139, Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 605 (1993) [hereinafter NAFTA]; Agreement among the Governments of Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore, and Thailand for the Promotion and Protection of Investments, Dec. 15, 1987 (as amended and enlarged by later agreement); The Southern Common Market (MERCOSUR): Protocol of Colonia for the Promotion and the Reciprocal Protection of Investments in the MERCOSUR, MERCOSUR/CMC/DEC No. 11/94 (Jan. 17, 1994), *available at* http://www.cvm.gov.br/ingl/inter/mercosul/coloni-e.asp.

BITs create a set of substantive legal protections similar to the broad guarantees of fairness and due process found in many states' domestic constitutions. They typically prohibit expropriation without just compensation and guarantee "fair and equitable treatment," a sort of covenant of good faith and fair dealing that binds the state even as a regulatory sovereign. Many BITs also include a most favored nation clause, which functions in much the same way as its trade law cousin. Some BITs go further and also include a "national treatment" clause, requiring foreign investors to be afforded substantially the same legal protections as investors from the host country. And BITs often include a guarantee of "full protection and security," which requires, at a minimum, that the government provide adequate physical protection from private violence and crime.[11]

2. *Procedural Enforcement*

In order for this body of substantive guarantees to have real-world force, it needs an enforcement mechanism at the back end. ICSID is the traditional heart of that mechanism.[12] It was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention" or the "Convention"), a multilateral treaty intended to establish a secure framework for promoting and protecting foreign investment in developing countries.[13] The World Bank sponsored, advocated, and substantially drafted the treaty over the course of a four-year negotiation process among Bank members.[14] Member nations had long leaned on the Bank for informal mediation of disputes with foreign investors, and the initial impetus for the Convention was the Bank staff's belief that formalizing this dispute settlement process could "be a major step toward . . . stimulating a larger flow of private international capital into

11. For a more in-depth survey of typical BIT protections, see Rudolf Dolzer & Margarete Stevens, Bilateral Investment Treaties (1995).

12. Also critical to the scheme are two features typical of BITs: (1) a dispute settlement clause in which states provide ex ante consent to direct arbitration with any investor who alleges violations of the BIT's substantive provisions, and (2) a waiver of the requirement that individuals exhaust their domestic remedies before asserting legal claims in an international forum. *See generally* Jan Paulsson, Denial of Justice in International Law (2005). States may incorporate these features into contracts and investment legislation as well.

13. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Oct. 17, 1966, 575 U.N.T.S. 159. There are currently 156 ICSID Convention signatories, of which 144 have deposited instruments of ratification. ICSID, Member States, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=SHowHome&pageName=MemberStates_Home.

14. Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, *in* 1 History of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 2 (1970) [hereinafter 1 History] ("[I]f the plans established for the growth in the economies of the developing countries were to be realized, it would be necessary to supplement the resources flowing to these countries from bilateral and multilateral governmental sources by additional investments originating in the private sector.").

those countries which wish to attract it."[15] Other motives were surely in play as well, including a desire by the capital-exporting countries that dominated the Bank to increase the protections for their investors overseas.[16]

The ICSID Convention created a facility for arbitration between signatory states and individual investors.[17] It enabled individuals to seek *direct* redress from sovereign countries before an institutionalized international forum—a major development whose significance was fully apparent to its drafters.[18] The resulting system of adjudication has played out within a shifting universe of ad hoc tribunals, each typically comprising three arbitrators drawn from a substantially recurring roster of experts. Over time, these tribunals have come to act more like formal international courts than like traditional commercial arbitrators: they write reasoned opinions that can run hundreds of pages long; they engage in sophisticated analysis of difficult questions of international law; and they cite, interpret, and critique one another's decisions, building a sort of common law of investment on which states and investors can more or less rely.[19] The ICSID arrangement also provides an annulment mechanism through which losing parties can appeal arbitral decisions before a second ad hoc tribunal under an extremely deferential standard of review.[20]

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15. Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, ¶ 9 [hereinafter Report of the Executive Directors]; *see also*, P.F. Sutherland, *The World Bank Convention on the Settlement of Investment Disputes*, 28 Int'l & Comp. L. Q. 367 (1979) (discussing impetus for ICSID).

16. For a classic critique of the investment regime from this perspective, see M. Sornarajah, The International Law on Foreign Investment (2d ed. 2004).

17. ICSID Convention, *supra* note 13, art. 25(1).

18. *See, e.g.*, Consultative Meeting of Legal Experts, Addis Ababa (Dec. 16–20, 1963), *in* 2 History, *supra* note 9, at 256 (Uganda) ("[T]he effect of [the Convention] would be to place nationals on a par with States. That represented a departure from customary international law and was a step which should not be taken lightly."); Consultative Meeting of Legal Experts, Addis Ababa (Dec. 16–20, 1963), *in* 2 History, *supra* note 9, at 293 (Togo); Consultative Meeting of Legal Experts, Santiago (Feb. 3–7, 1964), *in* 2 History, *supra* note 9, at 305 (Chile); Consultative Meeting of Legal Experts, Bangkok (Apr. 27–May 1, 1964), *in* 2 History, *supra* note 9, at 501 (Ceylon); Consultative Meeting of Legal Experts, Geneva (Feb. 17–22, 1964), *in* 2 History, *supra* note 9, at 393–94 (South Africa); Consultative Meeting of Legal Experts, Geneva (Feb. 17–22, 1964), *in* 2 History, *supra* note 9, at 403 (Broches) (stating that "the most important juridical innovation introduced by the Convention" was elevating individual rights against states to the international plane). For a range of perspectives on the revolution of the individual in international law more generally, see, *e.g.*, Theodor Meron, *The Humanization of International Humanitarian Law*, 94 Am. J. Int'l L. 239 (2000); Jonathan I. Charney, *Transnational Corporations and Developing Public International Law*, Duke L.J. 748 (1983); *cf.* Anne-Marie Slaughter, A New World Order (2004) (discussing the "disaggregated state").

19. Insisting all the while, of course, that there is no doctrine of stare decisis in international law. This tension between rhetorical rejection of binding precedent and de facto adherence to stare decisis is a typical feature of international adjudication. *See, e.g.*, Mohamed Shahabuddeen, Precedent in the World Court (1996); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication*, 9 J. Transnat'l L. & Pol'y 1 (1999).

20. ICSID Convention, *supra* note 13, art. 52(1) (limiting annulment review to challenges claiming, for example, that the Tribunal "manifestly exceeded its powers," was subject to "corruption," or "failed to state the reasons" for its decision).

To be clear, there are alternatives to ICSID: many BITs also allow arbitration on an ad hoc basis under the United Nations Commission on International Trade Law ("UNCITRAL") rules or through another international arbitral forum such as the Stockholm Chamber of Commerce or the International Chamber of Commerce. But these substitutes do not replicate all the protections of ICSID, for at least two reasons. First, they are not always available: the only enforcement option mandated as of right under some BITs is ICSID.[21] For investors proceeding under such BITs, it is ICSID or nothing—unless the state gives specific consent to arbitrate a particular dispute after it has arisen, or until the BIT parties see fit to renegotiate. Second, the ICSID Convention has uniquely binding enforcement provisions. It requires each contracting state to "recognize an award rendered pursuant to this Convention as binding" and to "enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."[22] In Roger Alford's felicitous formulation, this is an international Full Faith and Credit Clause without peer outside the supranational European arrangement.[23]

The ICSID mechanism may not yield flawless enforcement in every case: sovereign immunity may protect many state assets,[24] for example, and any

21. *See e.g.*, Agreement on Encouragement and Reciprocal Protection of Investments between the Government of the Republic of Malawi and the Government of the Kingdom of the Netherlands, Malawi-Neth., art. 9, Dec. 11, 2003, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/netherlands_malawi.pdf; Agreement between the Republic of Austria and Malaysia for the Promotion and Protection of Investments, Austria-Malay., art. 9(2), Apr. 12, 1985, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/austria_malaysia.pdf; Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Moldova for the Protection and Promotion of Investments, U.K.-Mold., art. 8(1), Mar. 19, 1996, 2067 U.N.T.S. 175; Agreement Between the Government of Mongolia and the Government of the Republic of Singapore on the Protection and Promotion of Investments, Mong.-Sing., art. 13(2), Jul. 24, 1995, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/mongolia_singapore.pdf; Treaty between the Federal Republic of Germany and the Republic of Namibia concerning the Encouragement and Reciprocal Protection of Investments, F.R.G.-Namib., art. 11(2), Jan. 21, 1994, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/germany_namibia.pdf; Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Belarus, Neth.-Belr., art. 9, Apr. 11, 1995, 1941 U.N.T.S. 213; Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia for the Promotion and Protection of Investments, U.K.-Malay., art. 7, May 21, 1981, 16 U.N.T.S. 5 [hereinafter U.K.-Malay. BIT].

22. ICSID Convention, *supra* note 13, art. 54(1); *see also* Ibrahim Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 Foreign Investment L.J. 1, 8 (1986) ("This simple procedure eliminates the problems of the recognition and enforcement of foreign arbitral awards, which subsist in domestic laws and under other international conventions.").

23. Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 Virginia J. Int'l L. 675, 692 (2005). On the suggestion that domestic "compliance constituencies" are crucial to the enforcement powers of international tribunals, see for example, Legalization and World Politics (Judith Goldstein et al. eds., 2001); Catherine Powell, *The Role of Transnational Norm Entrepreneurs*, 5 Theoretical Inq. L. 47 (2004).

24. ICSID Convention, *supra* note 13, art. 55 (stipulating that the Convention does not derogate from existing law relating to sovereign immunity from execution). For an excellent summary of the legal and practical challenges in executing ICSID awards, see Andrea Bjorklund, *State Immunity and the Enforcement of Investor-State Arbitral Awards*, *in* International Investment Law for the 21st Century: Essays in

domestic law grounds ordinarily available to challenge final judgments may also be used against ICSID awards.[25] But it was an enormous step beyond the previous regime of investment law enforcement, and it remains superior to the alternatives that exist today. In particular, the enforcement mechanism for ordinary commercial arbitration (which may be used for UNCITRAL and other non-ICSID awards) leaves much more room for domestic courts to overturn arbitral awards, particularly if there is a colorable basis in public policy for doing so.[26]

The advantages of ICSID's unique enforcement capabilities were recognized from the beginning.[27] As a Norwegian diplomat observed, they represented a "bold innovation" that "would require legislative action" in many countries, and which "[t]o the best of his knowledge . . . did not appear in any international instruments[,] in which enforcement clauses were usually hedged about by certain standard reservations."[28] A Yugoslavian jurist involved in the drafting process initially urged that the Convention "went too far in providing for enforcement against States" and was in fact "revolution-

Honor of Christoph Schreuer 302, 304 (Binder et al. eds., 2009) (concluding that a sufficiently persistent investor "can very likely execute his arbitral award against commercial assets of a State, assuming he is able to locate those assets").

25. ICSID Convention, *supra* note 13, art. 54(3); *see, e.g.*, Fed. R. Civ. P. 60(b) (permitting federal courts, in exceptional circumstances, to refuse to recognize final judgments in cases of, for example, fraud or newly discovered evidence); Edward Baldwin et al., *The Arbitration Risk Facing Sovereign Investors*, 23 Int'l Fin. L. Rev. 22 (2004) (suggesting that most domestic law provisions for reopening final judgments are very narrow).

26. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") permits domestic court systems to refuse to enforce commercial arbitral awards in a variety of circumstances, including where the award is contrary to public policy or relates to a subject matter "not capable of settlement by arbitration under the law of that country." United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 71 (May–June 1958).

27. *Cf.* Amerasinghe, *The International Centre for Settlement of Investment Disputes and Development through the Multinational Corporation*, 9 Vand. J. Transnat'l L. 793, 815 (1976) (noting that ICSID "goes beyond customary international law and the New York Convention" in eliminating even an *ordre public* exception to enforcement); *see also* Consultative Meeting of Legal Experts, Geneva (Feb. 17–22, 1964), *in* 2 History, *supra* note 9, at 426 (Broches) ("The question [was] . . . of limiting the grounds for attacking awards. Those grounds were limited by the Geneva and New York Conventions and the present Convention sought to limit them still further."); Dolzer & Stevens, *supra* note 11, at 11 n.35 ("Although many [bilateral treaties that preceded the BIT-ICSID regime] contained references to arbitration, these provisions were generally inadequate and offered little in the way of effective dispute resolution mechanisms").

28. Consultative Meeting of Legal Experts, Geneva (Feb. 17–22, 1964), *in* 2 History, *supra* note 9, at 427 (Norway) (questioning the necessity of the provision); *see also id.* (United Kingdom) ("The acceptance of foreign awards without the right to attack them would be a new departure . . . [and] should be accepted regardless of the fact that on paper it appeared a strange innovation."); Consultative Meeting of Legal Experts, Bangkok (Apr. 27–May 1, 1964), *in* 2 History, *supra* note 9, at 466 (Thailand) (enforcement provisions "went far beyond the normal universal practice of States"); Consultative Meeting of Legal Experts, Addis Ababa (Dec. 16–20, 1963), *in* 2 History, *supra* note 9, at 272 (Broches) (This "special feature of the Convention . . . went beyond any known forms of recognition of foreign judgments in requiring that the award of a tribunal be treated as final.").

ary in that sphere,"[29] and his Nigerian counterpart called it "one of the most important sections of the Convention."[30]

The formula supported by this "most important section[ ]" was simple. Capital-importing countries could promote economic development by offering substantive guarantees of protection to foreign investors; capital-exporting countries could achieve some modicum of security for their citizens investing overseas. ICSID then made those guarantees meaningful by providing an exceptionally secure avenue to enforce them. While the backlash described in Part IV has put pressure on investment law in recent years, on the whole the system has been remarkably successful. ICSID tribunals now resolve disputes with valuations that run to hundreds of millions of dollars and with subject matters that range from contract disputes and regulatory corruption to confiscatory tax policy and outright nationalization. Despite the high political and financial stakes of its caseload, ICSID has evolved into a notably well-functioning mechanism for adjudicating international economic disputes.

B. *Accessing the Regime*

Since the international investment regime hinges on the effectiveness of a reliable procedural mechanism for enforcing the underlying substantive guarantees, the rules governing access to ICSID are of great importance to the regime's efficacy.

Article 25 of the ICSID Convention sets the basic jurisdictional rules governing that access. It states:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of or in relation to an investment between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the Parties to the dispute consent in writing to submit to the Centre.[31]

29. Consultative Meeting of Legal Experts, Geneva (Feb. 17–22, 1964), *in* 2 History, *supra* note 9, at 379; *see also* Consultative Meeting of Legal Experts, Bangkok (Apr. 27–May 1, 1964), *in* 2 History, *supra* note 9, at 522 (Jordan) (recognizing that Convention created direct enforcement against states in domestic court); Consultative Meetings of Legal Experts, Geneva (Feb. 17– 22, 1964), *in* 2 History, *supra* note 9, at 429 (Austria); *id.* at 430 (Netherlands); Report of Working Group VI on Recognition and Enforcement of Awards (Dec. 8, 1964), *in* 2 History, *supra* note 9, at 892; *see also* Consultative Meeting of Legal Experts, Addis Ababa (Dec. 16–20, 1963), *in* 2 History, *supra* note 9, at 273 (Dahomey) ("wish[ing] to be assured that once an award was binding it would be enforced . . . [against] the losing state").

30. *Id.* at 272.

31. ICSID Convention, *supra* note 13, art. 25(1).

Most jurisdictional elements are fairly straightforward in most cases.[32] The two most frequently disputed are the existence of consent and the requirement of an underlying investment.

The ICSID process is available whenever both parties—the individual investor and the host state—have agreed to submit their dispute to the Centre. That consent can arise in three principal ways. First, it can take the form of a dispute settlement clause in a specific contract—with a foreign construction company to build a dam, for example. Such clauses commit both parties to binding ICSID arbitration of any future disputes arising out of the contract.[33] Second, it can occur on an ad hoc basis if both sides agree to submit an existing controversy to ICSID.[34] Third, it can arise from a host government's standing offer to arbitrate future disputes with an entire class of foreign investors. This third category is the most important in contemporary practice, in the form of BIT arbitration clauses that commit the signatory states to arbitrate any future claims raised by investors under the treaty's substantive provisions. Aggrieved investors can then trigger BIT arbitration at their discretion by filing a request for arbitration with ICSID.[35]

While determining the existence of consent can often involve a complicated factual assessment, the underlying legal principles are well settled. The "investment" requirement, by contrast, has been a far more vexed question, resulting in serious controversy and a dramatic shift in ICSID tribunals' approach in recent years.

32. While ICSID's nationality requirements have traditionally not been the subject of much litigation, tribunals are increasingly confronting that issue, especially in the context of veil piercing and the corporate form. *E.g.*, TSA Spectrum de Arg., S.A. v. Argentine Republic, ICSID Case No. ARB/05/05 (Dec. 19, 2008); Micula v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (Sept. 24, 2008); Tokios Tokeles v. Ukraine, Decision on Jurisdiction, ICSID Case No. ARB/02/18 (Apr. 29, 2004), *reprinted in* 20 ICSID Rev.—FILJ 205 (2005); Rompetrol Group, N.V. v. Romania, ICSID Case No. ARB/06/3, Decision on Jurisdiction and Admissibility (April 18, 2008); *cf.* Barcelona Traction, Light & Power Ltd. (Belgium v. Spain), 1970 I.C.J. 3 (Feb. 5, 1970). The requirement that the matter submitted constitute a "legal dispute" that "aris[es] directly out of" an investment is even less frequently a significant issue.

33. *See, e.g.*, Amco Asia, Inc. v. Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction, (1983), *reprinted in* 23 I.L.M. 351 (1984); Pierre Lalive, *The First World Bank Arbitration (Holiday Inns v. Morocco)—Some Legal Problems*, 51 Brit. Y.B. Int'l L. 123, 127–28 (1980) (discussing Holiday Inns v. Morocco, ICSID Case No. ARB/72/1); William Rand et al., *ICSID's Emerging Jurisprudence: The Scope of ICSID's Jurisdiction*, 19 N.Y.U. J. Int'l L. & Pol. 33, 40 (1986) (discussing Klöckner v. Cameroon, ICSID Case No. ARB/81/2).

34. *See, e.g.*, Ibrahim Shihata & Antonio Parra, *The Experience of the International Centre for Settlement of Investment Disputes*, 14 Foreign Investment L.J. 299, 302 n.12 (citing Swiss Aluminium v. Iceland, ICSID Case No. ARB/83/1, and Compañia del Desarrollo v. Costa Rica, ICSID Case No. ARB/96/1).

35. *See, e.g.*, Impreglio v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3, Decision on Jurisdiction, ¶ 108 (Apr. 22, 2005); Lanco Int'l v. Argentine Republic, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction, ¶¶ 42–43 (Dec. 8, 1998), *reprinted in* 40 I.L.M. 457 (2001). While the ICSID drafters expected most controversies to arise out of contractual arbitration clauses, they also contemplated a two-step "open offer" consent process, albeit in the context of domestic investment promotion legislation. *See* Report of the Executive Directors, *supra* note 15, ¶ 24 ("Nor does the Convention require that the consent of both parties be expressed in a single instrument.").

1. *Deferential Approach*

The traditional approach has been highly deferential to host states' ex ante decisions about which categories of economic activity to protect. Some tribunals following the deferential approach have come close to rendering the definition of investment nonjusticiable, asserting that it simply merges with the question of party consent.[36] So long as the underlying consent to arbitration recognizes the activity or asset as an investment, they suggest, the ICSID Convention imposes no further jurisdictional limit. Other tribunals, along with some commentators, have suggested that truly exceptional cases might be ruled out under the Convention.[37] They rarely attempt to specify what would be exceptional, although most have agreed that a single commercial transaction (such as the delivery of a single load of cars) would be outside the scope of the Convention.[38]

Tribunals following this approach have approved an extraordinarily wide array of investments. These include an unconsummated office construction project consisting mainly of plans and various regulatory approvals,[39] a liaison customs office for which all core functions took place overseas,[40] a hotel construction and operation contract,[41] a concession agreement to develop and operate a local port terminal,[42] a $2.3 million portfolio investment in

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36. *See, e.g.*, Gruslin v. Malaysia, ICSID Case No. ARB/99/3, Award, ¶¶ 13.5–13.6 (Nov. 27, 2000), *reprinted in* 5 ICSID Rep. 483 (2006); Lanco Int'l, Inc. v. Argentine Republic, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction, ¶ 48 (Dec. 8, 1998), *reprinted in* 40 I.L.M. 457 (2001).

37. *See, e.g.*, Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 39 (Apr. 19, 2004); Enron v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction, ¶ 44 (Jan. 14, 2004), *reprinted in* 11 ICSID REP. 273 (2007); Československa Obchodní Banka (CSOB) v. Slovak Republic, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, ¶ 68 (May 24, 1999), *reprinted in* 14 ICSID Rev.—FILJ 251 (1999). For similar suggestions in the commentary, see C.F. Amerasinghe, *The Jurisdiction of the Centre for the Settlement of Investment Disputes*, 19 Indian J. Int'l L. 166, 180 (1979); Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 Recueil des Cours 331, 362 (1972).

38. *See, e.g.*, Georges Delaume, *ICSID and the Transnational Financial Community*, Foreign Investment L.J. 37, 242 (1986) (discussing sales of services); Rand, *supra* note 33, at 36 (discussing ordinary sales contracts); Shihata & Parra, *supra* note 34, at 308 (1999). *But see* Paul Szasz, *A Practical Guide to the Convention on the Settlement of Investment Disputes*, 1 Cornell Int'l L.J. 1, 15 (1968) (World Bank Group staffer agnostic whether jurisdiction extends to sales contracts).

Perhaps the best description of the marginal limits imposed by this approach comes from the tribunal in *Fedax v. Venezuela*, which contrasted the debt instruments in that case to "short-term," "occasional" arrangements in the nature of "volatile capital," yielding only "quick gains" and then followed by "immediat[e]" departure from the host country, which might not qualify as an investment. Fedax v. Republic of Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, ¶ 43 (July 11, 1997), *reprinted in* 37 I.L.M. 1378 (1998). Interestingly, Fedax appears to have been the first case to mention the analytical factors now relied on by the restrictive approach. *See infra* note 55. But its application of them was deferential in the extreme.

39. Generation Ukr. v. Ukraine, ICSID Case No. ARB/00/9, Award, §§ 6.1, 6.5, 11.1 (Sept. 16, 2003), *reprinted in* 44 I.L.M. 404 (2005).

40. SGS Société Générale de Surveillance v. Phillipines, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, ¶¶ 13, 99–107 (Jan. 29, 2004), *reprinted in* 8 ICSID REP. 518 (2005).

41. Lalive, *supra* note 33, at 127 (discussing Holiday Inns v. Morocco, ICSID Case No. ARB/72/1).

42. Lanco Int'l, Inc. v. Argentine Republic, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction, ¶¶ 4–5, 15 (Dec. 8, 1998), *reprinted in* 40 I.L.M. 457 (2001).

local securities,[43] an advertising agency and print shop,[44] and $760,000 in debt instruments issued by a sovereign state.[45]

All of these cases exercise an explicit and self-conscious deference to state decisions about what policy structure will best take advantage of the international investment framework.[46] 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. Where consent is founded on a BIT, tribunals simply look at the BIT definition of "investment."[47] Where consent is founded on a contractual arbitration clause, tribunals look to whether the contract explicitly invokes ICSID jurisdiction or defines investment in some other way. If the consent document's definition of investment (whether express or implied) extends to the thing in dispute, ICSID has jurisdiction.[48]

It is irrelevant to this deference calculus whether the state subsequently contests ICSID jurisdiction in the context of a specific live controversy. These tribunals focus on states' ex ante policy decision to bind themselves and, by so doing, to create legitimate expectations on the part of investors. The deference operating in these decisions is thus not an open-ended acceptance of any legal position that a state might take. In particular, it does not mandate acquiescence to a state's efforts to avoid liability during active litigation. Rather, these tribunals defer to the states' capacity as autonomous international actors to take advantage of the ICSID structure by binding

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43. Gruslin v. Malaysia, ICSID Case No. ARB/99/3, Award, ¶ 8.1 (Nov. 27, 2000), *reprinted in* 5 ICSID Rep. 483 (Edward Helgeson ed., 2006).

44. Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶¶ 2, 78 (Apr. 29, 2004), *reprinted in* 20 ICSID REV.—FILJ 205 (2005).

45. Fedax v. Republic of Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, ¶ 43 (July 11, 1997), *reprinted in* 37 I.L.M. 1378 (1998); Fedax v. Republic of Venezuela, ICSID Case No. ARB/96/3, Award, ¶ 32 (Mar. 9, 1998), *reprinted in* 37 I.L.M. 1391 (1998).

46. *See, e.g.*, Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 82 (Apr. 29, 2004), *reprinted in* 20 ICSID REV.—FILJ 205 (2005); Československa Obchodní Banka (CSOB) v. Slovak Republic, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 64, 66 (May 24, 1999), *reprinted in* 14 ICSID REV.—FILJ 251 (1999); Fedax v. Republic of Venezuela, ICSID Case No. ARB/96/3, Award on Jurisdiction, ¶ 31 (July 11, 1997), *reprinted in* 37 I.L.M. 1391 (1998); Camuzzi Int'l v. Argentine Republic, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction, ¶ 58 (May 11, 2005); Mihaly Int'l Corp. v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2, Award, ¶¶ 33, 49 (Mar. 15, 2002), *reprinted in* 41 I.L.M. 867 (2002); Biwater Gauff (Tanz.), Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, ¶ 312 (July 24, 2008); *cf.* TSA Spectrum de Arg., S.A. v. Argentine Republic, ICSID Case No. ARB/05/05, Award, ¶¶ 8–10 (Dec. 19, 2008) (Aldonas, dissenting) (discussing question of foreign control for Article 25(2)(b) purposes).

47. *See, e.g.*, Parkerings-Compagniet v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, ¶¶ 249–54 (Aug. 14, 2007); M.C.I. Power Group, L.C. v. Republic of Ecuador, ICSID Case No. ARB/03/6, Award, ¶¶ 159–61 (July 26, 2007); SGS Société Générale de Surveillance v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision of Tribunal on Objections to Jurisdiction, ¶¶ 48, 49, 112 (Jan. 29, 2004); Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Decision on Jurisdiction, ¶¶ 65–66 (Dec. 8, 2003), *reprinted in* 43 I.L.M. 262 (2004).

48. For real and tangible personal property, there is essentially no inquiry into the nature or value of an asset; it is sufficient to own it. For activities and contractual rights, there is a highly deferential inquiry into whether the activity or relationship is plausibly economic.

themselves as they saw fit. Besides resonating with the Chayesian relational understanding of sovereignty as the competence and right to assume binding obligations in international society,[49] this approach arises naturally from the "grand bargain" theory of international investment law. Without the capacity to bind themselves, states' substantive promises would have no credible impact on foreign investors. Tribunals following the deferential approach therefore will not stand in the way of these policy commitments—and they will surely enforce them once they are made.

2. *Restrictive Approach*

Recently, the deferential approach has been substantially marginalized by a line of cases that scrutinize far more skeptically whether a given economic activity or asset constitutes an "investment."

The intellectual foundation for this approach can be found in the first edition of Christoph Schreuer's seminal treatise on the ICSID Convention.[50] In his discussion of Article 25, Schreuer posited five "features" that are "typical" to "most of the operations" that have been the subject of ICSID proceedings: (i) "a certain duration" of the enterprise, (ii) "a certain regularity of profit and return," (iii) an "assumption of risk," (iv) a "substantial" commitment by the investor, and (v) some "significance for the host State's development."[51] Schreuer's description was in many ways tentative and in the spirit of surveying the investment disputes that had actually been adjudicated to that point. It was certainly not, on its face, an attempt to propose a rigid test that would exclude future investments from the ICSID bargain. As Schreuer put it, "These features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention."[52]

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49. Abram Chayes & Antonia Chayes, The New Sovereignty: Compliance with International Regulatory Agreements 26–28 (1995) (suggesting a relational understanding of "sovereignty" as the capacity to make binding commitments on the international plane and thereby participate as a coequal member of the international community); *see also* Case of the S.S. "Wimbledon" (U.K., Fr., Italy & Japan v. F.R.G.) 1923 P.C.I.J. (ser. A.) No. 1, Part IV.A (Aug. 17) ("No doubt any convention creating an obligation of this kind places a restriction upon the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.").

50. Christoph Schreuer, The ICSID Convention: A Commentary (2001) [hereinafter Schreuer I]. Schreuer's factors had roots in earlier commentary, but his treatise was the first to draw them out in substantial analytical detail. *See, e.g.*, C.F. Amerasinghe, *supra* note 37, at 181 (discussing "duration," "regularity of profit or return," and "profit motive" as "relevant factors"); Alcoa Minerals of Jam., Inc. v. Jamaica, ICSID Case No. ARB/74/2 (July 26, 1975), *excerpted in* 4 Yearbook Commercial Arbitration 206, 206–08 (1979) (similar). A second edition of the treatise has just been published; its expanded discussion of this question is addressed below. *See* Christoph Schreuer, Loretta Malintoppi, August Reinisch, and Anthony Sinclair, The ICSID Convention: A Commentary (2d ed. 2009) [hereinafter Schreuer II].

51. Schreuer I, *supra* note 50, art. 25, ¶ 122 (emphasis deleted). Adherents describe this as the "objective" definition of investment in order to distinguish it from the deferential approach, which they describe as "subjective" because it accepts the parties' definition of investment.

52. *Id.*

Tribunals following Schreuer's lead, however, have been far more aggressive, converting his descriptive reflections into a prescriptive set of requirements. It is not entirely clear why. Part of it is surely a matter of Schreuer's immense prestige in the investment arbitration world. Part of it seems to be a lawyerly impulse to create definitions and limits for a jurisdictional term.[53] Part of it likely stems from a version of the hydraulic relationship between right and remedy. This last point is discussed at greater length in Part IV, but essentially it appears that tribunals may be cutting back on their jurisdiction in an ill-formulated (and perhaps even unconscious) effort to communicate modesty to their state-constituents and avoid applying what some view as the investment regime's increasingly overbroad *substantive* rules.[54]

Whatever the precise mix of motivating factors, the leading expression of the restrictive jurisdictional test came in 2001 with *Salini Costruttori v. Morocco*, a case involving a dispute over a three-year highway construction contract.[55] When Morocco refused to pay any of the fees allegedly due under the contract, the foreign investor filed an ICSID claim under the Italy-Morocco BIT. Morocco defended by claiming that its BIT commitment to treat contractual rights as "investments" was incompatible with ICSID jurisdiction—that it had made, in other words, an impossible promise.[56] The *Salini* tribunal rejected this argument. In concluding that the contract was an investment for ICSID purposes, *Salini* adopted what it described as an "objective" interpretation of Article 25[57] and employed a checklist of criteria nearly identical to Schreuer's.[58] Contrary to Schreuer's description of the individual factors as mere "typical features," however, *Salini* described the factors as a mandatory "test" for Article 25 purposes. Equally notable, the

53. It is here that misunderstanding of ICSID history has likely played the greatest role. These tribunals assume that the drafters' failure to define investment arose from a practical inability to enunciate precisely their common and limited vision of "investment." On this view, the deferential approach looks like a sloppy abdication of tribunals' responsibility to exercise their delegated definitional authority. *See infra* Part II.B.

54. I am not suggesting that stiffening the jurisdictional test is a *necessary* response under these circumstances—tribunals could just as well ratchet back the underlying substantive law and indeed may be doing so in some cases. But as discussed below, it seems likely to me 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.

55. Salini Costruttori, S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 23, 2001), *reprinted in* 42 I.L.M. 609 (2003). Schreuer's factors were actually first cited in *Fedax v. Venezuela* on the basis of one of his prior articles on the subject. *See* Fedax v. Republic of Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, ¶ 43 (July 11, 1997), *reprinted in* 37 I.L.M. 1378 (1998). Because that tribunal's implementation of Schreuer's factors was so toothless, however, I have classified it here as belonging to the deferential school. And indeed it appears from the second edition of Schreuer's treatise that he sees no incompatibility between his discussion of Article 25 and a genuinely deferential approach—although that deference might not extend so far as this article proposes. *See infra* text accompanying note 64.

56. Salini Costruttori, S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 45 (July 23, 2001), *reprinted in* 42 I.L.M. 609 (2003).

57. *Id.* ¶ 52.

58. *Id.* ¶¶ 52–57 (omitting regularity of profit and return).

tribunal suggested that no enterprise lasting less than two years could be an "investment."[59]

The cases that have followed *Salini*'s lead have gone even further. In addition to adding Schreuer's observation about regular profit and return to their analysis, these tribunals have sharpened the scrutiny paid to many of the individual factors.[60] Perhaps most important, where *Salini* converted Schreuer's descriptive "typical features" into a prescriptive "test," subsequent tribunals have further upped the ante by requiring *each* of the factors to be satisfied in some objective measure, rather than allowing for some totality-of-the-circumstances balancing among the factors.[61] (Others have hinted at a more liberal version of *Salini* by declining to evaluate an enterprise's actual contribution to the domestic economy.)[62] Moreover, none of them give any serious consideration to BIT definitions or contract terms; actual state practice on that point simply drops off the table. Rather than assessing whether the initial state determination about what activities are covered by investment protections is *reasonable*, in short, the *Salini* line assesses whether that determination is *correct*.[63]

59. *Id.* ¶ 54.

60. *E.g.*, Malaysian Historical Salvors v. Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶ 112 (May 17, 2007) [hereinafter Malaysian Historical Salvors I] (deciding that the risk involved in a venture amounted to mere "commercial risk" as opposed to ICSID-cognizable "investment risk"); Joy Mining v. Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, ¶ 57 (Aug. 6, 2004), *reprinted in* 44 I.L.M. 73 (2005). The regularity of profit and return is one exception; as Schreuer notes in the second version of his treatise, while it has received some support, most tribunals have not adopted it. SCHREUER II, *supra* note 50, art. 25, ¶ 157.

61. *See* Helnan Int'l Hotels, A.S. v. Arab Republic of Egypt, ICSID Case No. ARB 05/19, Decision on Objection to Jurisdiction, ¶ 77 (Oct. 17, 2006); Saipem, S.p.A. v. People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶ 99 (Mar. 21, 2007); *cf.* Malaysian Historical Salvors I, *supra* note 60, ¶ 106(e) ("If any of [the *Salini* factors] are absent, the tribunal will hesitate (and probably decline) to make a finding of "investment."). *Salini*, by contrast, had at least acknowledged that the factors were "interdependent" and "should be assessed globally." Salini Costruttori, S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001), *reprinted in* 42 I.L.M. 609 (2003); *see also* Jan de Nul, N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction, ¶ 91 (June 16, 2006) (adopting *Salini* factors as collectively "indicative" of the existence of an investment).

62. *See* Emmanuel Gaillard, *Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY (2009) (advocating this gloss on Victor Pey Casado v. Chile, ICSID Case No. ARB/98/2, Award (May 8, 2008)); L.E.S.I., S.p.A. v. République algérienne démocratique et populaire, ICSID Case No. ARB/05/3, Decision on Jurisdiction (July 12, 2006); Consortium Groupement Lesi-Dipenta v. République algérienne démocratique et populaire, ICSID Case No. ARB/03/8, Award for Lack of Jurisdiction (Jan. 10, 2005), *reprinted in* 19 ICSID REV.—FILJ 426 (2004); *see also* Phoenix Action, Ltd. v. Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 85 (Apr. 15, 2009) (turning Gaillard's approach into a rebuttable presumption that any economic activity contributes to the domestic economy).

63. For other cases adopting the *Salini* approach, see IBM World Trade Corp. v. Republic of Ecuador, ICSID Case No. ARB/02/10, Decision on Jurisdiction (Dec. 22, 2003); L.E.S.I., S.p.A. v. République algérienne démocratique et populaire, ICSID Case No. ARB/05/3, Decision on Jurisdiction (July 12, 2006); Mitchell v. Congo, ICSID Case No. ARB/99/7, Decision on Annulment (Nov. 1, 2006); Joy Mining v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction (Aug. 6, 2004), *reprinted in* 44 I.L.M. 73 (2005).

It is important to note that Schreuer has subsequently criticized these tribunals for badly overreading his discussion of Article 25. In the just-published second edition of his treatise, he argues that "[t]he development in practice from a descriptive list of typical features towards a set of mandatory legal requirements is unfortunate. The First Edition of the Commentary cannot serve as authority for this development."[64] Regardless of its lack of faith to intellectual pedigree, however, this trend has recently culminated in a trio of remarkable decisions denying ICSID jurisdiction over long-term, high-value economic activity by foreign investors. The cases merit some discussion, both to emphasize how stringently tribunals are now scrutinizing state definitions of "investment" and to suggest how at sea the tribunals are in trying to apply the *Salini*-Schreuer factors.

Mitchell v. Congo (2007): As described in the Introduction, Patrick Mitchell's Congo-based law firm was shut down by the government.[65] In the ensuing proceeding, the tribunal adopted the deferential approach to the investment question, reviewing the BIT's definition of investment to conclude that the law firm qualified on multiple grounds.[66] It therefore found jurisdiction and held that Congo's seizure of Mitchell's assets and destruction of his business constituted an illegal expropriation.[67] Congo filed for annulment of the award, convening a second ICSID tribunal to reassess the original decision under what was supposed to be a highly deferential standard of review.[68] The annulment panel reached a startling conclusion: the law firm was not an investment, despite the length of its operation, despite its funding with Mitchell's capital from overseas, and despite all the other factors discussed by the first tribunal. The annulment panel applied the *Salini* test and concluded that the business had not been shown to contribute "to the economic development [of Congo] or at least the interests of the State."[69] It reached this conclusion in acknowledged contradiction to the terms of the BIT.[70]

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64. Schreuer II, *supra* note 50, art. 25, ¶¶ 171–74 (criticizing the restrictive tribunals' "rigid list of criteria" and emphasizing that "[a] test that turns on the contribution to the host State's development should be treated with particular care" and "be treated with some flexibility.").

65. Mitchell v. Congo, ICSID Case No. ARB/99/7, Decision on Annulment, ¶ 1 (Nov. 1, 2006). News reports suggest that the law firm was targeted because it represented a Canadian mining corporation that was bringing an expropriation claim against the Congo-Kinshasa government. *See* Investment Treaty News (Nov. 24, 2006), *available at* http://www.iisd.org/pdf/2006/itn_nov24_2006.pdf (noting that Mitchell's employees were tried for high treason).

66. Mitchell v. Congo, ICSID Case No. ARB/99/7, Decision on Annulment, ¶ 24(48) (Nov. 1, 2006) (discussing law firm's physical property, its know-how and goodwill, and its legal "right to exercise its activities" as a going concern); *see also id.* ¶ 24(55) (noting that Mitchell transferred "money and other assets" into the country "which constituted the foundations for his professional activities").

67. *Id.* ¶ 3.

68. *Mitchell v. Congo* is all the more remarkable because it arose as an annulment proceeding, which is supposed to involve review solely for major structural failings such as manifest excess of powers or total failure to state reasons. ICSID Convention, art. 52(1); *see also supra* text accompanying note 19.

69. Mitchell v. Congo, ICSID Case No. ARB/99/7, Decision on Annulment, ¶ 39 (Nov. 1, 2006).

70. *Id.* ¶¶ 25, 26; *see also* U.S.-Congo-Kinshasa BIT, *supra* note 1, art. I(c) ("Investment means every kind of investment . . . , including equity . . . ; and includes: tangible and intangible property, including

Malaysian Historical Salvors (2007): The dispute in this case arose out of a marine salvage company's contract with the Malaysian government to recover a trove of antique artifacts that had sunk just off the Malaysian coast. In addition to the commitment of salvage ships and associated expenses for almost four years, the project required the investor to clean, restore, and warehouse the items discovered, as well as to open insurance policies that would cover risks associated with the salvage.[71] The claimant employed forty Malaysians individually and hired the collective services of a Malaysian village to assist in the onshore portion of the operation.[72] The tribunal acknowledged that the claimant also "imparted valuable know-how and knowledge on the science and process of historical marine salvage" and made contributions to Malaysia "in money, in kind, and in industry."[73] Despite all this activity, and even though the plain terms of the BIT covered the activities and property involved[74]—not least because the claimant ran its operations through a privately held domestic Malaysian corporation[75]—the tribunal held that the long-term recovery and repair operation was not an investment.

The tribunal suggested that claimants' enterprise failed on three counts. First, the tribunal deemed the four years it took to locate, salvage, and restore the sunken materials a mere "fortuity" of timing insufficient to satisfy the duration requirement.[76] Second, the tribunal concluded without explanation that the enterprise faced insufficient risk.[77] Third, it concluded that the corporation's contributions to the Malaysian economy were not sufficiently "significant," consisting as they did of $3.8 million in hard revenue and in-kind salvage,[78] an unquantified or "speculative" impact on the Malaysian tourist industry,[79] and the training and transfer of know-how to the

all property rights . . . ; a company or . . . interests in a company or interests in the assets thereof; . . . licenses and permits issued pursuant to law . . . ; [and] . . . any right conferred by law or contract, and any licenses and permits pursuant to law.").

71. Malaysian Historical Salvors I, *supra* note 60, ¶ 9.

72. *Id.*, ¶¶ 132–33.

73. *Id.*, ¶¶ 109, 133.

74. U.K.-Malay. BIT, *supra* note 21, art. I(1)(a)(ii),(iii),(v) (defining investment as "every kind of asset," including "claims to money or to any performance under contract," "shares, stock, and debentures of companies," and "business concessions conferred by law or under contract").

75. Malaysian Historical Salvors I, *supra* note 60, ¶ 2; *id.*, Claimant's Memorial on Jurisdiction, at 6, *available at* icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewPleadings&PleadingNo=2.

76. Malaysian Historical Salvors I, *supra* note 60, ¶¶ 110–11.

77. Malaysian Historical Salvors I, *supra* note 60, ¶ 112 (suggesting obscurely that "the assumption of risk by the salvor [was] inherent in the transaction, rather than a special feature of the Contract which affected the salvor's decision to undertake the project in question").

78. Malaysian Historical Salvors I, *supra* note 60, ¶ 134. The salvage proceeds were apparently the largest in the history of the salvage industry. Yulia Andreeva, *The Tribunal in Malaysian Historical Salvors v. Malaysia Adopts a Restrictive Interpretation of the Term "Investment,"* 25 J. Int'l Arb. 503, 506 (2008).

79. Malaysian Historical Salvors I, *supra* note 60, ¶¶ 136–38.

operation's local workforce. Since the BIT provided for no dispute resolution mechanism besides ICSID, the investor seemed to be left with no recourse.[80]

As it turns out, the end of this story may not yet be written. Malaysian Historical Salvors filed for annulment of the original award, and won in a split 2–1 decision that nullified the first tribunal's interpretation of "investment."[81] The net result is that the company may now re-file its original ICSID claim—although, given the structure of ICSID's annulment mechanism, the next ICSID panel remains free to rule against the investor again.

Joy Mining v. Egypt (2004): Joy Mining concluded a £13.3M contract to design, install, and maintain mining equipment at a phosphate mine located in Egypt's Western Desert and run by a government agency.[82] The installation process ran over four years, and included engineering and design, installation activities, inspection, and testing of the equipment as it was built.[83] Joy Mining further committed to providing technical assistance, training, and start-up operations for six months, followed by the ongoing production and maintenance of spare parts for ten years. It also took out letters of guarantee with the Bank of Alexandria, promising to pay Egypt ninety-seven percent of the contract price in the event of unsatisfactory performance. Egypt ultimately failed to release the bank guarantees under the terms of the contract, and Joy Mining brought an ICSID claim for damages.[84]

Despite presuming that Joy Mining's "contribution to the development of the mining operation" was "relatively substantial"[85] and despite the fact that the BIT defined Joy Mining's enterprise as an investment,[86] the tribunal found that neither the bank guarantee[87] nor the fourteen-year contractual arrangement[88] were investments within the meaning of Article 25. The reasons for the tribunal's skepticism about the broader mining project are not entirely clear, but essentially it suggested that the particular services involved—from the four-year on-site design and installation process and associated consulting services to the ten-year production and maintenance agreement—were neither conceptually distinct from a simple one-time widget delivery nor sufficiently large in value.[89] As such, they constituted "entirely normal commercial" terms and activity no different from "any commercial contract."[90]

80. U.K.-Malay. BIT, *supra* note 21, art. 7.
81. Malaysian Historical Salvors II, *supra* note 2.
82. Joy Mining v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, ¶¶ 15–16 (Aug. 6, 2004), *reprinted in* 44 I.L.M. 73 (2005).
83. *Id.* ¶ 55.
84. *Id.* ¶ 20.
85. *Id.* ¶ 57.
86. *See id.* ¶¶ 46–48, 54–55.
87. *Id.* ¶¶ 44–45, 54.
88. *Id.* ¶ 55.
89. *See id.* ¶ 55-56.
90. *Id.* ¶ 56–58.

3. *Implications of the Conflict*

In a few short years, the conditions for access to ICSID have been thrown into substantial uncertainty. While decisions since *Salini* have split almost evenly between the deferential approach and the restrictive approach, the momentum is clearly behind the latter.[91] Since 2006, seven decisions have adopted the *Salini* approach[92] and only two—*Biwater Gauff v. Tanzania* and the *Malaysian Historical Salvors* annulment—have rejected it.[93] While this trend has not escaped criticism,[94] we are rapidly leaving a regime in which jurisdictional limits were enforced only at the outer margins of economic activity. Tribunals have instead started imposing rigorous scrutiny based on

91. In fact, we may be seeing the beginning of a similar shift away from deference to state definitions of a "national" under Article 25. *Compare* Rompetrol Group, N.V. v. Romania, ICSID Case No. ARB/06/3, Decision on Jurisdiction and Admissibility, ¶ 80 (Apr. 18, 2008) (recognizing ICSID signatories' "wide latitude to agree on the criteria by which nationality would be determined"), *and* Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 25 (Apr. 29, 2004) (emphasizing "the deference this Tribunal owes" to BIT definition of nationality), *with* TSA Spectrum de Arg., S.A. v. Argentine Republic, ICSID Case No. ARB/05/05, Award, ¶¶ 133–54, 162 (Dec. 19, 2008) (refusing to defer to BIT definition of nationality).

92. *See* Phoenix Action, Ltd. v. Czech Republic, ICSID Case No. ARB/06/5, Award, ¶¶ 81–86, 118–33 (Apr. 15, 2009) (adopting *Salini* with "supplement[al] analysis"); Malaysian Historical Salvors I, *supra* note 60; Saipem, S.p.A. v. People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures (Mar. 21, 2007), *reprinted at* 22 ICSID REV.—FILJ 100 (2007); Mitchell v. Congo, ICSID Case No. ARB/99/7, Decision on Annulment (Nov. 1, 2006); Helnan Int'l Hotels v. Arab Republic of Egypt, ICSID Case No. ARB/05/19, Award (July 3, 2008); L.E.S.I., S.p.A. v. République algérienne démocratique et populaire, ICSID Case No. ARB/05/3, Award (July 12, 2006); Jan de Nul, N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction (June 16, 2006).

93. *See* Malaysian Historical Salvors II, *supra* note 2; Biwater Gauff (Tanz.), Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award (July 24, 2008). Several other cases have briefly noted that "investment" is not defined by the ICSID convention and turned to a more careful review of the relevant BIT without adverting to the Article 25 controversy. *E.g.*, Parkerings-Compagniet, A.S. v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award on Jurisdiction and Merits, ¶¶ 249–54 (Sep. 11, 2007); M.C.I. Power Group, L.C. v. Republic of Ecuador, ICSID Case No. ARB/03/6, Award, ¶¶ 159–61 (July 26, 2007); C.M.S. v. Argentine Republic, ICSID Case No. ARB/01/8, Annulment Decision, ¶ 71 (Sept. 27, 2007).

Both *Biwater* and (it appears) the *Malaysian Historical Salvors II* annulment panel advocate an interpretation of "investment" that would turn on state practice. Where BITs generally recognize a given category of asset or enterprise as an "investment," *Biwater* would recognize that category as a jurisdictionally legitimate investment for ICSID purposes as well. The *Biwater* theory, contrary to early tribunals' deferential approach to this question, suggests that a non-mainstream definition of investment would *not* receive deference from tribunals for purposes of ICSID jurisdiction. *See infra* note 209 for a critique of this approach.

94. *See, e.g.*, Devashish Krishan, *A Notion of Investment*, *in* INVESTMENT TREATY ARBITRATION: A DEBATE AND DISCUSSION (T. Grierson ed., 2008); Yulia Andreeva, *Salvaging or Sinking the Investment? MHS v. Malaysia Revisited*, *in* LAW & PRACTICE OF INT'L COURTS AND TRIBUNALS (2008). *But see, e.g.*, Sébastien Manciaux, *The Notion of Investment: New Controversies*, 9 J. WORLD INVESTMENT & TRADE 443 (2008) (generally supporting *Salini*); Emmanuel Gaillard, *Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY, *supra* note 24 (supporting narrower version of *Salini* that does not require a specific showing that the investment contributes to the domestic economy).

an external, formalist standard and are as a result rejecting state definitions of "investment" for the first time in the forty-year history of ICSID.[95]

Certain types of enterprise seem unlikely to be affected, such as massive foreign-controlled production factories or lead contractors in major multi-year infrastructure projects. But the treatment of a number of other types of investment is genuinely unclear. Just which projects will be deemed sufficiently related to development? Large-scale public infrastructure projects like the highway construction contract in *Salini* appear safe—although *Joy Mining* suggests that *subcontractors* in such projects may no longer be able to rely on ICSID adjudication. It is similarly uncertain whether contracts for residential or even commercial construction will constitute investments, given the infrastructure-focused application of *Salini*'s "development" criterion. Pure services contracts, which enjoyed ICSID coverage in cases like *SGS v. Pakistan*,[96] *SGS v. Philippines*,[97] *Helnan International Hotels*,[98] and *SEDITEX v. Madagascar*[99] are also clearly at risk given the bias of the *Salini* test toward tangible production.

The durational requirements are uncertain as well. Is there any remaining traction to the traditional approach's inclusion of all economic assets except "volatile capital" with its "short-term," "quick gains," and "immediat[e]" departure from the host country?[100] Or is *Salini*'s minimum 2-year time frame now the default? It is also uncertain how the balancing of these factors may play out and whether, for example, the durational requirement might vary depending on the perceived importance of the contract to the economy. Similar questions arise about equipment refurbishment contracts and "build-operate-transfer" contracts, which constituted investments in deferential cases like *Atlantic Triton Co. v. Guinea*[101] and *PSEG Global, Inc. v.*

95. While one pre-*Joy Mining* tribunal denied jurisdiction under the *contractual* definition of investment, its ruling was based on the agreement between the parties, not on a *Salini*-style assessment of Article 25. Mihaly Int'l Corp v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2, Award, ¶ 51 (Mar. 15, 2002), *reprinted in* 41 I.L.M. 867 (2002) (noting that the "Parties could have agreed that the formation of a South Asia Electric Company was to be treated as the starting point of the admitted investment," but "the facts of the case point to the opposite conclusion").

96. SGS Société Générale de Surveillance, S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision on Jurisdiction (Aug. 6, 2003).

97. SGS Société Générale de Surveillance, S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision on Jurisdiction (Jan. 29, 2004), *reprinted in* 8 ICSID Rep. 518 (2005).

98. *See* Helnan Int'l Hotels, A.S. v. Arab Republic of Egypt, ICSID Case No. ARB/05/19, Decision on Objection to Jurisdiction (Oct. 17, 2006) (adopting *Salini* test).

99. SEDITEX Eng'g v. Democratic Republic of Madagascar, ICSID Case No. CONC/82/1 (1982) (settled before constitution of a commission).

100. Fedax v. Republic of Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, ¶ 43 (July 11, 1997), *reprinted in* 37 I.L.M. 1378 (1998).

101. Atlantic Triton Co. v. People's Revolutionary Republic of Guinea, ICSID Case No. ARB/84/1, Award, ¶ 13 (Apr. 21, 1986), *reprinted in* 3 ICSID Rep. 13 (1995) (discussing a contract to equip and operate fishing boats).

Turkey,[102] but seem subject to far narrower limits under the restrictive approach of *Joy Mining* and *Malaysian Historical Salvors*.

Pure financial interests are also cast into uncertainty. Adhering to many BITs' unequivocal definition of stock shares and other financial interests as investments, ICSID tribunals following the deferential approach have found loans,[103] promissory notes,[104] and minority stock shareholdings[105] to be investments regardless of the type of corporation and regardless of the purpose of the investment. In the wake of *Salini*, there is growing pushback on this precedent, with commentators increasingly arguing, for example, that ICSID has no jurisdiction over sovereign bonds regardless of their value.[106] Are other types of financial instruments likewise at risk? It is also possible that there might be increased scrutiny of the *types* of corporations in which shareholders hold interest, such that a media company like the one at issue in *Lauder v. Czech Republic*[107] might not be sufficiently infrastructure-oriented to constitute an investment. All these questions and others are left uncertain by the dramatic shift in precedent.

The only solution for injured investors who fall into these gray zones may be to abandon ICSID altogether and rely on arbitration either ad hoc or in a forum like the International Chamber of Commerce or the Stockholm Chamber of Commerce.[108] Even these options will be unavailable, however, under the many BITs that specify ICSID as the sole option for dispute resolution.[109] More important, even where alternative forums are actually available, shifting investment arbitration to them sacrifices a major benefit of the ICSID regime: the replacement of commercial arbitration's more contingent

102. PSEG Global, Inc. v. Republic of Turkey, ICSID Case No. ARB/02/5, Decision on Jurisdiction, ¶ 18 (June 4, 2004) (discussing a "build-operate-transfer" contract to construct power plant).

103. Československa Obchodní Banka (CSOB) v. Slovak Republic, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, ¶ 283 (May 24, 1999), *reprinted in* 14 ICSID REV.—FILJ 251 (1999).

104. Fedax v. Republic of Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, ¶ 29 (July 11, 1997), *reprinted in* 37 I.L.M. 1378 (1998).

105. *See, e.g.* Lanco Int'l, Inc. v. Argentine Republic, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction, ¶ 10 (Dec. 8, 1998), *reprinted in* 40 I.L.M. 457, 461 (2001) (18.3% of stock); Camuzzi Int'l, S.A. v. Argentine Republic, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction, ¶¶ 9, 81 (May 11, 2005) (43.09% of stock); Continental Casualty Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Decision on Jurisdiction, ¶¶ 77, 86 (Feb. 22, 2006), *reprinted in* 2006 WL 462068, at 18, 20.

106. Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 Am. J. Int'l L. 711, 718–32 (2007).

107. CME Czech Rep. (The Netherlands) v. Czech Republic, Award, UNCITRAL Arbitration (Mar. 14, 2003); Lauder v. Czech Republic, Award, UNCITRAL Arbitration (Sept. 3, 2001).

108. Political risk insurance may also provide partial hedges for some investors, but it is extremely expensive, subject to highly restricted availability, generally limited in payout, and applicable only to certain forms of risk. *See generally*, Kenneth W. Hansen, *Managing Political Risks in Emerging Market Investment*, 18 Transnat'l Law. 77 (2004); Maura B. Perry, *A Model for Efficient Foreign Aid: The Case for The Political Risk Insurance Activities of the Overseas Private Investment Corporation*, 36 Va. J. Int'l L. 511 (1996). A full discussion of the limitations of political risk insurance is beyond the scope of this paper.

109. *See supra* note 21 (examples of ICSID-only BITs).

enforcement measures with a mandate that is directly enforceable in domestic courts without review.[110]

II. History: The Definition of "Investment"

The restrictive approach proceeds from a basic misunderstanding of the process that created Article 25.[111] Commentators have often assumed that the Convention "failed" to define investment because of a process malfunction.[112] The implication has been that the term simply defied ex ante definition as a practical drafting matter. Since the drafters' shared intuitive sense for the term could not be reduced to a comprehensive technical definition, in other words, they must have simply charged tribunals with developing those limitations by the application of pure reason.[113]

My new review of primary sources from the Convention's extensive drafting history, however, refutes the traditional view of "investment" as a desultory delegation to the regime's tribunal-agents. To the contrary, the threshold jurisdictional question of investment was actually a hot-button issue that dominated several stages of the negotiations.[114] It arose from a major clash between two diametrically opposed camps: (mostly) developing countries that wanted highly curtailed ICSID jurisdiction; and (mostly) developed countries that wanted wide-open jurisdiction over any plausibly economic activity. The failure to define "investment" was not an exasperated throwing of hands in the air; it was 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' concerns into account.[115] Moreover, the three core elements of the *Salini* test

110. *See supra* text accompanying notes 23–30.

111. Under what is now broadly accepted as customary international law, when a treaty term like "investment" fails to unambiguously demonstrate "the agreement of the parties," tribunals look to the drafting history and ratification process to discern the parties' intent. *See* VCLT, *supra* note 5, art. 32. See also *infra* Part III.D for further elaboration of how the historical materials discussed in Part II translate into doctrinal interpretation of Article 25.

112. *See, e.g.*, Sébastien Manciaux, *The Notion of Investment: New Controversies*, 9 J.W.I.T. 443, 445–47 (2008); David Sassoon, *Convention on Settlement of Investment Disputes*, 13 J. Bus. L. 334, 337 n. 5.

113. *Cf.*, *e.g.*, Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 Harv. Int'l L.J. 333, 338–44 (1999) (arguing that the WTO Appellate Body was delegated a gap-filling role); Michael Van Alstine, *Dynamic Treaty Interpretation*, 146 U. Pa. L. Rev. 687 (1998) (similar argument for U.N. Convention on Contracts for the International Sales of Goods).

114. World Bank General Counsel Aron Broches, for example, noted that the jurisdictional provision was "the only provision of the [draft Convention] to which possibly as many as one-third of the delegations addressed themselves." Regional Consultative Meetings of Legal Experts: Chairman's Report on Issues Raised and Suggestions Made (July 9, 1964), *in* 2 History, *supra* note 9, at 563.

115. Broches' summary of this conflict is especially crisp:

> [T]wo main trends had emerged; one favored a broad and flexible definition of the scope of the jurisdiction of the Center and would leave it to each State to determine the kind of disputes it would consent to submit to the Center; the other one was in favor of limiting the jurisdiction of the Center only to certain specific types of disputes.

were explicitly *considered and rejected* during the drafting negotiation.[116] The Convention that resulted 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.

A. *Drafting the ICSID Convention*

The ICSID Convention was written in three stages: an initial internal drafting process at the World Bank; a series of regional meetings where legal experts from participating states reviewed and discussed the World Bank's rough draft; and a convocation of member-state delegates for the "Legal Committee" that rewrote the document for final approval by the World Bank Executive Directors.[117] While this process was somewhat unorthodox, it was seen as a relatively expeditious way to generate a final draft that could then be approved or rejected by interested states on an individual basis.[118]

1. *Genesis of the Convention*

After years of discussions among development agencies about practical innovations that might spur international development,[119] in June 1962 a World Bank working group under the direction of the organization's general counsel, Aron Broches, completed the first draft of the ICSID Conven-

Summary Report on Views Expressed on Jurisdiction of the Center (Nov. 30, 1964), *in* 2 History, *supra* note 9, at 831; *see also* Report of the Chairman of the Legal Committee on Settlement of Investment Disputes (Dec. 23, 1964), *in* 2 History, *supra* note 9, at 936 ("There were two principal approaches to the problem of defining the Scope of the Convention. The first . . . may be characterized as the 'open' approach which would permit the parties to bring by agreement *any* investment dispute of a legal character. The other, which may be characterized as a 'closed' approach, would have limited disputes which might have come before the Centre to specific classes . . . . After lengthy discussions . . . , the draft reflecting the 'open' approach had obtained both the largest number of votes in favor and the smallest number of votes against.") (emphasis in original).

116. *See infra* notes 210–227 and accompanying text.

117. The Legal Committee's rules of procedure envisaged that "the Committee would try to reach a consensus on every issue," that major issues "would be regarded as settled if a substantial majority was obtained," and that "[i]f the votes on an important issue were fairly evenly divided the conflicting viewpoints would be reported to the Executive Directors" for final decision. Aron Broches, *Development of International Law By the International Bank for Reconstruction and Development*, 59 Am. Soc'y Int'l L. Proc. 33, 37 (1965). Broches suggested that "the success of this method is best attested by the fact that I had only two issues of importance to report to the Executive Directors," neither of which touched on the definition of investment. *Id.*

118. *See, e.g.*, Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 Recueil des Cours 331, 346–47 (1972); *see also* Memorandum of the Meeting of the Committee as a Whole (July 20, 1964), *in* 2 History, *supra* note 9, at 586–93 (debating whether to finalize the Convention at a diplomatic conference of states or in a committee of legal advisors to the World Bank's Executive Directors).

119. 1 History, *supra* note 14, at 2 (referencing discussions among the World Bank, Organization for Economic Cooperation and Development, and United Nations Committee on Trade and Economic Development).

tion for internal consideration.[120] The draft convention did not impose any subject matter restrictions on the proposed facility, extending its jurisdiction to *any* "disputes between Contracting States and nationals of other Contracting States."[121] The only jurisdictional requirements were mutual consent of the parties and a minimum amount in dispute of $100,000; there was no reference to an underlying investment.[122]

Internal review at the World Bank over the next year raised significant concerns about the lack of any subject matter restriction. The directors and staff generally agreed that the proposed facility should not be open to any conceivable "dispute" that might arise between individuals and foreign governments, but only to disagreements "concerning legal rights, contractual rights, or property rights, rather than political or commercial disputes."[123] They were equally concerned, however, about excessive specificity, fearing that overly technical specifications might foreclose unanticipated uses of ICSID that could advance international development.[124]

The next draft of the Convention, circulated in October 1963, tried to steer a middle course by limiting the Centre's jurisdiction for the first time to proceedings regarding "any existing or future *investment* dispute of a legal character."[125] The attached Comment explained that the omission of a "detailed definition of the category of disputes" was intentional, and that jurisdiction would be limited instead by the "requirement that the dispute be of a legal character as distinct from political, economic or purely commercial disputes."[126] The Comment also reiterated the staffers' overarching concern that "[t]o include a more precise definition would tend to open the door to

120. Working Paper in the form of a Draft Convention (June 5, 1962), *in* 2 History, *supra* note 9, at 19.

121. Working Paper in the form of a Draft Convention, art. IV, § 1 (June 5, 1962), *in* 2 History, *supra* note 9, at 33.

122. *Id.* at 33–34.

123. Memorandum of the Meeting of the Committee of the Whole, ¶ 4 (Dec. 28, 1962), *in* 2 History, *supra* note 9, at 54 (Broches); *see also*, *e.g.*, Memorandum of the Meeting of the Committee of the Whole, ¶ 38 (Dec. 28, 1962), *in* 2 History, *supra* note 9, at 66 (Bullitt); Memorandum of the Meeting of the Committee of the Whole, ¶ 25 (Dec. 28, 1962), *in* 2 History, *supra* note 9, at 65 (Suzuki).

124. Memorandum of the Meeting of the Committee of the Whole, ¶ 52 (June 5, 1963), *in* 2 History, *supra* note 9, at 96 (Khelil) ("While . . . the Convention should be limited to legal disputes as distinguished from political or commercial disputes, . . . it would be very difficult to draw the line between the political and legal aspects of a dispute . . . ."); Memorandum of the Meeting of the Committee of the Whole, ¶ 4 (Dec. 28, 1962), *in* 2 History, *supra* note 9, at 54 (Broches) ("There was the danger that recourse to the services of the Center might in a given situation be precluded because the dispute in question did not precisely qualify under the definition of the convention . . . These possibilities suggested it was inadvisable to define narrowly the kinds of disputes that could be submitted.").

125. Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. II, § 1 (Oct. 15, 1963), *in* 2 History, *supra* note 9, at 202 (emphasis added).

126. Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. II cmt. 4 (Oct. 15, 1963), *in* 2 History, *supra* note 9, at 203; *see also* Consultative Meeting of Legal Experts, Santiago (Feb. 3–7, 1964), *in* 2 History, *supra* note 9, at 322 (Broches) (explaining that this formulation "was the result of compromise between two positions, the first being that the reference need only be to investment disputes, and the second that there should be a precise definition of an investment dispute").

frequent disagreements as to the applicability of the Convention to a particular undertaking, thus undermining the primary objective" of advancing development by creating assurances for foreign investors.[127] Neither the Comment nor internal minutes and memoranda elaborated on the distinction between "legal" and "economic or purely commercial" disputes,[128] thus embedding an ambiguity that would find itself at the heart of the debate during the eventual negotiations over the Centre's jurisdiction.

2. *The Consultative Meetings of Legal Experts*

The World Bank promulgated the preliminary draft Convention to economic ministries around the world, and the draft embarked on a series of four so-called "Consultative Meetings of Legal Experts." Held between December 1963 and May 1964, these meetings took place in Addis Ababa, Santiago, Geneva, and Bangkok, canvassing delegates from a total of eighty-six states.[129] Particularly because some commentators critique both ICSID and the World Bank as tools of the developed West,[130] it is interesting to note the widespread support ICSID had at its inception. Many of the developing countries in attendance—though certainly not all[131]—began the ses-

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127. Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. II, § 3 cmt. 4 (Oct. 15, 1963), *in* 2 History, *supra* note 9, at 204.

128. *See* Regional Consultative Meetings of Legal Experts: Chairman's Report on Issues Raised and Suggestions Made, ¶ 40 (July 9, 1964), *in* 2 History, *supra* note 9, at 565 (conceding later in the process that this had been "somewhat unfortunate phraseology").

129. *See* Consultative Meeting of Legal Experts, Addis Ababa (Apr. 30, 1964), *in* 2 History, *supra* note 9, at 236; Consultative Meeting of Legal Experts, Santiago (June 12, 1964), *in* 2 History, *supra* note 9, at 298; Consultative Meeting of Legal Experts, Geneva (June 1, 1964), *in* 2 History, *supra* note 9, at 367, Consultative Meeting of Legal Experts, Bangkok (July 20, 1964), *in* 2 History, *supra* note 9, at 458; *see also* Memorandum of the Discussion by the Executive Directors (Sept. 20, 1963), *in* 2 History, *supra* note 9, at 174–75 (Woods) (discussing arrangements for four "regional consultative meetings of legal experts," with invitations issued "only to [World Bank] member countries, to countries that had applied for membership, and to Switzerland with which the Bank maintained a special relationship"); *see generally* Regional Consultative Meetings of Legal Experts: Chairman's Report on Issues Raised and Suggestions Made (July 9, 1964), *in* 2 History, *supra* note 9, at 557–58 (describing procedure and practices at Consultative Meetings).

130. Whatever force this critical perspective may have, the developing and developed worlds do not appear to have been at systematic loggerheads over the fundamental bargain of ICSID itself. As will become apparent below, however, they were certainly at odds on the scope and breadth of its jurisdiction.

131. Latin American countries, whose traditional suspicion of international arbitration as an incursion on state sovereignty was longstanding, were (with some exceptions) the most notable bloc of Convention skeptics. *See, e.g.*, Consultative Meeting of Legal Experts, Santiago (June 12, 1964), *in* 2 History, *supra* note 9, at 305–11 (skeptical expressions by Brazil, Argentina, Bolivia, Venezuela, Guatemala, Ecuador, Colombia); Memorandum of the Meeting of the Committee of the Whole (June 5, 1963), *in* 2 History, *supra* note 9, at 92–93 (Broches) ("The clearest opposition to [creating a Convention] came from those Directors representing Latin American countries."); Consultative Meeting of Legal Experts, Santiago (June 12, 1964), *in* 2 History, *supra* note 9, at 309 (Venezuela) (referencing with apparent dismay the "tone of some of the statements," which "did not augur well for the meeting," and reminding fellow delegates that they "were jurists"). None of them signed the Convention when it was first promulgated, although many eventually did. Guyana, a former British colony that became independent in 1966, was the only country in South or Central America to sign before 1981. ICSID, List of Contracting States and Other Signatories, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English (last visited July 29, 2009).

sions by enthusiastically endorsing the basic architecture of the Convention, buying into the hypothesis, in the words of a delegate from Guinea, that "economic development could not be achieved without capital and . . . [that] developing countries would not obtain capital unless they provided adequate guarantees."[132]

The opinions expressed about *which* investments should be subject to ICISD jurisdiction, on the other hand, were varied and contradictory. Some delegates, especially those from developing countries, called for a "precise definition of the scope of jurisdiction of the Center."[133] Others, primarily from capital-exporting countries, found even the loose reference to " 'dispute of a legal character' too restrictive."[134] The Swedish delegate went so far as

132. Consultative Meeting of Legal Experts, Addis Ababa (Apr. 30, 1964), *in* 2 History, *supra* note 9, at 244 (Guinea); *see also* Consultative Meeting of Legal Experts, Addis Ababa (Apr. 30, 1964), "*in* 2 History, *supra* note 9, at 287 (Central African Republic); Consultative Meeting of Legal Experts, Addis Ababa (Apr. 30, 1964), *in* 2 History, *supra* note 9, at 243–46 (noting support from Ethiopia, Nigeria, Dahomey, Ghana, Malagasy Republic); Consultative Meeting of Legal Experts, Santiago (June 12, 1964), *in* 2 History, *supra* note 9, at 305–06, 364 (noting support from Chile, Honduras, Costa Rica); Consultative Meeting of Legal Experts, Bangkok (July 20, 1964), *in* 2 History, *supra* note 9, at 468–75 (noting support from Nepal, Israel, Lebanon, Japan); *see also*, *e.g.*, Consultative Meeting of Legal Experts, Bangkok (July 20, 1964), *in* 2 History, *supra* note 9, at 547, 550 (noting support from Viet Nam, Saudi Arabia); Comments and Observations of Member Governments (Nov. 23, 1964), *in* 2 History, *supra* note 9, at 651 (support from Sudan at Legal Committee).

World Bank representatives expressed measured but happy surprise at the breadth of international support. Extracts from Statement by Mr. Broches Regarding the African Regional Meeting Held in Addis Ababa, Ethiopia (Jan. 17, 1964), *in* 2 History, *supra* note 9, at 298 ("The need for an instrument of the character of our draft was recognized. Nobody found anything radically wrong with it . . . [I]t was more constructive and more helpful and encouraging than I had dared to expect."); Memorandum from the President to the Committee of the Whole, ¶ 4 (June 10, 1964), *in* 2 History, *supra* note 9, at 554 ("[O]nly a relatively small minority had objections of principle to the basic idea of establishing facilities for international conciliation and arbitration."); Memorandum of the Meeting of the Committee of the Whole (Aug. 4, 1964), *in* 2 History, *supra* note 9, at 597 (Machado) ("He had been surprised when at the [Latin American regional] meeting in Santiago . . . there had been recognition of and praise for the idea of the Center, and many of the delegates had become intrigued.").

133. *E.g.*, Consultative Meeting of Legal Experts, Bangkok (July 20, 1964), *in* 2 History, *supra* note 9, at 468 (Ceylon); *id.* (Israel) (calling for a "[m]ore precise definition of . . . 'investment dispute' "); Consultative Meeting of Legal Experts, Bangkok (July 20, 1964), *in* 2 History, *supra* note 9, at 470 (India) (noting that the lack of a "precise definition of the category of disputes referable to the Center" was "a fundamental weakness"); Consultative Meeting of Legal Experts, Bangkok (July 20, 1964), *in* 2 History, *supra* note 9, at 474 (Japan) (calling for "a more precise definition of those terms"); Consultative Meeting of Legal Experts, Addis Ababa (Apr. 30, 1964), *in* 2 History, *supra* note 9, at 259, 261 (Tunisia) ("The types of disputes to be submitted to the Center should" receive "a comprehensive definition").

134. Consultative Meetings of Legal Experts, Geneva (June 1, 1964), *in* 2 History, *supra* note 9, at 396 (France) ("Discrimination in taxation, or even police measures, could adversely affect an investment contract without touching in any way the legal aspects of the contract."); *see also*, *e.g.*, Consultative Meetings of Legal Experts, Geneva (June 1, 1964), *in* 2 History, *supra* note 9, at 395 (South Africa) (suggesting that "no further definition should be sought"); Consultative Meetings of Legal Experts, Geneva (June 1, 1964), *in* 2 History, *supra* note 9, at 401 (Finland) ("[A] more precise definition . . . would tend to open the door to frequent disagreements as to the applicability of the Convention."); *cf.* Consultative Meetings of Legal Experts, Geneva (June 1, 1964), *in* 2 History, *supra* note 9, at 450 (United Kingdom) ("[T]he definition ought to be simple and should say as little as possible in the interests of devising a convention that could serve as a practical instrument for the settlement of as wide a range of disputes as possible.") (discussing the definition of "nationality"); Consultative Meeting of Legal Experts, Santiago (June 12, 1964), *in* 2 History, *supra* note 9, at 361 (Jamaica) (seeking "to keep

to suggest dropping the "investment" requirement from the Convention's operative language altogether.[135]

Delegates advocating a restrictive approach were seldom specific about how to limit the definition in practice. Some delegates proposed jurisdictional definitions of "investment" that were fully as comprehensive as standard BIT definitions are today.[136] Others suggested that investment should only include activity pursuant to a direct contract with the state and otherwise exclude private enterprise entirely.[137] Many countries were concerned that ICSID should not allow tribunals to determine "political questions," as opposed to what they described as "legal" matters of private right.[138] This view was rooted in a basic fear that still resonates today: the belief that ICSID tribunals should not review a state's regulation of internal affairs in its role as sovereign.[139]

The basic camps thus formed in these early stages, with advocates of a forum open to "as wide a range of disputes as possible"[140] squaring off against proponents of a far more limited jurisdiction that would exclude not just claims based on regulatory politics, but potentially any investments that had not been specifically approved by the state.

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the definitions as flexible as possible . . . [and thus] enable a wide variety of disputes to be brought within the jurisdiction of the Center") (discussing the definition of "nationality").

135. Consultative Meeting of Legal Experts, Geneva (June 1, 1964), *in* 2 History, *supra* note 9, at 401 (suggesting that the term "should be transferred to the Preamble").

136. *E.g.*, Consultative Meetings of Legal Experts, Addis Ababa (Apr. 30, 1964), *in* 2 History, *supra* note 9, at 285–86 (Tunisia) (proposing to define investments as "all categories of property, notably but not exclusively, goods and real estate, the right to participate in organizations, *créances pécuniares*, intellectual property rights including industrial property, copyright, and goodwill, and public concessions"); *see also* Consultative Meeting of Legal Experts, Bangkok (July 20, 1964), *in* 2 History, *supra* note 9, at 537 (Broches) (describing "an agreed list of transactions that would be regarded as investments, and then . . . some general residual clause.").

137. *E.g.*, Consultative Meeting of Legal Experts, Bangkok (Apr. 27–May 1, 1964), *in* 2 History, *supra* note 9, at 492–93 (Lebanon); Consultative Meeting of Legal Experts, Bangkok (Apr. 27–May 1, 1964), *in* 2 History, *supra* note 9, at 493–94 (India); Consultative Meeting of Legal Experts, Bangkok (Apr. 27–May 1, 1964), *in* 2 History, *supra* note 9, at 497–98 (Israel).

138. *E.g.*, Consultative Meeting of Legal Experts, Addis Ababa (Dec. 16–20, 1963), *in* 2 History, *supra* note 9, at 257 (Cameroon) (asking "whether the Center would be competent to decide political questions or merely questions relating to pecuniary matters or private law"); Consultative Meeting of Legal Experts, Bangkok (Apr. 27–May 1, 1964), *in* 2 History, *supra* note 9, at 500–01 (Ceylon) (suggesting cases of "highly political significance" are "unsuited for settlement on the plane of legal debate").

139. Consultative Meeting of Legal Experts, Bangkok (Apr. 27–May 1 1964), *in* 2 History, *supra* note 9, at 466 (Thailand) ("[A] State, in the ordinary course of exercising government functions, may have to take various broad measures which could affect the interests of foreign investors e.g. measures required to protect the health, morals and welfare of the community, as well as the security of the nation."); Consultative Meeting of Legal Experts, Bangkok (Apr. 27–May 1, 1964), *in* 2 History, *supra* note 9, at 504 (India) ("If . . . the State . . . passed a law affecting . . . the social security legislation or the taxation legislation . . . could such a measure be challenged on the grounds that it affected the legal right of that investor to the ownership, control or management [of its investment]?").

140. Consultative Meeting of Legal Experts, Geneva (Feb. 17–22, 1964), *in* 2 History, *supra* note 9, at 450 (United Kingdom).

3. *The Convocation of Drafters*

When the World Bank staff returned to Washington to incorporate the feedback, they again sought to bridge the gap by means of an ill-defined compromise.[141] The next draft, circulated in September 1964, thus retained the jurisdictional restriction to legal disputes arising out of "any investment."[142] But it now defined "investment" for the first time, as "any contribution of money or other asset of economic value for an indefinite period or, if the period be defined, for not less than five years."[143] The Comments to this draft provided no gloss comparable to the earlier version. The proposed text was left to stand on its own.

Once this latest draft had been circulated, the Bank convened a meeting of representatives from sixty-one interested nations to work out a final draft of the text.[144] It was here, at the "Legal Committee on Settlement of Investment Disputes," that the real give-and-take among signatory nations took place, and it was here that the crucial compromise coalesced. Discussions commenced in Washington, D.C. on November 23, 1964.[145]

The Bank drafters' compromise definition of "investment" flopped immediately. From the start, the same fault lines opened up between two camps of delegates. One bloc, again led by developed nations, opposed any attempt to limit the scope of the term,[146] contending that it would create arbitrary barriers to agreement among the parties.[147] Some suggested defini-

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141. Extracts from Statement by Mr. Broches Regarding the African Regional Meeting (Jan. 7, 1964), *in* 2 HISTORY, *supra* note 9, at 297 ("[S]ome delegates felt that the term 'investment' should be defined, and . . . we shall probably in the end have to devise a suitable definition of investment, difficult though it may be.").

142. Draft Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Sept. 11, 1964), *in* 2 HISTORY, *supra* note 9, at 621–22.

143. Draft Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Sept. 11, 1964), *in* 2 HISTORY, *supra* note 9, at 623.

144. *See* 1 HISTORY, *supra* note 14, at 8; *see also* Rules for the Conduct of Proceedings of Legal Committee (Nov. 17, 1964), *in* 2 HISTORY, *supra* note 9, at 647. The technical function of the Committee was as an advisory entity that would "prepare a final Committee text for submission to the Executive Directors," but the Executive Directors rubber stamped most of the Committee's final draft, by and large making only minor changes of a technical character. Memorandum of the President to the Executive Directors (Jan. 4, 1965), *in* 2 HISTORY, *supra* note 9, at 942; *see also* Memorandum from the General Counsel and List of Proposed Changes to the Revised Draft Convention (Jan. 8, 1965), *in* 2 HISTORY, *supra* note 9, at 943–52.

145. Summary Proceedings of the Legal Committee Meeting (Nov. 23, 1964), *in* 2 HISTORY, *supra* note 9, at 672.

146. Comments and Observations of Member Governments (Nov. 23, 1964), *in* 2 HISTORY, *supra* note 9, at 668 (United Kingdom), Summary Proceedings of the Legal Committee Meeting (Nov. 25, 1964), *in* 2 HISTORY, *supra* note 9, at 702 (United Kingdom) ("prefer[ring] to have no such definition in the Convention," as "parties should not be prevented from making arrangements to submit disputes to the Center"); Summary Proceedings of the Legal Committee Meeting (Nov. 27, 1964), *in* 2 HISTORY, *supra* note 9, at 710 (Iran) ("[I]t was not imperative to elaborate too much on the definition.").

147. Comments and Observations by the Republic of Austria (Nov. 24, 1964), *in* 2 HISTORY, *supra* note 9, at 670 ("[I]t should be the goal of the Convention to allow as general an application as possible."); Summary Proceedings of the Legal Committee Meeting (Nov. 25, 1964), *in* 2 HISTORY, *supra* note 9, at 702 (United Kingdom) ("The parties should not be prevented from making arrangements to submit disputes to the Center.").

tions that would sweep more broadly than the drafters' proposed durational compromise,[148] while others argued that any attempt at specification would introduce unacceptable uncertainty.[149] They all agreed that the definition "did not have the importance [that some countries] attributed to it," since the scope of arbitration would be limited by the scope of each individual state's consent.[150]

Arrayed against this bloc was a substantial group of countries, largely though not solely from the developing world,[151] that urged a substantial narrowing of the definition of "investment."[152] But as soon as these coun-

148. *See, e.g.* Summary Proceedings of the Legal Committee Meeting (Nov. 25, 1964), *in* 2 History, *supra* note 9, at 704 (Germany) (proposing definition of investment that includes "property, rights, and interests"); Summary Proceedings of the Legal Committee Meeting (Nov. 25, 1964), *in* 2 History, *supra* note 9, at 704 (Australia) (proposing to define investment as "every mode or application of money which is intended to return interest for profit"); Summary Proceedings of the Legal Committee Meeting (Nov. 25, 1964), *in* 2 History, *supra* note 9, at 703 (United States) (proposing to extend the definition of "investment" to mere "transfers" of money and other assets, rather than restricting it to "contributions").

149. Comments and Observations of Member Governments (Nov. 23, 1964), *in* 2 History, *supra* note 9, at 661 (South Africa) ("The definition of 'investment' seems unsatisfactory. Is capital appreciation covered?"); Comments and Observations of Member Governments (Nov. 23, 1964), *in* 2 History, *supra* note 9, at 668–69 (Viet Nam) ("For instance, we would like to know if under the term investment there would be included, as seems logical, contributions in foreign exchange and in local currency; on the other hand, should the definition be limited to investments made by a non-resident foreigner or should the Center have jurisdiction also on investments made by a resident foreigner?"); Summary Proceedings of the Legal Committee Meeting (Nov. 25, 1964), *in* 2 History, *supra* note 9, at 702 (United Kingdom).

150. Summary Proceedings of the Legal Committee Meeting (Nov. 25, 1964), *in* 2 History, *supra* note 9, at 701 (Costa Rica); *see also* Summary Proceedings of the Legal Committee Meeting (Nov. 25, 1964), *in* 2 History, *supra* note 9, at 702 (Dahomey) ("The fact that the basis of this jurisdiction is consent should dispel any misgivings on this subject."); Summary Proceedings of the Legal Committee Meeting (Nov. 27, 1964), *in* 2 History, *supra* note 9, at 706 (Sweden) ("[B]ecause of the condition of consent, there would be no need for complicated definitions.").

151. The Latin American countries were a special case. By and large their shared postcolonial experience led them to oppose the ICSID enterprise outright. Peru's sole submission at the beginning of the conference, for example, was a list of block quotes from its constitution emphasizing its inability to give special rights to foreign investors. Statement by the Delegation of Peru (Dec. 8, 1964), *in* 2 History, *supra* note 9, at 672 ("[Concessions and contracts with foreign businesses] shall . . . waive all recourse to diplomatic request . . . Foreigners shall be on equal terms with Peruvians . . . and may in no case claim exceptional status."); *see also* Summary Proceedings of the Legal Committee Meeting (Nov. 25, 1964), *in* 2 History, *supra* note 9, at 699 (Venezuela) (observing that Venezuelan constitution prohibited arbitration clauses "in respect of matters connected with public policy" and in particular for any "contracts of public interest" between the government and private persons); Comments by Mr. da Cunha (Brazil) on Chapter II (Nov. 30, 1964), *in* 2 History, *supra* note 9, at 838 ("[I]t would be inadmissible . . . to attempt to raise the Arbitral Tribunal to a super-power capable of changing the internal legislation of the Contracting States . . . the drafting and enforcement of which are inequivocably [sic] an act of sovereignty."). On the development of Latin America's historical discomfort with arbitration, *see generally* Gary B. Born, 1 International Commercial Arbitration 54–56 (2009).

152. Comments and Observations of Member Governments (Nov. 23, 1964), *in* 2 History, *supra* note 9, at 652 (China) (criticizing "the loose definition given to the word 'investment'"); Comments and Observations of Member Governments (Nov. 23, 1964), *in* 2 History, *supra* note 9, at 660 (Thailand) ("[J]urisdiction of Center . . . is too broad even though contracting state [sic] may specify classes of dispute to be submitted to Center."); Summary Proceedings of the Legal Committee Meeting (Nov. 27, 1964), *in* 2 History, *supra* note 9, at 707 (Central African Republic) ("[T]he definitions must be precise."); Summary Proceedings of the Legal Committee Meeting (Nov. 27, 1964), *in* 2 History, *supra* note 9, at 709 (Niger) ("stress[ing] the need for precise definitions"); Summary Proceedings of the Legal

tries started trying to nail down a specific definition, their agreement fell apart.

Some of them wanted to limit ICSID jurisdiction to specific agreements between a host government and a foreign investor; they did not want tribunals to review private investment made without special incentives or specific government approval.[153] Others suggested somewhat broader definitions, including "financial operations," "governmental guarantees," and even "'productive' investments to which the State was not a party."[154] Still others reverted to the suggestion from the Regional Working Groups to append an illustrative list of types of investment that would qualify for jurisdiction under the Convention.[155]

Another group in this bloc focused less on categories of economic activity and more on a dichotomy between "legal disputes" and "political disputes"[156] to retain regulatory space for states in their sovereign capacity. Other proposals in the same vein either ruled out any disputes that "affect the security of the State concerned"[157] or sought to hinge ICSID jurisdiction on the nature of the challenged government action.[158] Still others proposed

Committee Meeting (Nov. 27, 1964), *in* 2 History, *supra* note 9, at 709 (Philippines) (finding "the proposed jurisdiction of the Centre too broad").

153. Comments and Observations of Member Governments (Nov. 23, 1964), *in* 2 History, *supra* note 9, at 652–53 (China) ("[T]he jurisdiction of the Center . . . should not extend to . . . 'investments' other than those made pursuant to an investment agreement with the host State or in response to special investment promotion legislation."); *see also* Consultative Meeting of Legal Experts, Geneva (Feb. 17–22, 1964), *in* 2 History, *supra* note 9, at 446 (Italy) (suggesting that ICSID should protect only "investments made pursuant to a particular contract with a State" and "investments made in reliance on [an investment promotion] law of the host country," since "[p]ersons investing without special incentives in a foreign country did not deserve special protection").

154. Summary Proceedings of the Legal Committee Meeting (Nov. 27, 1964), *in* 2 History, *supra* note 9, at 708 (Portugal).

155. Summary Proceedings of the Legal Committee Meeting (Nov. 27, 1964), *in* 2 History, *supra* note 9, at 707 (Japan); Summary Proceedings of the Legal Committee Meeting (Nov. 25, 1964), *in* 2 History, *supra* note 9, at 703 (New Zealand); *see also* Summary Proceedings of the Legal Committee Meeting (Nov. 27, 1964), *in* 2 History, *supra* note 9, at 709 (Austria) (suggesting that "[a] descriptive list might be suitable" in light of the dispute about the scope of "investment").

156. Summary Proceedings of the Legal Committee Meeting (Nov. 25, 1964), *in* 2 History, *supra* note 9, at 700 (Ceylon) (noting that the phrasing "arising out of . . . [or] connected with any investment . . . were capable of the widest possible meaning," yielding "very wide and indefinite authority over the affairs of a sovereign state"); Summary Proceedings of the Legal Committee Meeting (Nov. 25, 1964), *in* 2 History, *supra* note 9, at 703 (Guatemala); Summary Proceedings of the Legal Committee Meeting (Nov. 25, 1964), *in* 2 History, *supra* note 9, at 703 (Tunisia) (suggesting that tribunals should be able only to rule on the valuation of an expropriation, not on its legality per se); Summary Proceedings of the Legal Committee Meeting (Nov. 27, 1964), *in* 2 History, *supra* note 9, at 709 (Philippines) (suggesting the elimination of claims based on expropriation).

157. Summary Report on Views Expressed on Jurisdiction of the Center (Nov. 30, 1964), *in* 2 History, *supra* note 9, at 830 (Uganda).

158. Summary Proceedings of the Legal Committee Meeting (Nov. 27, 1964), *in* 2 History, *supra* note 9, at 709 (Philippines) (suggesting eliminating claims based on expropriation and capital flow restrictions).

requiring that eligible investments be "regarded as being of public interest."[159]

As Broches put it at the time, "nearly all the [more specific] definitions which had been proposed were in fact definitions of what the delegates concerned believed their governments would in fact wish to submit to the Centre." He concluded that since "the views differed [so] widely, it would hardly be possible to arrive at a proper definition."[160]

Four days after the Legal Committee convened, the delegates agreed to transfer the issue to a working group.[161] But hopes that the confrontation could be resolved in a smaller group were soon dashed. After spending eight fruitless days exchanging proposals among themselves, the working group returned at a loss, bearing two opposing and incompatible formulations. One excluded any definition of "investment" at all.[162] The second delineated a closed list of circumstances in which the ICSID facility would be available.[163] While developing countries had thus managed to boil down their myriad suggestions for narrow jurisdiction to a single unified proposal, the philosophical collision between the two larger groups seemed intractable. The working group reported that "there was no possibility of reconciliation of the two proposals within the Working Group itself."[164] The two positions were at an impasse.

4. *The United Kingdom Compromise*

It was at this point that a compromise was finally struck yielding the jurisdictional structure of ICSID that exists today. When the issue was reopened before the broader Legal Committee on December 8, 1964, the United Kingdom proposed a solution that would more unequivocally join two principles intended to satisfy both sides: wide-open jurisdiction for ICSID as the baseline starting point, and explicit opt-outs that states could use to *limit* ICSID jurisdiction on an *individual* basis. Drawing on the previous

159. Comments by Mr. da Cunha (Brazil) on Chapter II (Nov. 30, 1964), *in* 2 History, *supra* note 9, at 839.

160. Summary Proceedings of the Legal Committee Meeting (Nov. 27, 1964), *in* 2 History, *supra* note 9, at 707 (Broches).

161. Summary Proceedings of the Legal Committee Meeting (Nov. 27, 1964, Morning), *in* 2 History, *supra* note 9, at 711 (Broches). The working group was chaired by the delegate from Tanzania and included 27 members from all regions of the globe and all levels of economic development. *See* Report on Scope of Jurisdiction of the Centre, arts. 26, 29 (Dec. 7, 1964), *in* 2 History, *supra* note 9, at 827 (Tanzania, Belgium, Sierra Leone, Germany, Central African Republic, Philippines, United Kingdom, Ivory Coast, Spain, United States, Denmark, Sweden, Dahomey, India, Panama, Greece, Ethiopia, Australia, Peru, Uganda, Guatemala, New Zealand, Norway, Nepal, Finland, Japan, and Netherlands).

162. Report on Scope of Jurisdiction of the Centre, arts. 26, 29 (Dec. 7, 1964), *in* 2 History, *supra* note 9, at 828.

163. *Id.* (limiting jurisdiction to three categories: (i) disputes involving a contract between the "State and a National of another State"; (ii) disputes over specific guarantees made by the state to specific investments"; and (iii) disputes to determine the injury suffered by an investor who was harmed when the state broke its own laws).

164. *Id.* at 829.

draft of the Convention[165] and ideas for compromise suggested in the working group,[166] the United Kingdom proposal did three things. It retained the basic jurisdictional grant over "investment" disputes. It deleted any definition of "investment" at all. And it added a new subsection to the Article which defined the Centre's jurisdiction, establishing a procedure for states to notify other signatories of the categories of dispute that they would *not* consider submitting to arbitration.[167]

It was the third piece that proved crucial. As the U.K. delegate explained, it meant that "[s]tates could *limit* [ICSID's] jurisdiction" and effectively tailor it to their liking—crucially, without "oblig[ing] [other States] to accept [those same] restrictions."[168] The formula, in other words, was a broad and open-ended reference to "investment" without limitation, combined with specific procedural mechanisms that allowed each state to create an individualized definition of "investment" after the Convention was ratified.[169] As discussed below, the presumption against surplusage suggests that the United Kingdom compromise probably intended *some* enforceable limit on the very outer margins of the concept. But the agreement was de-

165. Partly to emphasize that signing the ICSID Convention did not, without more, create jurisdiction over any particular dispute, a different Article of the previous draft had noted that states were free to submit "statement[s]" to the Secretary-General "indicating [the] . . . classes of dispute within the jurisdiction of the Center which [they] would in principle consider submitting." Draft Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 29 (Sept. 11, 1964), *in* 2 History, *supra* note 9, at 623 (located in Chapter II, "Jurisdiction of the Center"). That provision had not been incorporated as a sub-component of the Article actually defining jurisdiction, and it contemplated mere "information" about disputes already within ICSID's jurisdiction that the state "in principle" *would* consider submitting.

166. Summary Report on Views Expressed on Jurisdiction of the Center (Nov. 30, 1964), *in* 2 History, *supra* note 9, at 830 (Netherlands) ("[I]n order to meet some of the fears expressed by some capital-importing countries, States [should] be allowed to declare . . . the classes of disputes they would not consider suitable for [submission]."); *see also* Consultative Meeting of Legal Experts, Geneva (Feb. 17–22, 1964), *in* 2 History, *supra* note 9, at 412 (Netherlands) ("[S]ignatory States [should have] the right to exclude certain categories of disputes which they might be unwilling to submit to conciliation and arbitration").

The Dutch suggestion was an apparently milder version of proposals by developing states at the Working Group to add a *jurisdictionally preclusive* opt-out to the definition of investment. *See, e.g.*, Draft Submitted by Mr. Bomani (Tanzania) (Dec. 1, 1964), *in* 2 History, *supra* note 9, at 834; Summary Report on Views Expressed on Jurisdiction of the Center (Nov. 30, 1964), *in* 2 History, *supra* note 9, at 831 (India); *cf.* Proposal of Sierra Leone, Philippines, Tanzania, Uganda, Central African Republic, Nepal and India (Dec. 4, 1964), *in* 2 History, *supra* note 9, at 835 (suggesting that the drafters should also adopt "specif[ied] categories of disputes relat[ed] to investment").

167. Summary Proceedings of the Legal Committee Meeting (Dec. 8, 1964), *in* 2 History, *supra* note 9, at 821–22.

168. Summary Proceedings of the Legal Committee Meeting (Dec. 8, 1964), *in* 2 History, *supra* note 9, at 821 (emphasis added); *see also* Summary Report on Views Expressed on Jurisdiction of the Center (Nov. 30, 1964), *in* 2 History, *supra* note 9, at 831 (United States) ("[T]o limit the scope of the Center only to disputes specifically listed would unduly limit the free choice of States. States which did not wish to submit certain disputes to conciliation or arbitration could freely do so by withholding their consent.").

169. *See infra* Part II.A.5 for a discussion of the three principal mechanisms available to states for tailoring the eligible categories of "investment."

scribed at the time as allowing "each Contracting State [to], in effect, write its own definition" of "investment."[170]

The U.K. proposal broke the impasse that working group members had seen "no possibility of reconcil[ing]" only two days before. It was co-sponsored by a broad range of developing and developed countries, including some that had most adamantly demanded a narrow definition.[171] Indeed, the Committee's ultimate vote on the provision was almost an anticlimax after the list of cosponsors was announced. Two proposals were put to the floor: the narrowly defined list of investments proposed in the working group (changed by friendly amendment to be illustrative rather than exclusive),[172] and the United Kingdom's two-part compromise (revised in some minor respects).[173] The U.K. approach won by an overwhelming majority,[174] and an attempt to amend it by adding the other proposal's illustrative categories was quickly voted down.[175]

With that, the Legal Committee aligned itself with the permissive, consent-based approach to ICSID jurisdiction. The resulting resolution adopted essentially the version of Article 25 that exists today, extending jurisdiction "to any dispute of a legal character, arising directly out of an investment," forgoing any explicit definition of investment, and creating a notification process for individual states to identify "classes of disputes which [they] . . . would not consider submitting to the jurisdiction of the Centre."[176]

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170. Memorandum of the Meeting of the Committee of the Whole (Feb. 16, 1965), *in* 2 History, *supra* note 9, at 972 (Broches).

171. Summary Proceedings of the Legal Committee Meeting (Dec. 8, 1964), *in* 2 History, *supra* note 9, at 821 (U.K. proposal joined by Tanzania, Uganda, United States, Netherlands, Sierra Leone, Denmark, Norway, Finland, Sweden, Nepal, Malaysia, New Zealand, Turkey, Australia, Nigeria, Yugoslavia, Korea, Japan, Liberia, Greece, Germany, Austria, Ivory Coast, Belgium, India, Costa Rica, Lebanon, Iran, and the Malagasy Republic).

172. New Wording of Article 26: Proposal Submitted by the Delegation from Spain (Dec. 4, 1964), *in* 2 History, *supra* note 9, at 841–42 (specifying jurisdiction over disputes (a) arising out of a contract with the state, (b) arising out of specific commitments made by the state to specific investments, such as through investment promotion legislation, and (c) arising out of disagreement over compensation to the investor for the host state's violations of domestic law); Summary Proceedings of the Legal Committee Meeting (Dec. 8, 1964), *in* 2 History, *supra* note 9, at 824–25 (amending the Spanish proposal to be illustrative and non-exhaustive).

173. Summary Proceedings of the Legal Committee Meeting (Dec. 8, 1964), *in* 2 History, *supra* note 9, at 826 (requiring that disputes be "of a legal character" and arise "directly" out of investments, and deleting the words "in principle" from the notification provision).

174. Summary Proceedings of the Legal Committee Meeting (Dec. 8, 1964), *in* 2 History, *supra* note 9, at 826. Immediately before the vote, the United Kingdom's proposal was amended by virtually unanimous agreement to require that the dispute arise "directly" out of the investment, and that the dispute be "of legal character." *Id.* These changes, reflected in the printed version reported out of the Drafting Subcommittee, were the last substantive alterations to the U.K. compromise. *See* Fourth Interim Report (Dec. 11, 1964), 2 History, *supra* note 9, at 879–80.

175. Summary Proceedings of the Legal Committee Meeting (Dec. 8, 1964), *in* 2 History, *supra* note 9, at 826.

176. Legal Committee on Settlement of Investment Disputes, Fourth Interim Report (Dec. 11, 1964), *in* 2 History, *supra* note 9, at 879–80 (submitting proposed text of jurisdictional section); Revised Draft of Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Dec. 11, 1964), *in* 2 History, *supra* note 9, at 918–19.

5. *The Convention as Ratified*

The United Kingdom compromise was retained nearly *in haec verba* in the final version of the Convention that the Executive Directors of the World Bank promulgated for ratification in March 1965.[177] Emphasizing that "[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre,"[178] the Report of the Executive Directors that accompanied the proposed treaty elaborated:

> No attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the [notification] 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.[179]

Setting aside the startling inaccuracy of the suggestion that there was no attempt to define "investment," the Directors' gloss exactly reiterates the substantive tradeoff of the U.K. compromise. Indeed, the paragraph's very structure cuts against the notion that the job of defining the limits had been delegated to tribunals as gap fillers. The sole logical connection between the first half of the sentence and the second half is straightforward: the *reason* that "investment" was not defined was because individual states were charged with doing the tailoring themselves.

With that said, it must be admitted that the Report's abbreviated summary obscured the intensity and the details of the underlying conflict.[180] And this was no accident. The bland description of the compromise was adopted at least in part to appease Jorge Mejia-Palacio, a World Bank Director from Colombia who advocated a narrow version of investment and who ultimately became the only Director to enter a recorded vote against the Convention.[181] The draft Report initially circulated to the Directors for ap-

177. Broches explained to the Executive Directors that Article 25(1) "represented a compromise between various points of view" and "had been adopted by the Legal Committee by a very substantial majority." Memorandum of the Meeting of the Committee of the Whole (Feb. 16, 1965), *in* 2 History, *supra* note 9, at 972. The only change they ultimately made was to refer to "legal dispute[s]" rather than "dispute[s] of a legal character"—and that only to retain parallel structure with the ICJ Statute and with the Spanish and French versions of the ICSID Convention. *See* Memorandum from the General Counsel and List of Proposed Changes to the Revised Draft Convention (Jan. 8, 1965), *in* 2 History, *supra* note 9, at 944.

178. Report of the Executive Directors, *supra* note 15, ¶ 23.

179. *Id.* ¶ 27.

180. Even so, this abbreviated comment's focus on the *procedure* of consent comes in significant contrast to the Report's focus on the *substance* of definitions for other jurisdictional elements. For example, the Report noted that the Article 25 requirement of a "legal dispute" was "used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not," and explained that "[t]he dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation." Report of the Executive Directors, *supra* note 15, ¶ 26. Similarly, the Report discussed the Article 25 limitations on the categories of eligible parties in fairly extensive technical detail. *Id.* ¶¶ 28–30.

181. Excerpt from the Minutes of the Meeting of the Executive Directors (Mar. 18, 1965), *in* 2 History, *supra* note 9, at 1040.

proval in March 1965 had stated more bluntly that "[t]he Executive Directors did not think it necessary or desirable to attempt to define the term 'investment' . . . ."[182] Mejia-Palacio objected to this formulation, unable to "support the idea that a definition was unnecessary or undesirable."[183] Aron Broches responded on the fly by suggesting the final wording as a way of assuaging Mejia-Palacio's lingering regrets—truly an instance of diplomatic niceties obfuscating the essential substance of an agreement.[184]

The Convention as ratified left open at least three ways for individual countries to regulate the scope of investments subject to ICSID jurisdiction in their case: through arbitration agreements, through notifications to the Centre under Article 25(4), and through reservations from the Convention.

Consent to Arbitrate: There was substantial concern among delegates and World Bank staffers alike that the mere act of signing the ICSID Convention might be construed as consent to arbitrate any and all future investment disputes.[185] Given unanimous agreement that this outcome was not intended, the delegates reiterated the "cornerstone"[186] element of specific consent in one of the first preambulatory clauses to the entire convention: "no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration."[187] The jurisdictional role of consent was further clarified by an additional requirement that consent be in "writing," to emphasize its separate nature.[188] Individual countries could thus use explicit terms in an arbitration agreement itself to specify which investments would receive the ICSID guarantee.[189]

Article 25(4) Notification: The jurisdictional notification process introduced by the United Kingdom compromise allowed "[a]ny Contracting State . . . at any time . . . [to] notify the Centre of the class or classes of disputes which it . . . would *not* consider submitting to the jurisdiction of

182. Memorandum of the Meeting of the Committee of the Whole (Mar. 9, 1965), *in* 2 History, *supra* note 9, at 1027.

183. *Id.*

184. *Id.* This word choice in the widely promulgated report may bear substantial culpability for modern tribunals' failure to implement the historical agreement.

185. *E.g.*, Memorandum of the Meeting of the Committee of the Whole (Dec. 18, 1962), 2 History, *supra* note 9, at 55 (Lieftnick); Memorandum of the Meeting of the Committee of the Whole (Dec. 27, 1962), 2 History, *supra* note 9, at 67–70 (lengthy colloquy among Directors and Bank staff); Consultative Meeting of Legal Experts, Chile (Feb. 5, 1964), 2 History, *supra* note 9, at 334 (Nicaragua) (discussing separate section of draft Convention); Consultative Meeting of Legal Experts, Thailand (Apr. 29, 1964), 2 History, *supra* note 9, at 499 (Israel).

186. Report of the Executive Directors, *supra* note 15, ¶ 23.

187. ICSID Convention, *supra* note 13, Preamble.

188. Consultative Meeting of Legal Experts, Bangkok (Apr. 27–May 1, 1964), *in* 2 History, *supra* note 9, at 541 (Broches).

189. If a services contract was not viewed as an investment by the host country, that could be stipulated in the contract—or the issue could be avoided altogether by emphasizing that ICSID was not one of the available forums in the event of a contract dispute. If a bilateral treaty was not intended to cover activity within certain "purely economic" sectors, it could say so in its definition of asset or investment.

the Centre."[190] To trigger this provision, a state simply sends a letter to the ICSID Secretary-General invoking Article 25(4) and specifying which kinds of disputes should be ruled out in that state's case.

In practice, the notification process has turned out to be a less important way to tailor the scope of "investment" than limitations in consent documents such as BITs and contracts. But even so, ten countries have submitted Article 25(4) notifications to the Centre.[191] The restrictions they impose run the gamut of concerns expressed at the drafting convention, from categories of investment (Saudi Arabia reserves the right to preclude some oil-related disputes), to types of government action (China excludes all complaints not based on expropriation or nationalization), to extenuating circumstances (Guatemala excludes complaints arising out of civil disturbances), to regulatory screening processes (Turkey consents to arbitration only for those foreign investments that have been registered and approved).[192]

There is some controversy about the effect of such notifications—specifically, whether they operate to limit ICSID's jurisdiction or simply serve an informational purpose.[193] On one view, Article 25(4) notifications should create enforceable jurisdictional limitations that trump any other agreements a state might make in the form of BITs or investment contracts. There is some historical support for this interpretation. The notification proposal certainly played a crucial role in the compromise between the two opposing camps at the Legal Committee.[194] And several participants suggested that Article 25(4) notifications would have preclusive jurisdictional effect even where a governing BIT indicated a contrary understanding of "investment."[195] This interpretation is further supported by the choice to

190. ICSID Convention, *supra* note 13, art. 25(4) (emphasis added).

191. Contracting States and Measures Taken by Them for the Purpose of the Convention, ICSID/8-D (2008), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingMeasures&reqFrom=Main (listing notifications from China, Guyana, Israel, Costa Rica, Guatemala, Ecuador, Jamaica, Papua New Guinea, Saudi Arabia, and Turkey). Guyana and Israel have since withdrawn their notifications. *See id.*

192. *Id.*

193. One tribunal held that notifications are "merely informational" and do not qualify the consent given in the treaty. PSEG Global Inc. v. Republic of Turkey, ICSID Case No. ARB/02/5, Decision on Jurisdiction, ¶¶ 137 n.37, 145 (June 4, 2004) (citing expert opinions by Michael Reisman, Rudolf Dolzer, and Christoph Schreuer). Other tribunals have reached the opposite conclusion in dictum, suggesting that notifications can indeed limit the scope of jurisdiction. *See* Československa Obchodní Banka, A.S. v. Slovak Republic, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, ¶ 65 (May 24, 1999), *reprinted in* 14 ICSID Rev.—FILJ 251 (1999) (suggesting that notifications can limit scope of jurisdiction); Alcoa Minerals of Jam., Inc. v. Jamaica, ICSID Case No. ARB/74/2, Decision on Jurisdiction, *reprinted in* 17 Harv. Int'l L.J. 90, 103 (1976) (notifications can limit consent prospectively).

194. This point was made in one of the final internal World Bank meetings prior to the promulgation of the completed Convention. *See* Memorandum of the Meeting of the Committee of the Whole (Feb. 16, 1965), *in* 2 History, *supra* note 9, at 973 (Rajan) ("Article 25(4) was a very important provision and to some extent took care of the [concern about overly broad jurisdiction] raised . . . by India, and some other countries . . . . [O]ne reason for the wide support Article 25 as a whole had received in the Legal Committee was the incorporation in it of this provision.").

195. *See, e.g.*, Summary Proceedings of the Legal Committee Meeting (Dec. 8, 1964), *in* 2 History, *supra* note 9, at 822 (Philippines) (noting that the U.K. approach permitted "any State . . . to define the

place the clause, not only in the jurisdictional Chapter of the Convention, but also as a specific caveat within the individual Article that contains the entirety of the Centre's jurisdictional grant.

On the whole, though, notifications are better understood as prospective guides—effectively, rules of construction—for interpreting future agreements signed by the state that submits the notification. Certainly this is how early scholarly commentary interpreted Article 25(4).[196] It is also the more natural reading of the provision, which speaks not of eliminating the Centre's jurisdiction outright, but of "notify[ing]" parties of a state's policy position. This ambiguous language contrasts with rejected proposals for the opt-out whose jurisdictionally preclusive effect would have been unequivocal.[197] And the United Kingdom delegate—who, of course, had submitted the very proposal at issue—emphasized that notification would not bar ICSID arbitration where sufficiently specific consent had been given in a particular case.[198]

On this theory, because notifications are automatically circulated to all contracting states,[199] participants in the investment regime are put on constructive notice that broad but ambiguous language in BITs or contracts will be construed narrowly in light of the notifications.[200] Broad boilerplate

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jurisdiction of the Centre along the lines of the Spanish proposal"); *id.* (Broches) ("clearly permissible" to limit the jurisdiction of the Centre on a tailored basis in this way); Summary Proceedings of the Legal Committee Meeting (Dec. 8, 1964), *in* 2 HISTORY, *supra* note 9, at 823 (Italy) ("[T]he British proposal leav[es] it to each state to define which categories of dispute could be submitted to the Centre."); *cf.* Summary Proceedings of the Legal Committee Meeting (Nov. 11, 1964), *in* 2 HISTORY, *supra* note 9, at 711 (Broches) (stating that a previous version of the notification provision "was added to enable countries to exclude classes of investments, thereby narrowing the scope of the Convention as far as they were concerned").

196. *See, e.g.*, C.F. Amerasinghe, *The Jurisdiction of the International Centre for the Settlement of Investment Disputes*, 19 INDIAN J. INT'L L. 166, 226 (1979); David Sasson, *Convention on Settlement of Investment Disputes*, 13 J. BUS. L. 334, 334 n.3 (1965).

197. *See, e.g.* Summary Report on Views Expressed on Jurisdiction of the Centre (Nov. 30, 1964), *in* 2 HISTORY, *supra* note 9, at 831 (India) ("Each Contracting State shall notify to the Centre the class or classes of investment disputes which it would in principle consider submitting . . . . The Centre shall exercise jurisdiction *only* over such disputes of the class or classes so notified [and] only if the parties thereto have in writing consented to submit the dispute . . . .") (emphasis added); Amendments Proposed by Mr. A.R. Brinas (Philippines) (Nov. 30, 1964), *in* 2 HISTORY, *supra* note 9, at 832 (similar); Draft Submitted by Mr. Bomani (Tanzania) (Dec. 1, 1964), *in* 2 HISTORY, *supra* note 9, at 834 ("A Contracting State may at the time of ratifying the Convention stipulate any class or classes of disputes that it shall exclude from the scope of the facilities of the Centre.").

198. *See* Summary Proceedings of the Legal Committee Meeting (Dec. 8, 1964), *in* 2 HISTORY, *supra* note 9, at 824 (United Kingdom) (responding to Spanish delegate's query about the outcome in the event of "a conflict between a specific consent and a notification [to ICSID] to exclude the type of dispute covered by the specific agreement" by stating that "the specific and particular consent would govern"). Although the U.K. delegate had earlier suggested that states "could limit [ICSID's] jurisdiction" via the notification procedure without thereby "oblig[ing other States] to accept [those same] restrictions[,]" his later clarification made it clear that he understood notifications to function as a prospective rule of thumb for interpreting future agreements. Summary Proceedings of the Legal Committee Meeting (Dec. 8, 1964), *in* 2 HISTORY, *supra* note 9, at 821.

199. ICSID Convention, *supra* note 13, art. 25(4).

200. Fedax v. Republic of Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, ¶ 33 (July 11, 1997), *reprinted in* 37 I.L.M. 1378 (1998) (suggesting that Article

references to "investment" in Jamaica's post-notification BITs, for example, should be read in light of its Article 25(4) declaration that it intends to preclude ICSID jurisdiction over "investment[s] relating to minerals or other natural resources"—even if the facially broad language of the BIT would otherwise encompass such activities.[201]

Reservations: One final option was left open for Convention signatories to tailor the scope of ICSID jurisdiction: the opportunity to enter reservations to the treaty. The issue of reservations was a live one during the Convention, with some delegates urging reservations as a way to finesse the substantive disagreements about the scope of jurisdiction,[202] and others calling for a provision that would prohibit them.[203] The Convention as enacted did not specifically address reservations, leaving the question of their availability to the default rules of treaty interpretation.

Reservations have been a notoriously vexing issue in international law, both before and after the Vienna Convention on the Law of Treaties sought to clarify their operation.[204] But it seems likely that reservations on the scope of the Convention's jurisdiction would have been effective under the then-authoritative statement of customary international law: the *Genocide Convention* opinion.[205] Many of the factors that led the International Court of Justice to permit reservations to the Genocide Convention are equally applicable in the ICSID context. Particularly on the essential question of whether jurisdictional reservations would be compatible with the object and purpose of the treaty,[206] it seems likely that ICSID reservations would have been recognized as an important means of maximizing the number of signatories.[207] Reservations were thus another way for individual countries to tailor categories of ICSID investment that would be acceptable to them.

25(4) notifications should be used to construe the scope of consent with BITs or contracts); *see also* David A. Lopina, *The International Centre for Settlement of Investment Disputes: Investment Arbitration for the 1990s*, 4 Ohio St. J. on Disp. Resol. 107, 120 (1988) (advising corporations to "remain alert to any possible future [Article 25(4)] notification" when "considering upcoming investment options").

201. In Vienna Convention on the Law of Treaties terms, the notification would either be a "supplementary means of interpretation," VCLT, *supra* note 5, art. 32, or perhaps an indication of "[a] special meaning" for the BIT's otherwise broad terms, *id.* art. 31. This approach proceeds from the reasonable premise that fellow ICSID signatories are on constructive notice of Article 25(4) notifications.

202. *See* Consultative Meeting of Legal Experts, Addis Ababa (Dec. 16–20, 1963), *in* 2 History, *supra* note 9, at 292 (Sierra Leone) (suggesting amendment on ICJ referral issue to satisfy all parties "so . . . that it could be ratified without reservations"); Consultative Meeting of Legal Experts, Addis Ababa (Dec. 16–20, 1963), *in* 2 History, *supra* note 9, at 283 (Broches) (The Secretary-General believed that a reservation's validity turned on whether other states "accepted it. If they did not, the ratification was invalid.").

203. *See* Consultative Meeting of Legal Experts, Geneva (Feb. 17–22, 1964), *in* 2 History, *supra* note 9, at 442 (France) ("[R]eservations to the Convention ought not to be permitted.").

204. *See, e.g.*, Edward T. Swaine, *Reserving*, 31 Yale J. Int'l L. 307 (2006); William W. Bishop Jr., *Reservations to Treaties*, 103 Recueil des Cours 245 (1961).

205. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28) [hereinafter *Genocide Convention* opinion].

206. *Id.* at 29.

207. *Id.* at 22, 24. Other factors cutting in favor of allowing such reservations under the *Genocide Convention* opinion include the fact that ICSID's jurisdictional compromise was reached by a series of

B. The Restrictive Approach Reconsidered

The history described above presents a serious problem for the restrictive definition of investment: the three most important screening factors relied on by restrictive tribunals today were explicitly rejected during the drafting process.[208]

1. *Substantiality of Investment, Dispute, or Contribution to Development*

The activity at issue in both *Joy Mining* and *Malaysian Historical Salvors* was faulted for insufficient size and contribution to the host country.[209] But precisely such substantiality requirements were repeatedly rejected during drafting. The first draft of the Convention imposed a minimum $100,000 amount in dispute as a jurisdictional prerequisite.[210] The dollar minimum was withdrawn in the next draft, and despite occasional expressions of concern that it might leave ICSID open to "small or frivolous" disputes,[211] it was never reinstated—at least partly on the ground that "disputes involving small amounts could be important as test cases."[212] The same held true for all efforts to impose a substantiality requirement on the investment itself.[213] The United Kingdom compromise allowed the parties individually to impose size requirements under BITs and investment legislation as they saw

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majority votes rather than by consensus, and that there was no general expression by delegates of an intent to disallow reservations. *Id.* at 22, 25. For these reasons, the *Genocide Convention* opinion seems at odds with Schreuer's conclusion that it would have been "difficult to imagine any reservation" that is "compatible with the Convention's object and purpose." SCHREUER I, *supra* note 50, at 1273.

208. *Cf.* Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 80 (Apr. 29, 2004) (refusing over a strong dissent "to narrow the scope of covered investments by adding a condition . . . not found in . . . the Convention.").

209. Joy Mining v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction (Aug. 6, 2004), *reprinted in* 44 I.L.M. 73 (2005); Malaysian Historical Salvors I, *supra* note 60; *see also* SCHREUER I, *supra* note 50, art. 25, ¶ 122 ("the commitment is *substantial*"). *But see* Mihaly Int'l Corp. v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2, Award, ¶ 51 (Mar. 15, 2002), *reprinted in* 41 I.L.M. 867 (2002) (rejecting substantiality test).

210. Working Paper in the Form of a Draft Convention (June 5, 1962) 2 HISTORY, *supra* note 9, at 34.

211. Memorandum of the Meeting of the Committee of the Whole (June 6, 1963), *in* 2 HISTORY, *supra* note 9, at 115 (Garland); *see also, e.g.*, Consultative Meeting of Legal Experts, Addis Ababa (Dec. 16–20, 1963), *in* 2 HISTORY, *supra* note 9, at 258 (Dahomey) (suggesting that the Secretary-General should have the power to deem a dispute too financially insignificant to justify arbitration); Consultative Meeting of Legal Experts, Bangkok (Apr. 27–May 1, 1964), *in* 2 HISTORY, *supra* note 9, at 502 (Pakistan) (advocating a minimum amount in dispute); Consultative Meeting of Legal Experts, Addis Ababa (Dec. 16–20, 1963), *in* 2 HISTORY, *supra* note 9, at 257 (Cameroon); Summary Proceedings of the Legal Committee Meeting (Nov. 27, 1964, Morning), *in* 2 HISTORY, *supra* note 9, at 710 (Niger); *cf.* Comments by Mr. da Cunha (Brazil) on Chapter II (Nov. 30, 1964), *in* 2 HISTORY, *supra* note 9, at 839 (proposing that investments be "of public interest").

212. Regional Consultative Meetings of Legal Experts on Settlement of Investment Disputes, Chairman's Report on Issues Raised and Suggestions Made (July 9, 1964), *in* 2 HISTORY, *supra* note 9, at 567.

213. Consultative Meeting of Legal Experts, Bangkok (Apr. 27–May 1, 1964), *in* 2 History, *supra* note 9, at 497 (China) (proposing a limit on the value of total investment); Summary Proceedings of the Legal Committee Meeting (Nov. 27, 1964, Morning), *in* 2 History, *supra* note 9, at 706 (India) ("[O]nly 'substantial' investments should come under the regime of the Convention.").

fit, but imposed no such requirements as a matter of Conventional jurisdiction. As the Bank drafters explained in their elimination of "lower limit[s]" from the draft circulated to the Consultative Meetings of Legal Experts, "the parties would in practice be best qualified to decide whether, having regard to pertinent facts and circumstances including the value of the subject-matter, a dispute is one which ought to be submitted to the Center."[214]

2. *Duration*

Salini proposed that the minimum duration of eligible investments should be two years, and *Malaysian Historical Salvors* ruled out an enterprise that, under ideal conditions, might have been completed in eighteen months. But all efforts to draw such lines were rejected during the drafting process. The World Bank drafters' first attempt to define "investment" imposed a five-year minimum duration.[215] This limitation was strongly criticized in the Legal Committee,[216] and was dropped in the final draft after lingering debate over the issue.[217]

3. *"Merely" Commercial*

Schreuer captures the common wisdom that "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."[218] Tribunals have relied on this assumption in a variety of contexts, from imposing the murky requirement that an eligible venture undertake "investment" risk rather than mere "commercial" risk,[219] to suggesting that ICSID has no jurisdiction over businesses which are too ordinarily commercial, to excluding transactions which are too close to mere sales contracts.[220]

This focus on the commercial nature of an activity is incompatible with the historical course of negotiations. The World Bank's first circulated draft

214. Preliminary Draft of ICSID Convention (Oct. 15, 1963), *in* 2 HISTORY, *supra* note 9, at 204; *see also* 2 HISTORY, *supra* note 9, at 260, 432, 497, 567, 660 (rejected efforts to insert substantiality requirement).

215. Draft Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, (Sept. 11, 1964), *in* 2 HISTORY, *supra* note 9, at 621–23.

216. *See, e.g.*, 2 HISTORY, *supra* note 9, at 702 (United Kingdom); *id.* at 705 (Spain); *id.* at 707 (Sweden).

217. Consultative Meeting of Legal Experts, Geneva (Feb. 17–22, 1964), *in* 2 HISTORY, *supra* note 9, at 450 (Norway) (arguing that "many thousands of short-term transactions would never be regarded as coming within [ICSID jurisdiction]").

218. SCHREUER I, *supra* note 50, art. 25, ¶ 89.

219. *See, e.g.*, Malaysian Historical Salvors I, *supra* note 60, ¶ 86; Joy Mining v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, ¶ 57 (Aug. 6, 2004), *reprinted in* 44 I.L.M. 73 (2005).

220. Even the Malaysian Historical Salvors Annulment Panel fell prey to this misunderstanding. Malaysian Historical Salvors II, *supra* note 2, ¶ 69, 72 ("It appears . . . that use of the term 'investment' excluded a simple sale and like transient commercial transactions from the jurisdiction of the Centre."); *see also* Phoenix Action, Ltd. v. Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 82 (Apr. 15, 2009).

suggested ruling out "political, economic or purely commercial disputes"[221]—caveats that were clearly of concern to some of the leaders of the project, including Broches himself.[222] But when the draft was released to member nations, there was substantial resistance to the idea of excluding "commercial" disputes—both among countries who opposed any limitation on investment and among countries who supported a narrower definition.[223] The basic concern was that any such limitation would turn into a slippery slope excluding all economic activity; even the minimalist Indian delegate expressed skepticism that "it was really possible to distinguish between . . . commercial disputes" and investment activity that would otherwise come within the Centre's purview.[224] As a result, all efforts to preclude jurisdiction over "merely commercial" activity were dropped.[225]

So it is clear that the restrictive approach's core jurisdictional criteria were rejected during the negotiation process, despite strenuous and repeated efforts to incorporate them. But that still leaves a question: what limiting effect *did* the drafters understand the "investment" requirement to have? There is a good case that the historical agreement was for the requirement to have *no* administrable effect—that it is a nonjusticiable norm whose enforcement depends solely on the give and take among political entities. Both

221. Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Comment to Art. II (Oct. 15, 1963), *in* 2 History, *supra* note 9, at 203.

222. *See, e.g.*, 2 History, *supra* note 9, at 322 (Broches) ("The danger had been envisaged that a party might attempt to bring before the Center disputes of a purely commercial or political nature.").

223. *See, e.g.*, Consultative Meeting of Legal Experts, Addis Ababa (Dec. 16–20, 1963), *in* 2 History, *supra* note 9, at 260 (Ethiopia) ("[T]he Center should be empowered to hear political and commercial claims"); *id.* at 397 (France) (advocating inclusion of claims "based on purely economic or commercial considerations" unless they had no plausible allegation of "legal rights"); Summary Proceedings of the Legal Committee Meeting (Nov. 25, 1964, Afternoon), *in* 2 History, *supra* note 9, at 705 (Spain) ("[M]oney, capital goods and other goods required for the industrial development of a country ought to be included in any definition.").

224. Consultative Meeting of Legal Experts, Bangkok (Apr. 27–May 1, 1964), *in* 2 History, *supra* note 9, at 493 (India); *see also* Consultative Meeting of Legal Experts, Geneva (Feb. 17–22, 1964), *in* 2 History, *supra* note 9, at 395 (Spain) ("agree[ing] that the term should exclude disputes of a political character, but . . . that commercial and economic factors were generally too closely bound up with legal disputes for those factors to be ruled out in the manner suggested in the Comment [of the drafters attached to the convention]"); *cf.* Summary Proceedings of the Legal Committee Meeting (Nov. 25, 1964, Afternoon) *in* 2 History, *supra* note 9, at 702 (Dahomey) ("Disputes were not always well defined . . . [D]isputes having said mixed character should [not] be taken away from the jurisdiction of the Center. The fact that the basis of this jurisdiction is consent should dispel any misgivings on this subject.").

225. For substantially similar reasons, all efforts to eliminate the Convention's application to bonds, loans, and capital flow were rejected. *Compare* Summary Proceedings of the Legal Committee Meeting (Nov. 27, 1964, Morning), *in* 2 History, *supra* note 9, at 709 (Philippines) (suggesting the elimination of claims based on capital flow) *and* Consultative Meeting of Legal Experts, Addis Ababa (Dec. 16–20, 1963), *in* 2 History, *supra* note 9, at 261 (Burundi) ("[A] foreign company which lent money to a State could not be regarded as an investor") *with* Consultative Meeting of Legal Experts, Addis Ababa (Dec. 16–20, 1963), *in* 2 History, *supra* note 9, at 261 (Broches) (explaining that the current draft covered loans) *and* Consultative Meeting of Legal Experts, Bangkok (Apr. 27–May 1, 1964), *in* 2 History, *supra* note 9, at 474 (Australia) (stating that the Convention also covers "borrowing of cash by the host country from foreign private investors").

maximalists[226] and minimalists[227] recognized that eliminating definitions commended all line-drawing to states, with the scope of investment cabined only by individual countries' consent in order to "allow as general an application as possible."[228] Indeed, this is the reason that advocates of open jurisdiction abandoned efforts to specify broad definitions and instead began to urge that the Centre's jurisdiction on this score should be limited only by consent.

But that approach is vulnerable to the charge (if only as a practical matter) that it would render the term surplusage. So if we are inclined to believe that the United Kingdom compromise implied *some* administrable limit at the remote edges of the concept of investment, we still have the problem of understanding what that limit was. I think the best understanding is the simplest: *is the thing in question a plausibly economic activity or asset?* Beyond its appeal for an institution whose very genesis was aimed at "*economic* development,"[229] perhaps the best elaboration of this test was Aron Broches' extemporaneous explanation for his own intuitive understanding of the term. In

226. *See, e.g.*, Comments and Observations of Member Governments on the Draft Convention for the Settlement of Investment Disputes between States and Nationals of Other States (Nov. 23, 1964), *in* 2 History, *supra* note 9, at 668, 702 (United Kingdom) ("prefer[ing] to have no such definition in the convention," as "parties should not be prevented from making arrangements to submit disputes to the Center"); Comments and Observations by the Republic of Austria on the Draft Convention (Nov. 24, 1964), *in* 2 History, *supra* note 9, at 670 ("[I]t should be the goal of the Convention to allow as general an application as possible."); Consultative Meetings of Legal Experts, Santiago (Feb. 3–7, 1964), *in* 2 History, *supra* note 9, at 361 (Jamaica) (hoping "to keep the definitions as flexible as possible . . . [which] would enable a wide variety of disputes to be brought within the jurisdiction of the Center") (commenting on scope of "nationality" requirement); *see also* Consultative Meeting of Legal Experts, Bangkok (Apr. 27–May 1, 1964), *in* 2 History, *supra* note 9, at 542 (Broches) (suggesting that even "outstanding and deferred payments" would "come within the term 'investment' in its broadest sense").

227. *See, e.g.*, Consultative Meetings of Legal Experts, Bangkok (Apr. 27–May 1, 1964), *in* 2 History, *supra* note 9, at 493 (India) (noting that failure to define investment would leave "[o]nly one limitation . . . explicitly stated, namely the consent of parties, and . . . would probably expose States to pressure to consent to arbitrate disputes which would not be arbitrable under any international law or understanding"); Summary Proceedings of the Legal Committee Meeting (Dec. 8, 1964, Afternoon), *in* 2 History, *supra* note 9, at 822 (Spain) ("consider[ing] the [United Kingdom proposal] to be exceedingly broad since it did not specify what the jurisdiction of the Centre would be"); Summary Proceedings of the Legal Committee Meeting (Nov. 25, 1964), *in* 2 History, *supra* note 9, at 700 (Ceylon) (noting that the phrase "arising out of or in connection with an investment" was "capable of the widest possible meaning," yielding "very wide and indefinite authority over the affairs of a sovereign state"); *cf.* Consultative Meetings of Legal Experts, Bangkok (Apr. 27–May 1, 1964), *in* 2 History, *supra* note 9, at 496 (China) ("'Investment' was a term whose content varied according to the different economic or political backgrounds or points of view of the various countries"); *id.* at 493 (India) (suggesting the impossibility of "distinguish[ing] between political, economic and commercial disputes on the one hand, and legal disputes on the other.").

228. Comments and Observations by the Republic of Austria on the Draft Convention (Nov. 24, 1964), *in* 2 History, *supra* note 9, at 670. The Directors' comment that "consent alone will not suffice to bring a dispute within its jurisdiction" does not seem to contradict this conclusion about the *investment* requirement specifically. Report of the Executive Directors, *supra* note 15, ¶ 25. That comment introduces the entire section on jurisdiction, which also includes a discussion of the Convention's requirements of "national" status and "legal dispute." See *supra* note 180 for the point that the purely process-based limits in the report's discussion of "investment" are a sharp contrast to the substantive limits in its discussion of "national" status and "legal dispute."

229. ICSID Convention, *supra* note 13, pmbl.

suggesting fields of law that "had nothing to do with investments," he resorted to a list of profoundly personal activities that are—at least rhetorically—completely removed from the marketplace: "the status of persons, marriage and divorce, adoption, nationality, the coming of age."[230] By contrast, he explained, "[i]n the case of investments" courts issue "decision[s] that a party owed to the other party a certain sum of money."[231] If we take Broches' explanation seriously, the best sense to make of the Convention's unrestricted reference to "investment" is that ICSID doors were left open to any plausibly economic activity or asset.

ICSID thus became an open-ended vehicle to encourage development by protecting foreign business interests that might otherwise hesitate to commit money and effort to an uncertain environment. Rejecting every effort to restrict the definition of investment, the United Kingdom compromise left states free to decide which categories of foreign economic activity they wanted to encourage. The primary mechanism for this tailoring was the Convention's structural guarantees that any particular nation could individually narrow the class of disputes that it would agree to settle before ICSID. In Broches' summary of the arrangement in his report to the Executive Directors, "each contracting State could, in effect, write its own definition."[232]

III. Regime Design: Deference and Autonomy

The previous Part demonstrated that a hard-fought historical compromise extended the jurisdictional term "investment" to an extremely wide range of endeavors, covering any plausibly economic asset or activity. This Part will suggest that the historical approach properly reflects the value of deference by international tribunals to the judgment of sovereign states.

The underlying question is simple: given the object and purpose of the ICSID Convention, who is best placed to decide when its grand bargain should be available—arbitral tribunals or individual states? This Part seeks to answer that question by proposing three considerations: (i) the benefit of maximizing policy flexibility in a pluralist world; (ii) the wisdom of vesting decisional authority in the body with comparative advantages in expertise and political legitimacy; and (iii) the need to protect vulnerable interests by tightening legal scrutiny. It concludes that the operational logic of the ICSID Convention confirms the soundness of the historical arrangement.

230. Memorandum of the Meeting of the Committee of the Whole (Feb. 23, 1965, Afternoon), *in* 2 History, *supra* note 9, at 989 (contrasting cases for which *ordre public* is relevant to the cases that would be decided by investment tribunals).

231. Memorandum of the Meeting of the Committee of the Whole (Feb. 23, 1965, Afternoon), *in* 2 History, *supra* note 9, at 989.

232. Memorandum of the Meeting of the Committee of the Whole (Feb. 16, 1965), *in* 2 History, *supra* note 9, at 972.

A. *Pluralism: Deferring to Policy Flexibility in a Changing World*

When tribunals defer to states' legal interpretations, they respect the need for policy flexibility in a pluralist world. This is attractive in at least two ways. First, it allows different Convention signatories to pursue different policies at any given moment in time—and, specifically, to guarantee ICSID protection to economic assets and activities that fall below the *Salini* threshold.[233] Second, it permits individual regime participants to change their minds over time, setting new ground rules in response to shifting political, ideological, and economic realities.[234]

In the area of investment law, flexibility allows variations in both political objectives and experimental approaches—in other words, in both means and ends. Experimental variations accept the basic premise of the regime and tinker with various means of advancing its underlying goals. States can thereby tailor their investment incentive packages on the basis of shifting evidence and assumptions about which categories of activity are so likely to promote economic development that they justify the potential liability cost of extending ICSID protection.

Variations can also occur because of the shifting dictates of domestic politics. Even if bureaucrats conclude that the ICSID regime actually promotes investment, ideological preferences can overwhelm finance ministry calculations. Raw questions of sovereignty are compounded by domestic unease with the control of local assets by international business interests.[235] The decision can even vary among industrial sectors: perhaps a host government is comfortable encouraging certain types of investments (construction contracts, for example) but not others (such as exploitation of natural resources). For all these reasons, different countries will have different appetites for different ICSID packages at different times.

Given varying preferences about how to use the ICSID forum, tribunals should exercise strong deference to state choices on the question of whether an economic enterprise is an "investment." To begin with, assuming free

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233. *See* Regional Consultative Meetings of Legal Experts: Chairman's Report on Issues Raised and Suggestions Made (July 9, 1964), *in* 2 History, *supra* note 9, at 566–67 (Broches) ("Several other delegations . . . felt that the reluctance of some States to submit particular classes of disputes to arbitration was no reason to narrow the scope of the Convention for all Contracting States[,] many of whom had no objection to its present scope.").

234. *Cf.* Summary Proceedings of the Legal Committee Meeting (Nov. 25, 1964, Afternoon), *in* 2 History, *supra* note 9, at 704 (Broches) (explaining the drafters' decision not to specify a definition of investment because the attempted definitions "were always directed towards particular facts or situations which the parties or governments had in mind while the matter envisaged by this Convention was more fluid").

235. This can be raw protectionism or xenophobia, as with much of the negative reaction to Japanese investors' purchases of American real estate in the 1980s. It can also come from a more defensible desire for national control over crucial industries and security-sensitive areas, such as Venezuela's cancellation of its oil contracts with foreign oil companies, or the successful opposition in the United States to the Dubai Ports deal.

policy choice,[236] this approach should tend to satisfy the maximum number of state participants. It allows interested states to extend protections to a broad range of economic activity, and it permits states that are more protective of their sovereign prerogatives to limit or decline ICSID jurisdiction altogether. Furthermore, this approach allows for experimentation across the investment law system as a whole. Particularly because there is a range of views about whether BITs even work,[237] allowing broad variance in state precommitments to extend ICSID protection makes sense not just as a means of tolerating different responses to empirical uncertainty, but also as a means of testing different approaches so as to *reduce* that uncertainty.[238]

It should not be surprising that states are in fact developing investment policy in precisely the variegated way contemplated here, tailoring individualized packages of incentives in the international investment regime. They have excluded whole categories of industry from the coverage of BIT protection.[239] They have required explicit approval by a central investment registry, creating a flexible screening mechanism to decide which types of activities should receive investment protections.[240] They have imposed dura-

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236. The text accompanying notes 247-253, *infra*, attempts to anticipate and respond to critiques of this simplifying assumption.

237. *See infra* note 230 for further discussion of this question.

238. For conflicting views on the "laboratories of democracy" rationale in the domestic context, see Susan Rose-Ackerman, *Risk-Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. Legal Stud. 593 (1980) (criticizing the laboratories theory) and Brian Galle & Joseph Leahy, *Laboratories of Democracy, Policy Innovation in Decentralized Governments*, 58 Emory L. J. 1333 (2009) (supporting the laboratories theory).

Any benefits of flexibility would be risked by relying solely on state practice to define "investment." *See* Devashish Krishan, *A Notion of Investment*, *in* Investment Treaty Arbitration: A Debate and Discussion (T. Grierson ed., 2008) (suggesting a state practice approach to defining investment). There are real attractions to the state practice approach, particularly its ability to anchor treaty interpretation in an objective but currently broad measure. But it sacrifices the flexibility that was actually agreed to in the Convention and leaves individual countries subject to any jurisdictional floor that may come into vogue. With that said, at least two tribunals seem sympathetic to this mode of analysis, and it is certainly preferable under current conditions to the restrictive approach. Biwater Gauff (Tanz.), Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, ¶ 314 (July 24, 2008) (suggesting that patterns in "very substantial numbers of BITs across the world" could generate an "international consensus"); Fedax v. Republic of Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 34–36 (July 11, 1997), *reprinted in* 37 I.L.M. 1378 (1998) (reviewing BITs, Energy Charter Treaty, Mercosur Protocols, and Mex.-Colom.-Venez. Free Trade Agreement).

239. *See, e.g.*, Agreement between the Government of Canada and the Government of the Kingdom of Thailand for the Promotion and Protection of Investments, Can.-Thail., arts. 1(f), 4(3), Jan. 17, 1997, *available at* http://www.sice.oas.org/Investment/BITSbyCountry/BITs/Can_thailand.pdf (excluding "cultural industries" including TV, film, publishing, and radio; excluding real estate not intended for "business purposes") (both states have signed but not ratified ICSID); Treaty between the United States of America and the People's Republic of Bangladesh Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Bangl., art. 2.2(a), July 25, 1989, S. Treaty Doc. No. 99-23 (referring to annex at the end of the treaty) (listing industries not subject to national treatment guarantee); Agreement between the Government of the Republic of Finland and the Government of the Republic of Argentina on the Promotion and Reciprocal Protection of Investments, Fin.-Arg., art. 1(1)(c), Nov. 5, 1993, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/argentina_finland.pdf (excluding loans not "directly related to a specific investment").

240. *See, e.g.*, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia for the Promotion and Protection of Investments,

tional requirements.[241] They have excluded ordinary commercial enterprise from the scope of their protection.[242] If these exclusions sound familiar, they should: they all relate to positions advocated by members of the jurisdictional minimalist bloc at the drafting convention. In short, maximizing flexibility appears in fact to effectuate the original promise of allowing ICSID participants to pursue their particular interest in the regime, extending it expansively or restricting it more narrowly as they see fit.

B. *Institutional Settlement: Deferring to Expertise and Legitimacy*

Increased deference to states is also appropriate in areas where they tend to have superior expertise or political legitimacy in policing the boundaries of a legal norm. On this point it is helpful to recall the underlying purpose of the ICSID Convention: to promote economic development by increasing the flow of foreign investment into interested host countries. To be sure, there is a live controversy about the actual efficacy of BITs in increasing foreign investment generally and development in capital-importing countries specifically.[243] The institutional settlement question, however, takes

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U.K.-Malay., art. 1(1)(b)(ii), Oct. 21, 1988, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/uk_malaysia.pdf [hereinafter U.K.-Malaysia BIT]; Gruslin v. Malaysia, ICSID Case No. ARB/99/3, Award, ¶¶ 9.2, 25.5 (Nov. 27, 2000), *reprinted in* 5 ICSID Rep. 483 (Edward Helgeson ed., 2006) (applying article 1(1)(b)(ii) of U.K.-Malaysia BIT to exclude a non-approved project); PSEG Global, Inc. v. Republic of Turkey, ICSID Case No. ARB/02/5, Decision on Jurisdiction, ¶ 125 (June 4, 2004) (describing Turkey's Article 25(4) notification).

241. *See, e.g.*, Agreement between the Government of Ukraine and the Government of the Kingdom of Denmark concerning the Promotion and Reciprocal Protection of Investments, Ukr.-Den., art. 1(5), Oct. 23, 1992, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/denmark_ukraine.pdf; Agreement between the Government of Australia [and] the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments, Mex.-Austl., art. 1(a)(ix), Feb. 18, 1998, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/Australia_mexico.pdf (excluding loans or debt securities where the original maturity is "less than three years") (Mexico has not signed ICSID); Agreement between the Republic of Austria and Bosnia and Herzegovina for the Promotion and Protection of Investments, Austria-Bos. & Herz., art. 1(2)(h), Oct. 2, 2000, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/austria_bosnia.pdf (excluding credits to finance commercial transactions "with a duration of less than three years").

242. *See, e.g.*, Agreement between the United Mexican States and the Republic of Austria on the Promotion and Protection of Investments, Mex.-Austria, art. 1(2), Feb. 18, 1998, www.sice.oas.org/Investment/BITSbyCountry/BITs/MEX_Austria.pdf (excluding commercial transactions for sale of goods or services) (Mexico has not signed ICSID); Fedax v. Republic of Venezuela, ICSID Case No. ARB/96/3, Award on Jurisdiction, ¶ 36 (July 11, 1997), *reprinted in* 37 I.L.M. 1378 (1998) (citing 1994 Mexico-Colombia-Venezuela Free Trade Agreement (excluding money claims arising from commercial contracts for the sale of goods or services and commercial credits) (Mexico has not signed ICSID)); *see also* North American Free Trade Agreement, art. 1139(i)(i), U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) (excluding "claims to money that arise solely from . . . commercial contracts for sale of goods or services"). NAFTA disputes are not subject to ICSID jurisdiction, but the point is that states are in fact engaged in an ongoing and active process of tailoring their package of economic incentives.

243. Studies on this question conflict. Some find evidence that the introduction of BITs has a significant positive effect on levels of foreign investment under at least some circumstances. *E.g.*, Jennifer Tobin & Susan Rose-Ackerman, *When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties* (2006), www.law.yale.edu/documents/pdf/When_BITs_Have_Some_Bite.doc; Jeswold Salacuse & Nicholas P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain*, 46 Harv. Int'l. L.J. 67 (2005); Eric Neumayer & Laura Spess, *Do Bilateral Invest-*

the object itself as a given—certainly a core purpose of ICSID was to promote and protect foreign investment—and then asks which actors are best positioned to assess when extending ICSID jurisdiction in fact advances that goal.

As with the interest in flexibility and intra-systemic variation, the considerations of expertise and legitimacy cut in favor of a highly deferential approach by tribunals to the question of "investment." Deferring to state definitions of the term keeps tribunals out of the quagmire of enforcing static boundaries in the quintessentially fluid area of economic policy.[244] Absent evidence of inconsistency with the regime's purpose or some other underlying value which needs protection, this inevitably arbitrary enterprise entangles tribunals in an inquiry for which they are poorly suited. And it does so in a context—the dimensions of which are explored in Part III.C—where there is no vulnerable private interest that must be protected from bad-faith state interpretations, as might be the case with investment law's substantive guarantees.

To be clear, the point is not that states are categorically free from legitimacy or even competence problems themselves.[245] The suggestion rather is that states have a *better* claim to legitimacy and competence on this particular issue—the connection between any given economic activity and the long run goal of economic development—than the investment tribunals that are the only practical alternative.

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ment Treaties Increase Foreign Direct Investment to Developing Countries?, 33 World Dev. 1567 (2005); Tim Büthe & Helen V. Milner, *The Politics of Foreign Direct Investment into Developing Countries: Increasing FDI through Policy Commitment Via Trade Agreements and Investment Treaties* (2005), www.allacademic.com/meta/p_mla_apa_research_citation/0/5/9/8/5/p59852_index.html; Peter Egger & Michael Pfaffermayr, *The Impact of Bilateral Investment Treaties on Foreign Direct Investment*, 32 J. Comp. Econ. 788 (2004).

Other reviews are more skeptical about whether BITs actually attract investment. Jason Webb Yackee, *Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment*, 42 Law & Soc'y Rev. 805, 807 (2008) (finding no correlation between formal strength of investment protections and the level of foreign investment); Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract Foreign Direct Investment?: Only a Bit. . . and They Could Bite* (World Bank, Policy Research Working Paper No. WPS 3121, 2003) (finding no correlation). And Andrew Guzman has cautioned that even if BITs increase total investment flows, they may still reduce the net welfare of developing countries depending on how their benefits are distributed. Andrew Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 Va. J. Int'l L. 639. *But see* Jeswold Salacuse & Nicholas Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain*, 46 Harv. Int'l L.J. 67, 112 (2005) ("[T]he bargain implicit in the BITs has advanced the interests of both developed and developing countries.").

244. American lawyers are all too familiar with one such example: the history of judicial efforts to police the boundaries of the constitutional Commerce Clause. The courts' efforts to delineate "commerce" culminated in a line of cases drawing essentially arbitrary lines between economic activity "in the stream" of interstate commerce and economic activity outside of it. Partway through the Great Depression, however, the judiciary reversed course and has since effectively abandoned any effort to restrain the federal government's power over "economic activity." United States v. Lopez, 514 U.S. 549, 559 (1995). For an interesting discussion of what this history might suggest for international adjudicators' review of state economic policymaking more generally, see Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 Duke L. J. 1143, 1211–12 (2005).

245. Paul Stephan points out, for example, that this point is more complicated for states whose economic policy is influenced by the International Monetary Fund in exchange for desperately needed loans.

C. *Protecting Vulnerable Interests*

A third reason to defer to state interpretations of a legal norm is when the norm is intended to facilitate state activity rather than to restrain it. To clarify this point, it is helpful to start with the contrasting case: norms intended to impose limits on state power. Think of investment law's ban on uncompensated expropriation, human rights law's restrictions on arbitrary detention, or the UN Charter's ban on aggression. Applying these norms in an adversarial context necessarily presents a fundamental and irreconcilable confrontation of interests.[246] The norms themselves are protective, in other words, and the interpretive question arises when the regulated entity (the state) seeks to interpret those norms to the detriment of a protected entity (be it an individual or another state). There may still be reasons to defer to state interpretations of protective norms, but those reasons run up against an external limit—the injured party's interest in the security of the protective norm. Tribunals reviewing a state's interpretation of the norm then act as a structural check on that state's invasion of a vulnerable interest.

The structural role of "investment," by contrast, is quite different from the structural role of human rights and free trade norms. The entity harmed by judicial deference on the question of ICSID jurisdiction (*i.e.*, the defendant state facing liability in a particular case) is the same entity whose prior judgment (*i.e.,* in a BIT or contract) the tribunal must assess. The only entity hurt by deference to that judgment is the entity to which deference is actually directed: the state itself. There is therefore not the same impetus for close scrutiny as there is with legal norms regulating a more zero-sum relationship, such as those protected by substantive BIT guarantees.

The application of deference principles is certainly complicated by the diachronic problem that this jurisdictional question increasingly arises when a state seeks to escape its BIT commitments by relying on the restrictive interpretation of "investment" in litigation. But the most sensible object of deference in the context of investment law's grand bargain is to the state's autonomy to make binding commitments, not to its ad hoc effort in a litigation posture to evade those commitments.[247] By respecting a state's decision to commit itself to a particular use of the ICSID mechanism, the tribunal is treating the state as an adult participant capable of making meaningful

246. The interplay of interests is complicated by the repeat nature of the international game. Even a state eager to punish a rogue trading partner, for example, might not advocate a minimalist interpretation of tariff restrictions, since it may one day find itself at the receiving end.

247. *See* Consultative Meeting of Legal Experts, Santiago (Feb. 3–7, 1964), *in* 2 History, *supra* note 9, at 334, 336 (Broches) ("There would be no point in contemplating a Convention unless a government's word was regarded as its bond . . . The obligation in question was not to make a promise, but to keep it once made . . . The question was one of honoring a specific commitment."). *Cf.* United States v. Mead Corp., 533 U.S. 218, 228 (2001) (suggesting in the context of domestic law that positions adopted by administrative agencies for the purpose of litigation have received "near indifference" from the courts). For further discussion of this point, see *supra* text accompanying note 27.

commitments, rather than as an infant incompetent to make a binding decision and thus entitled to change its mind.

This analysis has one large caveat: it might be that the vulnerable parties protected by "investment" are the host states themselves. Scholars have observed that less powerful nations as a class have less leverage in bilateral negotiations than they do in multilateral negotiations like the Legal Committee which worked out the final version of the ICSID Convention. Most recently, George Downs and Eyal Benvenisti have explained that weaker nations perform better in multilateral negotiating contexts because they can band together—whether by logrolling or simply by joining voices on a single issue of common interest—to more effectively demand concessions from powerful states.[248] Andrew Guzman suggests that precisely this dynamic has played out in the investment context, with something like a race to the bottom (or top, depending on your perspective) transpiring as developing countries accede on a bilateral basis to strong protections for foreign investors as part of the competition for global capital.[249] In fact, developing countries expressed this very concern during the ICSID negotiations, pressing it as a reason to entrench a specific, limited definition of "investment" in the Convention.[250]

248. Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 Stan. L. Rev. 595, 597 (2007).

249. Andrew Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 Va. J. Int'l L. 639 (1998); *see also* Zachary Elkins, Andrew T. Guzman, & Beth Simmons, *Competing for Capital: The Diffusion of Investment Treaties, 1960-2000*, 2008 U. Ill. L. Rev. 265, 267–79 (2008).

250. Summary Proceedings of the Legal Committee Meeting, (Dec. 8, 1964, Afternoon) *in* 2 History, *supra* note 9, at 825 (Tunisia) (expressing "[d]eep concern with respect to the British proposal which would lead to a competition between the capital-importing states who would then be compelled to present a comparative list of advantages to private investors."); Summary Proceedings of the Legal Committee Meeting (Nov. 25, 1964, Afternoon) *in* 2 History, *supra* note 9, at 700 (Ceylon) ("No capital-importing State which had accepted the Convention could refuse consent to arbitration which investors would invariably require[,] and capital would stop flowing to countries that did not accede to the Convention."); Memorandum of the Meeting of the Committee of the Whole (Dec. 18, 1962), 2 History, *supra* note 9, at 57–58 (Krishna Moorthi) ("[A] state which did accede with reservations would find itself under continued pressure to make its accession to the convention progressively less conditional"); *see also* Summary Proceedings of the Legal Committee Meeting (Dec. 8, 1964, Afternoon), *in* 2 History, *supra* note 9, at 823–24 (Central African Republic) (criticizing "the idea of leaving the limitations to the procedure of notification rather than embodying the limitations in the [Convention] text because the procedure of notification would result in a comparison being drawn between the advantages given by one capital-importing country as against another capital-importing country."); Consultative Meeting of Legal Experts, Addis Ababa (Dec. 16–20, 1963), *in* 2 History, *supra* note 9, at 259 (Tunisia) ("[The Convention's] optional character would . . . become more and more theoretical."); *id.* at 261 (Mali) (agreeing that "recourse to the facilities of the Center was optional in theory only"); Consultative Meeting of Legal Experts, Santiago (Feb. 3–7, 1964), *in* 2 History, *supra* note 9, at 308 (Bolivia) ("[I]f the draft Convention were not unanimously rejected, foreign capital might blacklist the countries that did not wish to submit their disputes with investors to international arbitration"); Consultative Meeting of Legal Experts, Bangkok (Apr. 27–May 1, 1964), *in* 2 History, *supra* note 9, at 470 (India) ("If a distinction were not drawn between cases where the dispute itself was not arbitrable . . . the Convention [might] compel every State to agree to conciliation or arbitration in every case for fear of an adverse inference.").

There is force to this argument. But particularly given the historical evidence uncovered in this paper, these concerns should remain no more than a background caution, for at least three reasons.

First, the case for helpless developing states may be significantly overdrawn, at least as regards their power to define investment. At least some traditionally capital-importing countries *are* asserting limits on the scope of economic activities to which they are willing to extend the ICSID bargain. As described above, developing states have imposed duration requirements, registration requirements, industrial sector requirements, and a series of other limitations on how far BIT protections extend. These limitations encompass not just the *Salini* test's individual criteria, but, as mentioned, many of the very limitations that developing countries had proposed during the original drafting process.[251] Nor has this show of strength been limited to the definition of investment: A resurgence of economic nationalism in Latin America, for example, has led to denunciations and renegotiations of BITs throughout the area.[252]

Second, there are indications that *developed* countries may be backing off from their historical advocacy of broad definitions of investment. As the United States has started to face increasing numbers of investment claims as a defendant, it has sought to limit its exposure under future BITs. The retrenched definition of investment in the latest U.S. Model BIT actually tracks some of the principal *Salini* criteria quite explicitly, including "such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."[253] These factors are vague and pliable. But on the background of the "investment" debate they have tremendous significance. They give explicit license for tribunals to draw *Salini*-style analytical boundaries around economic activity, albeit through interpretation of an amendable BIT rather than in the effectively unamendable context of Article 25.

Third, just as traditionally investment-exporting countries like the United States, England, and Germany are suddenly finding themselves on the receiving end of investment litigation,[254] traditionally investment-importing countries like Brazil and India are increasingly finding their own investors being injured by the actions of governments overseas.[255] Indeed, it

251. *See supra* text accompanying notes 208, 225.

252. Christian Tietje, Karsten Nowrot, & Clemens Wackernagel, *Once and Forever? The Legal Effects of a Denunciation of ICSID*, 6 TRANSNAT'L DISP. MGMT. 1, 5 (Mar. 2008).

253. 2004 U.S. Model BIT, at 3, www.state.gov/documents/organization/117601.pdf (also noting that forms of debt that result from the sale of goods or services are less likely to be an investment.).

254. *See, e.g.*, Damon Vis-Dunbar, *Indian Lawyer Pursues Claim Against the United Kingdom under the India-UK BIT*, INVESTMENT TREATY NEWS, Nov. 28, 2008, http://www.investmenttreatynews.org/cms/news/archive/2008/11/28/indian-lawyer-pursues-claim-against-the-united-kingdom-under-the-india-uk-bit.aspx; Vattenfall, AB v. Federal Republic of Germany, ICSID Case No. ARB/09/6 (BIT claim against Germany by Swedish investor).

255. *See, e.g.*, Alexandria Valencia, *Ecuador Sends Troops to Expel Brazilian Company*, REUTERS, Sept. 23, 2008, www.reuters.com/article/bondsNews/idUSN2345983220080923 (describing Ecuador's incursions

was recognized already in the earliest days of Convention drafting that "some [traditionally capital-importing] countries were now beginning to invest in other [traditionally capital-importing countries]."[256] While this phenomenon may be less prevalent in countries that have not advanced so far along the development curve, it nonetheless suggests further reason for skepticism about ICSID critics' Manichean view of who benefits from the regime.

While there may thus be reason for caution about competitive pressures on capital-importing states, there are also indications that any such problem may be mitigated in practice. Even where it is not, however, tribunals may simply need to accept that the ICSID definition of investment might pressure some developing countries to subject their sovereign authority to broader external review than they would prefer. What developing states did secure during the negotiation process was a set of mechanisms to opt out of the ICSID regime if—and to the precise extent that—they so elected. That this bargain may constrain the choices of some capital-importing states in a competitive world is, ultimately, insufficient to invalidate it as a legal matter.

D. From Theory to Doctrine: The Vienna Convention on the Law of Treaties

While presumably implicit in the discussion so far, it remains to be demonstrated how all of this translates into doctrinal analysis under the Vienna Convention on the Law of Treaties, whose provisions on treaty interpretation are typically viewed as having the force of customary international law. This is not a complicated matter, and I do little more than sketch it here. Tribunals will have to decide for themselves whether Part II's historical observations and Part III's discussion of deference within a treaty framework are convincing; my point in this sub-Part is simply to suggest that the doctrinal vehicles for implementing them are straightforward.

As to the historical agreement, it is true that the Vienna Convention is viewed as relegating *travaux préparatoires* to a secondary role in treaty interpretation. But it is equally black letter law that the interpretive process properly turns to drafting history whenever a term is ambiguous: drafting history remains relevant and potentially decisive for any colorably contentious problem of construction.[257] To say that the definition of "investment"

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on local assets belonging to Brazilian company Odebrecht); *Cemex Files Lawsuit before ICSID against Government over Nationalization*, Dec. 5, 2008, http://www.bnamericas.com/story.xsql?id_sector=5&id_noticia=459869&Tx_idioma=I&source (describing a $1.3bn claim by Mexican cement company against Venezuela for expropriation); Damon Vis-Dunbar, *supra* note 254 (BIT claim against the United Kingdom by Indian lawyer).

256. Memorandum of the Discussion by the Executive Directors (Sept. 10, 1963), *in* 2 History, *supra* note 9, at 179–80 (Machado).

257. VCLT, *supra* note 5, art. 32(a). An independently sufficient route to the same end is the Vienna Convention's oft-overlooked injunction that "[a] special meaning shall be given to a term if it is established that the parties so intended." VCLT, *supra* note 5, art. 31(4).

has been contentious is an understatement, and turning to the dictionary definitions of "investment,"[258] "*investissement*,"[259] and "*inversión*"[260]—the jurisdictional term in the Convention's three authoritative languages—does little more than restate the question.[261] Because of space constraints, I will not engage here in a lawyer's trilingual exegesis of those definitions; I will simply assert that it would be disingenuous to pretend they are unambiguous.[262] If this is not an occasion for resort to *travaux*—especially when they tell so clear a story—then it is not clear what would be.

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258. *See, e.g.*, BLACK'S LAW DICTIONARY (4th ed. 1951) ("The placing of capital or laying out of money in a way intended to secure income or profit from its employment."); WEBSTER'S THIRD NEW INT'L DICTIONARY (3rd ed. 1961) ("An expenditure of money for income or profit or to purchase something of intrinsic value: capital outlay"; "the sum invested or the property purchased"; "the commitment of funds with a view to minimizing risk and safeguarding capital while earning a return—contrasted with *speculation*"; "the commitment of something other than money to a long-term interest or project"); WEBSTER'S NEW INT'L DICTIONARY (2d ed. 1957) ("The investing of money or capital in some species of property for income or profit; the sum invested or the property purchased."); OXFORD ENGLISH DICTIONARY (1961) ("The investing of money or capital"; "the conversion of money or circulating capital into some species of property from which an income or profit is expected to be derived in the ordinary course of trade or business. Distinguished from *speculation*.").

259. The French term "investissement" in its economic sense derives from English. DICTIONNAIRE HISTORIQUE DE LA LANGUE FRANÇAISE (1992) ("L'emploi devenu usuel de l'économie est un emprunt adapté à l'anglais *investment*"); *id.* (defining "investir": "Investir a repris a l'anglais *to invest* son emploi en économie pour «employer (des capitaux) dans une entreprise»"). LEXIS DICTIONNAIRE DE LA LANGUE FRANÇAIS (1975) ("Emploi de capitaux visant à l'accroissement de la production d'une entreprise"); *see also id.* (defining "investir": "Placer de l'argent, des capitaux, pour en tirer profit ou assurer l'expansion d'une entreprise"); TRÉSOR DE LA LANGUE FRANÇAISE (1983) ("Application par un individu, une entreprise ou un gouvernement, d'une certaine quantité de monnaie à la création de biens de production, d'équipement, de produits de consommation ou de services"; "capitaux investis"; "Investissements étrangers, de longue durée, nationaux, privés, publics; investissements productifs; accroissement des investissements").

260. Spanish dictionaries tend to define the term "inversión" by reference to the verb "invertir" (to invest). DICCIONARIO MANUAL E ILUSTRADO DE LA LENGUA ESPAÑOLA (1927) (defining "invertir": "Hablando de caudales, emplearlos en aplicaciones productivas"); DICCIONARIO IDEOLÓGICO DE LA LENGUA ESPAÑOLA (1942) (defining "invertir") ("Hablando de caudales, emplearlos, gastarlos en aplicaciones productivas"); DICCIONARIO MANUAL E ILUSTRADO DE LA LENGUA ESPAÑOLA (1950) (defining "invertir": "Hablando de caudales, emplearlos en aplicaciones productivas"); NUEVA ENCICLOPEDIA SOPEÑA (1955) ("Emplear, gastar el dinero").

261. *See also* Amerasinghe, *supra* note 27, at 180 ("[D]ictionary definitions devised for the purpose of economic science or financial analysis may be irrelevant for the purpose of defining investment in connection with the Centre's jurisdiction. So also tax law or investment law definitions in municipal law are intended to relate to special objectives and would be of limited usefulness.").

262. Nor does it appear that the delegates intended to borrow "investment" as a term of art from another legal regime. *See, e.g.*, 2 HISTORY, *supra* note 9, at 492 (Lebanon) ("'[I]nvestment was an economic concept and did not correspond to any European legal concept'"); 2 HISTORY, *supra* note 9, at 493 (India) (noting that the term "needed definition" and noting that the United States' Mutual Security Act had similarly been obliged to define the term "investment" for its own particular purposes); *see also* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 60 (2009) ("[T]he term 'investment' has its origin in economic terminology and needed to be understood and defined as a legal concept when first used in investment agreements.").

The Mutual Security Act was a vehicle through which the United States provided economic assistance to friendly countries. Mutual Security Act of 1954, Pub L. No. 83-665, § 413(b)(4)(H), 68 Stat. 832, 848 (defining investment as "any contribution of capital goods, materials, equipment, services, patents, processes, or techniques by any person in the form of (1) a loan or loans to an approved project, (2) the purchase of a share of ownership in any such project, (3) participation in royalties, earnings, or profits of any such project, and (4) the furnishing of capital goods[,] items and related services pursuant to a

As for deference to states' ICSID commitments, the framework proposed in Part III has direct doctrinal bite because of the Vienna Convention's injunction to interpret treaty terms in light of the agreement's "object and purpose."[263] The avowed object and purpose of the ICSID Convention was to provide states with a new tool to promote economic development by protecting transnational investors. For all the reasons set forth in Part III, those goals are best served by an approach that defers to states' ex ante policy commitments in extending the ICSID umbrella to foreign investors. That approach enables policy flexibility in a pluralist world, allocates responsibility for deciding the scope of the ICSID bargain to the entities best situated to make that determination, and accounts for the need to interpret protective treaty terms more strictly. Perhaps most important for the treaty's object and purpose, the restrictive approach so damages states' ability to credibly extend investment protection for many categories of economic activity that (at least in those instances) it vitiates precisely the bargain which ICSID is designed to enable.

The only potential doctrinal rejoinder not already accounted for in this paper would be based on subsequent state practice, which the Vienna Convention specifies "shall be taken into account" when interpreting a treaty term.[264] The dozens of occasions where states have contested jurisdiction under the restrictive definition, in other words, might each constitute an instance of state practice on the definition of "investment." This is not implausible, but neither is it the only possible source of state practice. As Devashish Krishan has suggested, the definitions adopted by BITs are at least equally plausible candidates for the assessment of state practice—and those definitions are dramatically broad.[265] Of course, "investment" in one treaty could well mean something different than "investment" in another treaty. But because ICSID was designed to enable precisely such "re-definition" of investment via subsequent state agreement, that objection seems weak—particularly for those BITs that specify ICSID as the sole method of dispute resolution.[266] As between these two sources of state practice, considered ex ante judgments probably ought to carry greater weight than deci-

contract providing for payment in whole or in part after the end of the fiscal year in which the guaranty of such investment is made"); *see also* Mutual Security Act of 1951, Pub. L. 82-165, 65 Stat. 373 (Oct. 10, 1951) (predecessor of 1954 act); Mutual Security Act of 1956, Pub. L. No. 84-726 (adding provisions not relevant to this question); Mutual Security Act of 1959, Pub. L. No. 86-108, 73 Stat. 246; Foreign Assistance Act of 1961, Pub. L. No. 87-195, §223(a), 75 Stat. 424, 431 (tracking Mutual Security Act's definition of "investment," while adding "capital commodities" and striking "capital goods," "materials," and "equipment").

263. VCLT, *supra* note 5, art. 31(1).

264. *Id.* art. 31(3)(b).

265. Devashish Krishan, *A Notion of ICSID Investment*, *in* INVESTMENT TREATY ARBITRATION: A DEBATE AND DISCUSSION (TJ Grierson ed., 2008); *see also* Biwater Gauff (Tanz.), Inc. v. United Republic of Tanzania, Award, ICSID Case No. ARB/05/22 ¶¶ 313–15 (July 24, 2008) (discussing dominant BIT practice of defining "investment" to cover virtually any conceivable economic asset or enterprise).

266. Memorandum of the Meeting of the Committee of the Whole (Feb. 16, 1965), *in* 2 HISTORY, *supra* note 9, at 972 (Broches) ("[E]ach contracting State could, in effect, write its own definition.").

sions made subject to the distorting short-term incentives that affect state agents litigating live controversies. State practice thus seems at worst ambiguous on the question, and in no event a source of such clarity as to override the other considerations outlined herein.

The doctrinal path is clear, in short, to implement the analysis suggested in this Article. Tribunals have every reason to put paid to the restrictive approach and restore the bargained-for meaning of the ICSID Convention.

IV. Regime Design: A Problem of Backlash

The constriction of ICSID jurisdiction is a substantial problem in its own right. But it also points to a broader, trans-substantive theme in international adjudication: the need for a properly theorized system of deference to state decisionmaking. This article has suggested one way to calibrate that deference in the context of a particular legal problem. It is possible, however, to look at ICSID's jurisdictional controversies as an epiphenomenon of a different problem that runs deeper still.

There is growing concern that investment law does not extend sufficient deference to states' sovereign regulatory authority. This concern is not new; indeed, it resonates with fears that were expressed while the ICSID Convention was being drafted. And it runs the gamut of substantive investment law. Tribunals' scrutiny of state environmental policy has yielded damages awards for foreign investors,[267] leading to sharp criticism of the developing regulatory takings doctrine.[268] Awards have only recently started to issue in the dozens of ICSID cases arising from Argentina's currency crisis, but the initial trend is against recognizing a state of necessity or "essential security interests" defense—a tendency that has drawn attack not just from political critics but from legal scholars as well.[269] And persistent divergences among groups of tribunals and arbitrators on crucial questions of investment law

267. *See, e.g.*, Metalclad v. Mexico, Award, ICSID Case No. ARB(AF)/97/1 (Aug. 30, 2000) ($16.7 million for designating alluvial stream plain as an ecological zone); Técnicas Medioambientales Tecmed v. Mexico, Award, ICSID Case No. ARB(AF)/00/2 (May 29, 2003) ($5.5 million for requiring landfill to relocate away from rapidly growing municipality). For a recent discussion of these and other regulatory takings cases, see Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 Am. J. Int'l L. 475 (2008).

268. *See, e.g.*, Vicki Been & Joel Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and The Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. Rev. 30 (2003).

269. *See, e.g.*, C.M.S. Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005) (denying existence of economic emergency); Enron Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Award (May 22, 2007); Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award, ¶¶ 346–55, 378–88 (Sept. 28, 2007); *see also* LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Award (Oct. 3, 2006) (recognizing only limited period of genuine necessity). *But see* Continental Casualty Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award, ¶¶ 231–33 (Sept. 5, 2008) (finding that "essential security interests" defense precluded virtually all of investor's claims). For commentary on this issue, see, e.g., Stephan Schill, *International Investment Law and the Host State's Power to Handle Economic Crises*, 24 J. Int'l Arb. 265 (2007); William Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 Va. J. Int'l L. 307 (2008).

have led some to challenge the system's capacity to generate any kind of certainty at all.[270]

Perhaps connected to this growing awareness of the power of tribunals to supervise domestic regulatory processes, there has been a marked slowdown of entry into force of new BITs.[271] Moreover, there is increasing talk by some countries of stepping away from commitments that they have already made. In April 2007, Bolivia, Nicaragua, and Venezuela agreed to withdraw from the ICSID Convention as a means of creating a "New Regional Economic Order" for the Americas.[272] To date, Bolivia and Ecuador are the only countries to have done so,[273] but both Venezuela and Nicaragua periodically reassert their intent to withdraw. And Ecuador has passed a new constitution that essentially prohibits ICSID arbitration,[274] while embarking on a process of withdrawing from many of its existing BITs.[275]

The rise of the restrictive approach to ICSID jurisdiction may well be related to this broader backlash against investment arbitration[276]—certainly the timing of the two developments overlaps rather neatly. In this sense, the narrowing pressure on "investment" could be a species of the right-remedy hydraulic, with tribunals responding to what they perceive as overly-expansive substantive law by tamping down on jurisdiction at the front end or remedial measures at the back end.[277] That this might be occurring is, by its nature, impossible to prove. But at least some advocates of the *Salini* ap-

270. *See, e.g.*, Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 Fordham L. Rev. 1521 (2005) (arguing that concern about inconsistent decisions is overstated).

271. *See* Anne van Aaken, *Perils of Success? The Case of International Investment Protection*, 9 Eur. Bus. Org. L. Rev. 1 (2008). While this slowdown could be explained in part by saturation of the realistically available market for BITs, van Aaken points out that the universe of potential BIT pairings is not remotely close to exhausted by the treaty pairings currently in place.

272. Tietje, *supra* note 252.

273. *Bolivia Submits a Notice under Article 71 of the ICSID Convention*, May 16, 2007, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement3; *Ecuador Submits a Notice under Article 71 of the ICSID Convention*, July 9, 2009, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement20.

274. *El Gobierno terminará contratos con petroleras que insistan en llevar sus reclamos al Ciadi*, El Comercio, Aug. 6, 2008 (discussing constitutional requirement that all international arbitrations be conducted in a South American forum).

275. Luke Eric Peterson, *Ecuador Announces that It Wants Out of U.S. Investment Treaty*, Investment Treaty News (Int'l Inst. for Sustainable Dev., Winnipeg, Man., Can.), May 9, 2007, at 5.

276. For a general discussion of the backlash, see Charles Brower & Stephan Schill, *Is Arbitration a Threat or Boon to the Legitimacy of International Investment Law?*, 9 Chi. J. Int'l L. 471, 471–76 (2009).

277. *See, e.g.*, Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 Mich. L. Rev. 2001 (1998). For an insightful application of these principles in the international context, see Sonja B. Starr, *Rethinking "Effective Remedies": Remedial Deterrence in International Courts*, 83 N.Y.U. L. Rev. 693 (2008). The hydraulic theory has its limits in a system where tribunals are not bound by prior precedent or a higher court. If a tribunal disagrees with broader trends in substantive investment law, it should be just as free to reject them as it is to adopt the *Salini* approach. With that said, alternate explanations for the restrictive approach are not obvious. For example, a concern for scarce judicial resources seems unlikely, since all costs of ICSID adjudication—including all arbitrators' fees and a $75,000 registration fee to ICSID itself—are paid directly by the parties. Similarly, it is hard to imagine that systemic capacity

proach seem motivated by deeper (and perhaps well-founded) policy concerns about the broad reach of unaccountable ICSID panels,[278] and at least one ICSID arbitrator critiquing the "dangers of a broad definition" has suggested that "practitioners should be well aware that going too far in trying to extend the scope of ICSID arbitrations might lead, in the long run, to a change in position of many a developing country" regarding their participation *vel non* in the investment law regime.[279]

If the *Salini* approach is in fact a conscious response to an insufficiently deferential framework of investment precedent, however, it is badly misdirected. It eliminates entirely from review any injury done to a substantial subset of foreign investors, no matter how egregious or unequivocal. And it leaves tribunals entirely free to continue overreaching (if that is what it is) in precisely those cases that involve the highest financial stakes. As a response to the backlash against investment law, it is simultaneously over- and under-inclusive to a fault.

What increasing resistance to the international investment regime should prompt instead is a recalibration of the mechanisms of deference to state decisions on *substantive* questions of investment law. While tribunals very occasionally mention the margin of appreciation doctrine without elaboration, investment law has no systematic approach to this question,[280] and certainly nothing remotely approximating the shades of deference that courts have worked out in the domestic context. Careful attention to this issue may even have implications for other regimes, ranging from human rights to trade and even interstate disputes under traditional international law. While the interests at stake in these different areas may well vary so much as to render a unified field theory of deference impractical, an attempt to develop a more systematically theorized structure for deference to states in their domestic regulatory sphere is much needed.[281]

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concerns could be motivating pay-for-play arbitrators to use Article 25 to winnow their dockets, particularly since there is no apparent shortage of qualified arbitrators.

278. *See, e.g.*, Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 Am. J. Int'l L. 711 (2007).

279. Dominique Grisay, *International arbitration: the ICSID Convention: a convenient solution for companies in conflict with states*, 6 The Bullet"iln", Mar. 18, 2007, http://www.imakenews.com/iln/e_article000763642.cfm?x=b11,0,w; *see also* Afr. Holding Co. of Am. v. Democratic Republic of the Congo, ICSID Case No. ARB/05/21, Award, (July 29, 2008) (finding Article 25 investment but declining jurisdiction on jurisdiction *ratione temporis* grounds) (Francisco Orrego Vicuña, Otto L.O. de Witt Wijnen, and Dominique Grisay, arbitrators).

280. *See, e.g.*, Continental Casualty Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Decision on Jurisdiction, ¶¶ 77, 86 (Feb. 22, 2006).

281. For interesting steps in this direction, see*, e.g.*, Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. Int'l L. & Pol. 843 (1999); Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 Eur. J. Int'l. L. 907 (2006). Depending on how such doctrines are developed, they might bring investment law back, if not full circle, then at least part-way to controversies thought long settled. The Calvo Doctrine—advocated for years by Latin American countries and incorporated into many Latin American investment contracts, constitutions, and laws—provided that foreign nationals could not be given rights beyond those provided to citizens by domestic law. It has largely, though not entirely, fallen by the wayside as a significant principle of international law,

Conclusion

Given the drafting history of the ICSID Convention and the practical advantages of restraint, tribunals should exercise near-total deference to state definitions of "investment." So long as an activity or asset is colorably economic in nature, it should constitute an investment under Article 25. On this approach, every single enterprise that has been rejected by the restrictive approach would pass muster. In fact, none of them would be particularly close calls.

This does not strip the investment requirement of meaning. It simply places primary control over that meaning back in the hands of the states parties to the Convention. Nor, it should be noted, does it totally eliminate the tribunal's role of gatekeeper. In the apt formulation of one tribunal, "something absurd" can still be excluded from ICSID jurisdiction. If a teenage backpacker slips and falls on public streets during a summer trip to New Zealand, she should not be able to bring an ICSID claim based on her "investment" of time in the country. Charles Taylor should not be able to bring an ICSID claim against Sierra Leone on the ground that his military activities there constituted an "investment" of effort with the long-run goal of personal gain.

Harder cases involving the relationship between a dispute and some underlying economic activity can be imagined. I will suggest three. First, imagine that Katya Kapitalistka—an investor from Ukraine who is visiting Liverpool for two weeks to supervise her factory there—gets hit by a drunk driver while on a camping trip with friends in the English countryside. Can she bring an ICSID claim against the United Kingdom if its courts fail to compensate her injury? As a jurisdictional matter, I think the answer is probably no. She might argue that her weekend jaunt was "arising directly out of" her local investment in the sense that she would have vacationed elsewhere if she hadn't owned the Liverpool factory. But tribunals should probably reject that suggestion. The purely personal, purely recreational activity is simply too divorced from economic activity to arise directly out of the factory investment in an Article 25 sense.

Now imagine that Katya is hit by another drunk driver (she is very unlucky) while taking a taxi from her Liverpool hotel to the factory one morning the next week. Should an ICSID tribunal hear her subsequent claim that U.K. courts denied her justice when she sought legal recompense? That is a much closer question. Ultimately the taxi ride seems so integral to her supervision of the local factory—if only on a sort of expense account logic—that it should fall within ICSID's jurisdiction.

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but the kind of regulatory deference proposed here might push things back in that direction. For a recent discussion of ways that the Calvo Doctrine retains some vitality, see Wenhua Shan, *Is Calvo Dead?*, 55 Am. J. Comp. L. 123 (2007).

Finally, imagine that Katya's cousin (and fellow citizen of Ukraine) Timur Trader contracts to ship a single container load of *matryoshki* nesting dolls from his factory in Odessa to a toy company in London. Can Timur bring an ICSID claim against the United Kingdom when customs agents seize his container at its point of entry and confiscate its contents for use as target practice? If the analysis presented here is correct, the answer is clearly yes. The container of toys is an economic asset, and the importation of them is an economic activity. That should be the end of the story.

This last example is likely to be the most controversial implication of my analysis. If commentators agree on anything in this area, it is that pure trade transactions should not be subject to ICSID jurisdiction.[282] (This is despite the fact that drafting attempts to exclude "commercial" assets and transactions were all rejected.[283]) Note first, however, that this example is almost certain to remain academic. I am aware of no BIT likely to be construed to cover a simple trade exchange. Even setting that aside, giving up the standard view on this question does not seem especially troubling. If some country really does commit to extending the ICSID guarantee to "mere" transactions in trade, only its own ox is gored when a claim is eventually brought on this basis.[284] And the consequences of the contrary view have been *far* worse. The restrictive approach has opened up an actual (not hypothetical) slippery slope that runs at least as far as *Joy Mining*'s conclusion that a fourteen-year construct-test-maintain contract is, for ICSID purposes, the same as selling a stick of bubble gum. That outcome is profoundly incompatible with both the history and structure of international investment law.

Nor is it simply a throwaway point to observe that no current BIT is likely to be interpreted as covering individual sales of goods. In fact, that observation highlights an important corollary of this article's analysis. Some observers have been skeptical about whether all developing countries fully grasp every implication of each BIT that they sign. On this view, regardless of how badly the restrictive approach misreads ICSID history, it may at least serve a screening function—however crude, inaccurate, and paternalistic—for reducing the unanticipated consequences of BIT provisions that states might not have agreed to if they had understood them. It is crucial to recognize that, even under this article's analysis, tribunals sympathetic to this perspective retain a way to express that sort of visceral skepticism about

282. Consider, for example, what the Joy Mining arbitrators viewed as a devastating *reductio* of the claimant's argument in that case: "if a distinction is not drawn between ordinary sales contracts, even if complex, and an investment, the result would be that *any* sales or procurement contract involving a State agency would qualify as an investment." Joy Mining v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, ¶ 58 (Aug. 6, 2004), *reprinted in* 44 I.L.M. 73 (2005) (emphasis added). My response would be: just so—and not only when one of the parties is a state agency.

283. *See supra*, text accompanying notes 221-225.

284. This is one place where dictionary definitions could make a difference under the Vienna Convention on the Law of Treaties. At least some of the definitions—though certainly not all of them—could support ruling out single-transaction sales of goods like the container ship hypothetical. *See infra* text accompanying note 282.

whether a particular enterprise is *really* the sort of thing a state had in mind when it joined the investment regime. But rather than tinkering further with the Article 25 boundaries, these tribunals should root any narrowing construction in the BIT, contract, or other consent document that opened the ICSID doors in the first place.

That approach would be far preferable to the status quo. The trend of entrenching narrow definitions of investment in the Convention has created a serious process problem: those definitions effectively become unamendable. The extreme difficulty of revising any multilateral agreement is well known. Compounding that challenge here is the particular situation with investment law, where various multilateral efforts to revise the regime have failed in recent years.[285] And the other route for amendment—tribunals simply changing course—will become increasingly unlikely if the *Salini* test becomes further entrenched in the broader community of investment arbitrators.[286] By contrast, amending consent documents is far more practicable. Indeed, we amend contracts, investment legislation, and BITs all the time.[287] By vesting its narrowing impulse in a BIT definition of "asset" or "investment," a tribunal can thus allow any country that disagrees to overrule the result by revising the BIT.

To be clear: my own inclination is to apply BIT terms according to ordinary methods of interpretation rather than based on a visceral mistrust for investment law generally or an inchoate instinct for what should "really" have been intended in a particular bilateral agreement. But the scheme outlined in this article retains a place for those who are convinced that tribunals should play a screening role beyond what might be suggested by text and history. Such skepticism, however, should be given effect through what

285. Concerted opposition has so far doomed both a global Multilateral Agreement on Investment ("MAI") and an ICSID appeals facility. *See* James Salzman, *Labor Rights, Globalization, and Institutions: The Role and Influence of the Organization for Economic Cooperation and Development*, 21 MICH. J. INT'L L. 769, 804–31 (2000) (MAI); *Suggested Changes to the ICSID Rules and Regulations*, ¶ 4 (ICSID Secretariat Working Paper, May 12, 2005), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=Archive&AnnounceNo=22_1.pdf. Along similar lines, it remains very much open to question whether anything will come out of the Doha round of WTO talks. *World Trade Talks End in Collapse*, BBC NEWS, July 29, 2008, http://news.bbc.co.uk/2/hi/business/7531099.stm (suggesting that "the collapse of the Doha talks could symbolise an end to multilateral trade agreements").

286. While it is beyond the scope of this paper to explore the relevant game dynamics, it is at least conceivable that investor and state control over arbitrator nominations could have some effect. *Cf.* Paul Stephan, *Courts, Tribunals, and Legal Unification – The Agency Problem*, 3 CHI. J. INT'L L. 333 (2002). Even setting aside the two sides' conflicting incentives on this question once a live controversy has arisen, however, the nomination process is a very noisy method of exercising control since so many unrelated legal principles (each potentially outcome-determinative) are in play in any given arbitration.

287. *See, e.g.*, *Recent Developments in International Investment Agreements*, UNCTAD/WEB/ITE/IIT/2005/1, at 6 (Aug. 30, 2005), http://www.unctad.org/sections/dite_dir/docs//webiteiit20051_en.pdf (citing renegotiations of 85 BITs). In at least one case, this kind of revision has been directly targeted at adjusting the scope of covered investments. *See* Jan de Nul, N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction, ¶¶ 24–33 (June 16, 2006) (noting that the revised 2002 Egypt-BelgoLux BIT defined "investment" to include some forms of economic activity that had not been covered by its 1977 predecessor).

American lawyers might call "statutory" interpretation of BITs and contracts rather than through "constitutional" interpretation of the ICSID Convention.

In the final analysis, the purpose of ICSID was to create a reliable forum that would empower states to strike a deal with potential sources of foreign capital: in exchange for foreigners' investment of energy, capital, and effort, host governments would create a legally secure environment in which to operate. ICSID is thus a procedural enabling mechanism for a complicated economic principle that can be taken advantage of by anyone who chooses to join—and can be ignored by anyone who wants to stay out. So long as states do not propose facially absurd definitions of "investment" that are not grounded in a plausibly economic activity or asset, the best course is to let member nations agree on the development infrastructure as they see fit. The whole point of the grand bargain is that states are free to decide what kinds of foreign economic enterprise to encourage as a way of developing their domestic economies. ICSID tribunals should not stand in the way.