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The Cost of Uncertainty

The notion of investment in Bilateral Investment Treaties and ICSID Arbitration

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Summary

Bilateral Investment Treaties (BIT) are entered into by two state signatories wishing to promote, protect and liberalize investments. A BIT protects a private party, that is an investor having made an investment, by allowing for such a private party to address judicial recourse against a state signatory under the Washington Convention (the Convention).

The Convention provides jurisdiction for the International Centre for Settlement of Investment Disputes (ICSID/ the Centre) for disputes arising directly out of investments. However, the Convention contains no definition of the term “investment”. The ICSID being relatively new and not bound by the principle of stare decisis, lacks a clear and firm body of case law defining investment for purposes of the Convention. Thus, it is difficult for treaty drafters to define the term “investment” so that the treaty definition corresponds to the definition under the Convention as established by ICSID.

The basic outline is that drafters may narrow the definition of investment in order to decide what disputes shall be allowed to be submitted to the ICSID. Drafters may not extend the jurisdiction of the Centre by widening the definition by way of treaty. In practice, it is not always evident that ICSID allows the Convention to overrule BITs, as the parties’ autonomy is regarded. The lack of consistent jurisprudence in this respect provides for an uncertainty among investors. This leaves investors not knowing if they are protected by the treaty or not.

Although it is difficult to provide a solution for this problem, there are in my view two main ways of improving the interplay between ICSID, the Convention and BITs. The first being, to develop a body of jurisprudence by consistently applying certain criteria that an asset must have in order to be regarded as an investment. The second is that treaty drafters should use the same criteria in order to define “investment”.

If there is no change in the interplay between the Convention, the BITs and jurisprudence, investors may use other means of recourse. A lack of interplay opposes the purposes for the Convention and may, in the long run, cause investors to be more careful in choosing when and where to invest, hence limiting investment promotion, protection and in an extended period of time; liberalization.

Preface

During the course of my research, there have been a few people who, unconditionally, have assisted and supported me in my work. I therefore briefly wish to mention these people. My supervisor Karol Nowak not only deserves a courteous mention but also a cordial thank you. He has during the course of my work not only been an excellent supervisor but also extremely encouraging and inspiring. His ability to quickly grasp new ideas and concepts and follow sudden changes in theory has been highly valuable within this field of study.

I further wish to mention and thank Jeffrey Hertzfeld who not only took the time to see me and discuss international investment disputes on a short notice when I was in Paris, but also warm-heartedly did so. Another extremely helpful person is Peter Prokopic who has provided me with some practical insight on the subject matter. Martin Karlsson and Nils Eliasson have also assisted in untangling some of the knots related to the subject treated in the essay, wherefore I would like to thank them for this.

Two of my close friends, Måns Alriksson and Emma Nilsson, as well as the librarian Lena Olsson at the Raoul Wallenberg Institute have also been of invaluable help, providing me with the express sending of materials to the most random places in the world. My dear friends Martin Beijer and Christian Lindhé also deserve a special mentioning as they have assisted me in proof-reading. These people have shown unselfishness out of this world and a thank you is merely a means of showing appreciation but not enough.

As this is my final production coming from the university I also embrace the opportunity to thank my mentor David Klose for many long discussions, both humorous and serious in nature. They have been priceless and ever so precious to me.

On a final note, thank you to all those of you who have believed in me. You hold in your hands a fruit of your confidence. Take a BIT(e) and enjoy!

Abbreviations

BIT	Bilateral Investment Treaty
E.g.	<i>Exempli gratia</i> (for example)
Ibid.	Ibidem (in the same place)
I.e.	<i>Id est</i> (that is)
ICSID	International Centre for Settlement of Investment Disputes
IMC	General Organization for Industrial and Mining Projects of the Arab Republic of Egypt
OECD	Organisation for Economic Co-operation and Development
UAE	United Arab Emirates
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US	United States

1 Introduction

1.1 Context

Historically, it has not been possible for a private person to address judicial recourse against a State for maltreatment, unless through the *Home State* and the use of diplomatic channels.¹ The Washington Convention² on which the ICSID relies, therefore provides a rather unique system for the settlement of disputes between investors and state parties. Another unique quality of ICSID arbitration is that an award automatically becomes executable under the New York Convention.³

Yet another eye-catching dimension to investment disputes is the magnitude of the awards. The disputes often involve claims for damages amounting to hundreds of millions, or billions, of US Dollars. As a result, there have been many debates relating to the subject, for instance concerning the establishment of an appeals facility. Yet, many investors addressing claims against a *Host State* end up in somewhat lengthy preliminary hearings. This happens either due to objection of jurisdiction from the respondent, or because the tribunal *sua sponte* examines the jurisdiction under article 25(1). The matter of jurisdiction may be examined even though a BIT states that the transaction or asset in question specifically shall constitute an investment and the BIT contains an ICSID arbitration clause for such investments.

1.2 Scope of study

As the role of BITs and the Washington Convention is somewhat ambiguous, the interplay between the two is equally complex. This paper

¹ Redfern, Alan & Hunter, Martin, “*Law and Practice of the International Commercial Arbitration*”, pp. 562-564.

² Convention on the settlement of investment disputes between states nationals of other states, Washington 18 March 1965. (A.k.a. the ICSID Convention).

³ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958. Interview with Hertzfeld, Jeffrey 19 March 2007.

focuses on providing an account for the notion of investment, *ratione materiae*, under article 25(1) of the Convention. It also describes the notion under BITs and ICSID jurisprudence, and is followed by an analysis of issues relating to jurisdictional objection on the basis of *ratione materiae* and the definition of investment.

1.3 Delineations of study and outline of the thesis

Considering the scope of study, the paper focuses on describing and commenting on the notion of investment and the interplay between the Washington Convention, BITs and ICSID jurisprudence. Where traditional sources of law do not provide guidance in the subject matter, normative comments are made. I have clearly stated that these are my own reflections.

Under the chapter of the Convention, a brief overview of the rules governing jurisdiction is provided. The focal point is quickly narrowed down to the matter of *ratione materiae*, and in particular, *the notion of investment*. Although there are other interesting aspects relating to the matter, such as those of *ratione personae*, I do not attempt to provide an account for these, as an investor is often defined as someone having made an investment.

There are numerous ways of drafting BITs, but this essay does not provide an account for all the different types of BITs. Instead I illustrate what some BITs look like. I do this by using the relatively newly signed Sweden-United Arab Emirates (UAE) BIT. The reason for this being that it is somewhat more extensive than many old investment treaties, yet not unusual. It does also, in certain other aspects, contain illustrative provisions specific for the two signatories. After having described the Sweden-UAE BIT, I then illustrate and analyze a few other BITs assuming new approaches.

Having examined the notion of investment under the Convention and BITs, I have looked into ICSID jurisprudence in order to show where the two meet. In the choice of case law, I have considered cases in which the tribunals have assumed a traditional “subjective approach” as well as cases based upon certain “objective criteria”. I feel that these cases clearly give an account of the wide spectra of dilemmas and various approaches taken by the parties as well as the tribunal, in order to find the perfect interplay between BITs and the Convention. On the basis of what is presented above, an analysis is put forward.

In this context, it should be noted, that there are many ways in which this portrayal of the problems relating to the definition of investment could have been done. However, I have to some extent chosen the delineations I believe necessary in order to make this paper comprehensible and useful for a practitioner.

1.4 Methodology & Sources

I would like to call attention to the range of available material. Although there has been a lot of material produced on the subject of investment arbitration, I have found many sources to treat the question of *ratione materiae* in a limited and similar manner. In certain cases, there has been some more extensive material published, but the access to this material has been highly limited as libraries only seem to have a finite number of titles on the subject. To some extent, the essay is therefore limited by means of access, despite continuous attempts to get hold of all material. Off course, this has been a problem, but I believe the material I have used has been sufficient in order to draw reasonable conclusions.

Approaching a circular subject matter such as the one at hand, to some extent calls for a method slightly different from a legal dogmatic one. As a starting point I have however used a legal dogmatic method, only to move into other ways of complement. This means that I have used different sources of law available for interpretation and systemization, in order to be

able to determine certain generally applicable rules and regulations.⁴ Applying a legal dogmatic theory can easily be explained as attempting to understand how a judge would assess a certain situation, leaving the judge, in the case of investment arbitration; the tribunal as the ultimate interpreter of law. As a result, all factors influencing the court, or in this case the tribunal, shall be considered as sources of law.⁵ Viewed in this light, I believe it fair to consider international principles of law, the Convention, BITs and ICSID jurisprudence as sources of law. Although the influence of some of these sources, such as the BITs can be discussed (for example the BITs that are merely treaties but can be regarded as legal framework), I have disregarded developing this further, as they all fall under the scope of what I understand influences the tribunal in their decision-making power. The doctrine does largely provide guidance on the subject, as many of those who comment on international investment disputes are practitioners. However, I see doctrine as a mechanism for analysis, much as my own comments are of normative character.

For a more profound treatment of the subject matter, I have made a few additional examinations of further aspects within the domain of international investment disputes. Drawing on my experience from the Swedish Embassy, I have been provided with several opportunities to discuss investment-related issues with diverse foreign companies, the UAE acting as a hub in the region for international investments. The implications of these discussions were often that BITs are regarded as of subordinate importance in the decision making of whether to make a foreign investment. In the paper, I therefore avoid referring to these conclusions.

My interviews with foreign enterprises in Slovakia and Libya have also been fruitful, in the sense that I have been provided with illustrative examples of problems encountered by foreign entities making investments.

⁴ Pezzenik, Alexander, "Juridikens teori och metod" (*Theory of law and methodology*), p. 35.

⁵ Agge, Ivar, "Allmän Rättslära" (*Jurisprudence*), p. 29.

Further, I briefly wish to mention that I from my discussions with Mr. Hertzfeld, a retired partner at Salans Law Firm in Paris, also have been able to grasp the practical aspects of ICSID arbitration.⁶ This has enabled me to limit the scope of the presentation and make it what I hope is considered useful from a practitioner's point of view.

⁶ Mr. Hertzfeld has frequently been engaged in investment disputes under the ICSID.

2 Jurisdiction of the ICSID

2.1 The Washington Convention

The Washington Convention (“the Convention”) is the legal framework for investment disputes subject to ICSID arbitration. The Convention was created not for the settlement of all disputes between private-public parties, but in order to “increase salutary economic activity and feed the engine of sustained development and prosperity around the world”.⁷ Given this starting point, the jurisdiction of the ICSID is carefully outlined in the Convention to focus on *disputes arising directly out of investments*. The following description will thusly focus briefly on substantive questions of jurisdiction as found in article 25 of the Convention, only to quickly move on to an in-depth study of the notion of investment, as presented above. Firstly it should however be mentioned that ICSID practice under article 25 of the Convention derives primarily from the power of an arbitral tribunal to decide on its own jurisdiction (article 41) and the screening function of ICSID’s Secretary General (article 36).

2.1.1 Article 25.1 – Jurisdiction *ratione materiae*

Article 25 lays down the general parameters for ICSID’s activity by stating the requirements relating to the nature of the dispute, *ratione materiae*, and to the parties, *ratione personae*.⁸ There are three criteria that need to be fulfilled in order for an investor to be able to successfully submit a dispute for resolution under the ICSID, namely that:

- i) there is a legal dispute arising directly out of an investment;
 - ii) both contracting states are parties to the Washington Convention;
- and

⁷ Rubins, Noah “*The notion of investment in international investment arbitration*” p. 323.

⁸ Schreuer Christopher, “*A commentary to the ICSID Convention*” p. 89.

- iii) both the Host State and the investor have consented to arbitration.⁹

2.1.2 Investment in ICSID arbitration

Despite the phrasing of article 25(1), the Convention contains no definition of “investment”. According to Delaume, this omission is intentional. It has been argued that such a definition would have been out of limited interest as it would either have been *too broad* to serve a useful purpose *or too narrow* for its intentions.¹⁰ Whilst drafting the Convention, one of the delegates, Mr Broches, held not only would it be hard to find a satisfactory definition, but also that such a definition would likely lead to jurisdictional controversies.¹¹ The First Draft of the Convention defined investment as “any contribution of money or other assets of economic value for an indefinite period or, if the period be defined, for not less than five years”.¹² This draft led to many discussions and counter proposals were suggested. Mr. Broches however, stated that the definitions put forward by the different delegates, were biased in the sense that they were based on what the delegates believed their governments would wish to submit to the ICSID.¹³ The Secretariat made yet another attempt to define investment as:

“the acquisition of (i) property rights or contractual rights (including rights under a concession) for the establishment or in the conduct of an industrial, commercial, agricultural, financial or service enterprise; (ii) participations or shares in any such enterprise; or (iii) financial obligations of a public or private entity other than obligations arising out of short-term banking or credit facilities.”¹⁴

⁹ Redfern & Hunter, “*Law and practice of the international commercial arbitration*” p. 572.

¹⁰ Delaume Georges R, “*Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*”, 1 INT.LAW. 64,70 (1966).

¹¹ History of the ICSID Convention, Vol I, pp. 22, 54, 59.

¹² *Ibid.* p. 116.

¹³ *Ibid.* pp. 704, 707.

¹⁴ History of the ICSID Convention, Vol II, p. 844.

Discussions of jurisdictional difficulties following such a definition finally resulted in omitting any definition of the term.¹⁵ During the drafting procedure, there were a few specific points that recurred when discussing the term investment. Schreuer has summarised these points, narrowing them down to that of *the magnitude of the investment, the parties' autonomy, the applicability to old investments, loans, suppliers' credits, outstanding payments and ownership of shares*.¹⁶ Interestingly, some of these points recur in case law concerning the jurisdiction of the ICSID. As Schreuer remarks in his commentary on the Convention, "it is clear that the parties have much freedom in describing their transaction as an investment". Yet, it could be argued that despite the lack of a definition of investment in the Convention, its' object and purpose indicates that there should be some *positive impact on development*.¹⁷ After all, the preamble of the Convention mentions "the need for international co-operation for economic development and the role of the private investment therein".¹⁸ Moreover, as Schreuer also points out, the Report of the Executive Directors supports this idea as it states that the Convention was "prompted by the desire to strengthen the partnership between countries in the cause of economic development".¹⁹

¹⁵ *Ibid.* pp. 668, 702, 703, 706-707, 709, 821-826, 844.

¹⁶ For a more thorough discussion, see Schreuer pp. 123-124.

¹⁷ Schreuer p. 125.

¹⁸ Preamble of the Washington Convention.

¹⁹ Para. 9, 1 ICSID Reports 25.

3 Bilateral Investment Treaties

3.1 What are Bilateral Investment Treaties?

A BIT is a treaty between two states that constitutes a legal framework for the treatment of investment flows between the two nations.²⁰ Although the BIT is entered into by two states, it entitles investors from either of the contracting states protection for investments made within the state territory of the other contracting state.²¹ In case of an investment dispute the claimant is an investor from one State party, known as the investors' *Home State*. The defendant is the State where the particular investment was made, i.e. the *Host State*.²²

The constellation of parties to a BIT can vary, as the treaties can be entered into by: a capital exporting nation and a developing country, between two capital exporting countries or between two developing countries.²³

Irrespective of the party constellation, there is a common denominator for the contracting state parties, namely that each state acting as a *Host State* is subject to derogation of State sovereignty.²⁴ The reason for states concluding these agreements is, as mentioned in the preamble of the Washington Convention, "the role of private international investment" in "international cooperation for economic development".²⁵ The primary aim of the BITs is that of *investment protection*, but as Salacuse mentions, *investment promotion* and *liberalization* are just as important.²⁶ In a BIT between a capital exporting state and a developing country the capital

²⁰ Cremades Bernado M. and Cairns Davis J.A., "Contract and Treaty Claims and Choice of Forum in Foreign Investment Disputes" in "Arbitrating Foreign Investment Disputes", (ed. Horn, Norbert) p. 326.

²¹ See for example the Sweden-UAE BIT (1999).

²² Cremades and Cairns p. 326.

²³ Salacuse Jewels W., "Towards a Global Treaty on Foreign Investment: The Search for a Grand Bargain", in "Arbitrating Foreign Investment Dispute", (ed. Horn, Norbert), p. 57.

²⁴ Salacuse, p. 54

²⁵ The Washington Convention, Preamble.

²⁶ Salacuse, p. 61. Further elaborated in section 3.2, below.

exporting country may be guaranteed a protection for investments made in the territory of the *Host State*, whereas the developing country to a great extent lacks the means necessary in order to make similar investments. The purpose of a developing nation concluding such an agreement would therefore be to *promote* foreign investment and thereby increase the flow of capital and closely related technology to the state. Reducing the risk for investments thus represents an increase in capital flow. Between two *capital exporting nations*, the objective may be slightly different. Focus lies instead on that of *reciprocity* and *mutual protection*.²⁷

In addition, another interest for the *Home State* is that of *liberalizing* investments, i.e. to facilitate the flow of investments to the *Host State* by eliminating different restrictions. Whereas investment promotion lies within the realm of interest for the *Host State*, the liberalization of investments improves the investment climate, which enables more investments out of interest for the *Home State*.²⁸

3.2 Protection, promotion and liberalization of investments

As stated before, there are three objectives with the BITs; to *protect*, *promote* and *liberalize* investments. The first two goals of the BIT are often explicitly stated in the heading or the preamble of the treaty itself, such as in the Sweden-UAE BIT which states: “Agreement/.../on the promotion and reciprocal protection of investments.”²⁹

The purpose of a protection for investments is to limit interference in foreign investments made by the *Host State* through that of a legal framework, as well as ensure that an investor suffering loss should be able to initiate proceeding outside the jurisdiction of the *Host State*. One step in that direction are the efforts that have been made in order to establish a

²⁷ Salacuse, p. 59.

²⁸ Salacuse, p. 60.

²⁹ Sweden-UAE BIT (1999).

standard set of contents and structure for BITs.³⁰ These guidelines of contents and structure will be treated in depth under chapter 3.4.

Whereas the investment protection is in the interest of the *Home State*, investment *promotion* is out of interest for the *Host State*. In order to obtain an equilibrium in the commonly somewhat asymmetrical relationship between a capital exporting nation and a developing country, promotion is of great importance. As mentioned, the basic working presumption upon which BITs rest is that a stable investment climate providing investment protection reduces risks and risk reduction promotes investment.

However, the World Bank has in the World Development Report (2005) showed that there is in fact little, if any, correlation between the conclusion of BITs and the subsequent investment inflows.³¹ Although this question of correlation is one that has been scrutinized in many cases, I believe there are more aspects to analyze than just the mere correlation between BITs and the flow of investment. To start, the legal and economic aspects do not always coincide in a favourable manner. Furthermore, it is important to bear in mind, that although an enterprise may not make an investment decision on the basis of a BIT, a part of the decision will consist of risk evaluation. Such a risk evaluation will consider the possibility of recourse and compensation for loss. Given the many diverse variables that influence investment decisions I therefore agree with Vandevelde who has held that it is hard to pin point the precise effect of BIT on an investors decision to invest in a particular country.³²

Moreover, a codification is often a codification of already existing pro-foreign policies.³³ Nonetheless, Salacuse makes an important point, stating that the BIT codification increases the guarantee of investment protection as policies are raised to the level of international law, limiting the ability of a

³⁰ Salacuse, p. 61.

³¹ The World Development Report 2005.

³² Vandevelde K.J. "Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties" (1998) 36 Colum J of Transnatl L 501, pp.524-525.

³³ Salacuse, pp. 70-71.

country to change these policies easily.³⁴ With regards to the aforementioned aspects taken into account when making an investment decision, I would argue that the codification is out of great importance as the question of jurisdiction is brought to an international level in the case of an investor suffering loss and wishing to bring about recourse.

As far as investment *liberalization* is concerned, this lies within the interest of the Home State. Restrictions implemented in a State by national law may create hindrances for foreign direct investment. The reason may be out of strategic or political reasons, or as rather common in developing countries, a state may consider difficulties for a national investor to compete on equal footing with a foreign company.³⁵ Restrictions may be outlined in different ways but often by law. In the UAE for example, a foreign investor must have a local sponsor holding the majority of shares in a foreign entity establishment within the UAE.³⁶ In order to comply with the objective of the signatories to liberalize investments for the Home State, BITs often contain a provision for the contracting State parties to encourage and create favourable conditions for investors of the other State in the State acting as a Host State.³⁷ Yet, many BITs hold clauses stating that Host States may admit foreign investments subject to their national laws. In the Sweden-UAE BIT for example, article 2 (1) declares that “each Contracting State shall/.../promote in its territory investments by investors of the other Contracting State and shall admit such investments in accordance with its legislation”.³⁸ Thus, as Salacuse puts forward, the concept of investment liberalization appears to be restricted by national laws despite the existence of a BIT.³⁹

In my opinion this is a rather narrow and theoretical analysis of the outcome of BITs, as it ignores the economic and political dimensions of a favourable

³⁴ Vandeveldel K.J. pp. 522-525.

³⁵ Salacuse, pp. 73-74.

³⁶ Interview with Nordström, Magnus, Embassy of Sweden, UAE, 20 September 2006.

³⁷ Salacuse p. 73.

³⁸ Sweden-UAE BIT (1999).

³⁹ Salacuse, p. 73.

investment climate. The idea put forward by Salacuse is interesting, as it may appear to encourage two signatories to exclude restrictions of national law in the Host State. The consequences of exempting foreign investors from national law would however make it impossible for a Host State to retain a solid legal framework on areas such as labour law, bookkeeping and taxation. It therefore seems to me that the concept of investment liberalization ought to aim to remove hindrances precluding the flow of direct investments, rather than eliminate all State sovereignty. During the early 1990's for example, Libya imposed conditions on foreign enterprises to pay lifelong monthly pension for all employees, in the event of entering into liquidation.⁴⁰ In such circumstances a BIT between Libya and the Home State could have removed such obstacles, hence creating liberalization for foreign direct investment, without necessarily granting foreign investors exemption from all national legislation. It should be pointed out, that some countries such as Slovakia, has had more favourable conditions for foreign investments than national.⁴¹

However, in my opinion the idea of liberalization does not necessarily imply that foreign investors should be treated more favourably than local investors, merely that the aim is to place foreign investments on an equal footing with national ones.

3.3 Scope of the treaty

Most treaty rights deriving from BITs are general in their nature, and protection for these rights is granted by international law. There is for example a right to compensation in the case of expropriation as well as protection from discriminatory measures.⁴² The protection granted by international law in combination with the BIT provides an investor with the possibility of referring to principles of international law in order to support their suit. In the case of *Compania de Aguas del Aconquija SA & Vivendu*

⁴⁰ The information has been provided by a company that wishes to remain anonymous, due to confidentiality policies of the company.

⁴¹ Interview with Prokopic, Peter, Ericsson Slovakia.

⁴² Cremades & Cairns p. 328.

Universal SA (formerly Compagnie Générale des Eaux) v the Argentine Republic the ICSID Annulment Committee on the question of substantive law held the following:

“...the inquiry which the ICSID tribunal is required to undertake is one governed by the Washington Convention, by the BIT and by applicable international law”.⁴³

I believe it is this “smörgåsbord” of opportunities that makes ICSID arbitration and jurisdiction desirable for investors seeking compensation on the basis of treaty rights. ICSID-arbitration is in fact a rather unique institution, as it provides individual claimants an opportunity to seek remedy directly against another state, without depending on the Home State to resort to diplomatic action or international judicial proceedings.⁴⁴ In practice, this faceted protection of investors results in many objections of jurisdiction, causing long and costly preliminary hearings.⁴⁵

3.4 The definition of investment

The definition of investment in ICSID arbitration sometimes differs from the definition in BITs. A quick glance at case reports from the ICSID, reveals that numerous preliminary objections therefore seem to focus on whether an investor has made an investment or not, i.e. *the notion of investment*.

3.4.1 Introduction

As stated earlier, there is no definition of the term “investment” under the Convention. Article 25(1) merely states “the jurisdiction of the Centre shall

⁴³ *Compania de Aguas del Aconquija SA & Vivendu Universal SA (formerly Compagnie Générale des Eaux) v the Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002, at para. 102.

⁴⁴ Redfern & Hunter pp. 562-566.

⁴⁵ The latter information is based upon an interview with Hertzfeld, Jeffrey, 19 March 2007.

extend to any legal dispute arising directly out of an investment”.⁴⁶ This leaves contracting states free to define “investment” as they deem necessary for the purposes of the contracting parties.⁴⁷ Ultimately, however, the requirement of investment is an objective one.⁴⁸ The parties’ discretion results from the fact that the outline of the definition is somewhat unclear, but the parties only have a limited freedom to determine what constitutes an investment.⁴⁹ The determination is, although important, not conclusive for an arbitral tribunal to decide on its own competence under article 41 of the Convention. As a result, an agreement between the parties concerning the subject-matter of submission to the jurisdiction of the Centre may be narrower than the Convention allows, but never wider. Two signatories may for example agree that only approved projects shall be subject to the jurisdiction of the Centre. For the purposes of the Convention, the existence of an investment may need to be ascertained by certain characteristics, which I will get back to when dealing with case law. In conclusion, the claimant must be able to show that the investment from which the dispute arises, is an investment not only *under the BIT* but also *under the Convention* in order to be able to submit a dispute for resolution under the Centre.

3.4.2 Trends

Historically, many BITs contained broad and general definitions, such as the Germany – Sri Lanka BIT from 1963; “the term ‘investment’ shall comprise all categories of assets including all categories of rights and interests”.⁵⁰ Although new treaties generally are more elaborate in their definitions, such as the Sweden – UAE treaty from 2000, definitions are still left open-ended, thereby recognizing the dynamics of the term “investment”, and how it may evolve over time.⁵¹ There is however, yet another trend, important to note. During the 1990’s, numerous treaties were signed, many

⁴⁶ Article 25(1) of the Washington Convention.

⁴⁷ Redfern & Hunter, p.569.

⁴⁸ Schreuer, p 125.

⁴⁹ Schreuer, p. 125.

⁵⁰ The Germany – Sri Lanka BIT (1963).

⁵¹ Redfern & Hunter, p. 570.

with broad definitions of the term investment. During the same period, there were however only a limited amount of disputes submitted to the Centre for resolution.⁵² By December 2005, there were according to statistics (from an UNCTAD Report) used by the Deputy Secretary-General of OECD, some 2400 BITs and 170 disputes pending before the Centre.⁵³ Eager to attract investments, it appears to me that signatories during the 1990's often left the definition of "investment" somewhat vague and unclear, not realizing how this would provide investors with an incentive to attempt to stretch the term "investment" before arbitration proceedings.⁵⁴ As an increasing number of disputes are submitted to the Centre for settlement, signatories have seen to become more aware of the consequences of broad definitions, allowing for all kinds of assets to qualify as investments. New approaches in treaty drafting are therefore being explored, such as in the Canada-Costa Rica BIT from 1999 as well as in the US Model BIT from 2004.⁵⁵ As there is no firm body of case law deriving from ICSID arbitration, it seems it is difficult to adapt new flexible treaty solutions on the basis for ICSID jurisprudence. Perhaps this is one of the reasons for why many BITs include provisions of dispute settlement under the UNCITRAL (United Nations Commission on International Trade Law) rules or ad hoc-arbitration. The lack of a definition of 'investment' in the UNCITRAL rules leaves the parties free to agree upon the scope of investment. However, an analysis of the UNCITRAL rules falls outside the scope of this paper.

3.4.3 Definition clauses

Salacuse has listed four basic definitional dimensions that most BITs take into consideration:

⁵² Interview with Hertzfeld, Jeffrey 19 March 2007.

⁵³ Deputy Secretary-General of the OECD; Richard Hecklinger's opening remarks at the symposium on "Making the most of international investment agreements: a common agenda", as seen at the website <http://www.oecd.org/dataoecd/5/6/36053773.pdf> accessed 15 March 2007.

⁵⁴ See for example *Mihaly International Corp. V. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, 15 March 2002.

⁵⁵ See under chapter 3.5.

- “(i) the form of the investment
- (ii) the area of investment’s economic activity;
- (iii) the time when the investment is made; and
- (iv) the connection of the investor with the other contracting state.”⁵⁶

Many BITs commence with a broad definition such as above mentioned, often referring “the term ‘investment’ means any kind of asset”.⁵⁷ The definition then briefly mentions the prerequisites for *ratione personae* and further specifies the geographical area in which the investment must be made, i.e. “invested by an investor of one Contracting State in the territory of the other Contracting State”.⁵⁸ BITs then often contain a *non-exhaustive* list of different types of assets that typically constitute an investment.⁵⁹ The Sweden-UAE BIT contains a list of what the term investment shall include:

“in particular, though not exclusively:

- (a) movable and immovable property as well as any other property rights, such as mortgage, lien, pledge, usufruct and similar rights including property under a leasing agreement;
- (b) shares, stocks and debentures of companies, or interests in such companies, loans related to investments and bonds issued by a Contracting State or any of its natural or legal persons and returns retained for the purpose of re-investment;
- (c) liquid assets, deposits and claims to money or to any performance under contract having economic value associated with an investment;
- (d) intellectual property rights, technical processes, trade names, know how, goodwill and other similar rights;

⁵⁶ Salacuse, p. 62.

⁵⁷ See for example the Sweden-UAE BIT (1999) art. 1.

⁵⁸ The Sweden-UAE BIT (1999) art. 1.

⁵⁹ See for example the Sweden-UAE BIT (1999) or Sweden- Romania BIT (2002).

- (e) business concessions conferred by law, administrative decisions or rights under contract, including concessions to search for, develop, extract or exploit natural resources.”⁶⁰

Although the list of assets may differ slightly from one BIT to another, the definition today includes direct and indirect investments.⁶¹ Yet, there are certain assets that typically are subject to dispute. These investments are inter alia intellectual property, public debt and indirect investments, and are by the OECD regarded as “issues requir[ing] further work to determinate their appropriate treatment” in future agreements.⁶² It appears, there are evident difficulties in trying to avoid these grey areas whilst maintaining non-exhaustive lists. Creating an exhaustive list would however include the risk of limiting the notion of “investment” and its dynamic nature. At the same time, non-exhaustive lists leave a wide-open space for jurisdictional objections regarding investments that have not been listed in the definition clause.

In order to master the difficulties of defining “investment”, a new approach has recently been assumed in the US-Uruguay BIT, which is based on the 2004 US Model BIT and was signed in November 2005. The BIT at case retains the broad general definition, contains a non-exhaustive list, and in addition, contains a number of characteristics that an asset must have in order to qualify as an investment.⁶³

3.5 Various approaches in BITs

The search for the perfect BIT, is as Salacuse calls it, the search for a grand bargain. Bearing this in mind, it is easy to understand that various and new approaches are taken by treaty drafters, all hoping to create the perfect BIT. In 2004 the US established a new Model BIT, assuming a new approach.

⁶⁰ The Sweden-UAE BIT (1999) art. 1:1 (a)-(e).

⁶¹ See further the tribunal’s decision in *Fedax N.V. v Venezuela* under chapter 4.3.2.

⁶² Draft OECD Multilateral Agreement on Investment at 11 n. 2 available at www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf.

⁶³ See below under chapter 3.5.1 and the US-Uruguay BIT (2004).

This approach is analyzed by looking at the US-Uruguay BIT signed in November 2005, the first treaty signed by the US on the basis of the 2004 US Model BIT. In addition, I account for the Canada- Costa Rica BIT from 1999, which in my view effectively handles a number of issues that have been subject to controversy in previous arbitrations.

3.5.1 The US-Uruguay BIT

The 2004 US Model BIT, or the US-Uruguay BIT based upon the previous, assumes a new approach in defining investment. The outcome of this is yet hard to predict, but there are a few interesting aspects to this new approach. Thus, this BIT deserves consideration.

The US-Uruguay BIT contains much as other BITs a broad general statement that “investment means every asset/.../that has the characteristics of an investment” such as “the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk”. These characteristics are similar to those that have evolved in ICSID jurisprudence.⁶⁴ It also contains a non-exclusive list of forms an investment may take, in the same way as the aforementioned Sweden-UAE BIT. The treaty then expressly notes that loans and other debt instruments as well as licenses and permits are included as investments if they have the above characteristics. The latter must therefore create rights protected under domestic law in order to be an investment. By footnote, the treaty also points out what is less likely to have the mentioned characteristics, such as bank accounts with no commercial purpose or connection to an investment. Briefly, the treaty lists what does *not* constitute an investment, i.e. claims to payment that are immediately due and result from the sale of goods or services.⁶⁵

There are, in my opinion natural advantages in trying to sharpen the definition of investment by means of limitations. The effectiveness of the

⁶⁴ See below under chapter 4.2.

⁶⁵ The US-Uruguay BIT (2004).

BIT is however somewhat difficult to analyze beforehand. The characteristics mentioned appear to be non-exclusive, hence leaving way for further restrictions of the notion by the tribunal. At the same time, they largely overlap with jurisprudence, as already stated above. The characteristics mentioned are a minimum requirement for the assets in order to be considered investments. Yet, it leaves no guarantee that assets mentioned in the non-exclusive list (or non-listed assets) constitute an investment just because they fulfil the characteristics set out. The treaty therefore marginally clarifies and simplifies predictability for the investor. On the other hand, in comparison to other BITs, the treaty clearly takes a more State-favourable approach in defining “investment”. As for the “non-investments” mentioned by way of footnote, these are rather uncontroversial. The mere listing however, serves as a quick guidance to the investor, and eliminates any potential doubts on the outlined items. Overall, I sincerely believe the limitations of the definition are a step in the direction of clarification.

3.5.2 The Canada – Costa Rica BIT

Although the Canada - Costa Rica BIT dates back to 1999 and has been overshadowed by new Model BITs such as the one mentioned above, there are certain aspects of it that are worth mentioning in this context. As I have stated earlier, the BIT effectively handles a number of issues subject to controversy in past arbitrations.

The treaty retains a broad general statement that the investment includes any asset owned or controlled directly or indirectly by an investor. The definition then contains a non-exclusive list much like any other BIT and then states a requirement of the asset to be “acquired in the expectation or used for the purpose of economic benefit or other business purposes”. The treaty goes on to note that investment does not mean claims to money that arise solely from commercial contracts for the sale of goods services or “the extension of credit in connection with a commercial transaction, such as trade financing, where the original maturity of the loan is less than three

years”. The treaty then adds a few interesting paragraphs effectively dealing with matters that may commonly be subject to dissonance. In favour of the investor, it deals with *loans to enterprises that are affiliates* of the investor and considers these loans to be investments. Furthermore, it provides an account of *the control of investment, changes in the form of an investment* and “*returns*”.

In large, the treaty does not differ much from that of the US-Uruguay treaty in its main points. It does however list characteristics the assets must have in order to be considered as investments, that is they must be used for the purpose of *economic benefit* or *business purposes*. By regulating loans, it also manages to incorporate a requirement for *duration*. Interesting to note is that the characteristics listed differ from the characteristics listed in the US-Uruguay treaty, but are largely, in accordance with requirements aired during the negotiating history of the Convention and ICSID jurisprudence. Moreover, the definition does not leave way for further restrictions of the definition, other than subject to the decision of the Centre.

3.5.3 Implications from the new approaches

Looking at the two treaties discussed above, it seems they both have items of interest in attempting to find new approaches. I would find it interesting to see what a treaty would look like, dealing with both characteristics as a minimum requirement for investment, and grey areas such as those mentioned by the Canada – Costa Rica BIT. Keeping in mind the relation between treaty and Convention characteristics, I believe the signatories as well as the parties to a dispute would benefit from using characteristics identical to those that have evolved from ICSID case law (naturally, more criterion could be applied do the parties wish to limit the scope further). After all, as I mentioned above, a dispute submitted to the Centre for resolution must be an investment under both the BIT and the Convention. It does however strike me once again how difficult it is finding the perfect interplay between politics, economics and law. In addition, one must bear in

mind, the flexibility of ICSID jurisprudence, creating uncertainty among treaty drafters, signatories and parties to a dispute.

4 The notion of investment in ICSID case law

4.1 Introduction

As the Convention contains no definition of what constitutes an investment, the question has been left to the tribunal to decide. Before looking more in depth at the development of the definition in case law, I wish to clarify that case law created by the ICSID tribunal does not follow the stare decisis principle of Anglo-Saxon law.⁶⁶ It (case law i.e.) is instead, a rather vivid concept, which ensures the need of flexibility in disputes concerning such delicate, and as already stated dynamic, matters as investments. As noticeable when looking at previous decisions from the tribunal, this flexibility has also encouraged investors to try to stretch the term “investment” in order to include a wide range of assets.⁶⁷ The lack of a consistent body of case law has not only left investors with hope and opportunities, but, in my opinion, also left a wide gap of uncertainty. Although the tribunal in many cases has referred back to the intentions of those who drafted the Washington Convention, the tribunal itself has noted the difficulties of predicting what constitutes an investment.

In *Salini v Morocco*⁶⁸, the tribunal noted the dearth of previous decisions dismissing claims based on the absence of *ratione materiae*.⁶⁹ The tribunal therefore went on to establish certain criteria that would determine the presence of investment. The *Salini v Morocco* case and criteria are developed under chapter 4.3.6 as well as a few other cases, some of them in which the tribunal has relied on the guidance of certain objective criteria, as listed below. Before providing an account for these cases however, I will

⁶⁶ Interview with Hertzfeld, Jeffrey 19 March 2007.

⁶⁷ See below, e.g. in the case of *Mihaly v Sri Lanka*.

⁶⁸ *Salini Construttori S.p.A. v Kingdom of Morocco*, ICSID case no. ARB/00/4, Decision of 23 July 2001.

⁶⁹ *Ibid.* para. 52.

present the objective characteristics used in order to establish if an asset constitutes an investment under the Convention. I do however wish to draw attention to the selectiveness of the tribunal, as not all criterion are applied in all cases.

4.2 Objective Criteria for the definition of investment

Schreuer suggests five criteria, characteristics i.e, that may be useful in trying to establish whether an asset constitutes an investment. These characteristics should however not be seen as jurisdictional requirements, but rather as guidance in cases where an asset is not covered by a non-exclusive list.⁷⁰ An investment shall for the purposes of the Convention have the following characteristics:

- i) a certain *duration*
As Rubins speculates, this criterion presumably relates to the Host State's desire to encourage commitment of capital. An investment project of limited duration may due to its unpredictability worsen financial instability rather than diminish it.⁷¹ However, a short-term investment need not be automatically excluded from the scope of investment.
- ii) involve a certain *regularity of profit and return*
Although an agreement containing a one-time lump sum does not necessarily have to be excluded from the scope of investment, it is untypical. Usually an expectation of return is present, even where no profit is made.⁷² In a concurring opinion in *CME v the*

⁷⁰ Schreuer, p. 140.

⁷¹ Rubins, p. 297.

⁷² Schreuer, p. 140.

Czech Republic, professor Brownie put forward that this was an essential aspect of an investment.⁷³

- iii) typically involve the assumption of *risk* by both sides Schreuer notes that this “is in part a function of duration and expectation of profit”.⁷⁴ Rubins also argues that it is the element of risk taking which necessitates international legal protection.⁷⁵
- iv) normally involve a *substantial* commitment or contribution; and This criterion of a certain magnitude was considered already during the negotiating history of the Convention, but was dismissed.⁷⁶ As Rubins points out, the criteria is not entirely convincing as a certain expenditure may be out of a great financial value for one company, whereas the same amount may be an incidental expense for another.⁷⁷ However, it is used by the tribunal and found in ICSID jurisprudence.
- v) be significant for the Host State’s *development*. This factor is argued to be part of the Convention’s object and purpose and is found in the preamble of the Convention.⁷⁸ Interestingly, it is as Rubin notes, the only criteria of the five that focuses on “the State’s motivation to accept and protect the operation in question.”⁷⁹ Delaume even suggests that the State’s viewpoint in this matter should be dominating in deciding on what constitutes an investment.⁸⁰

⁷³ *CME Czech Republic B.V. v The Czech Republic*, Final Award in UNCITRAL Arbitration Proceedings, 14 March 2003, Separate Opinion of Ian Brownlie.

⁷⁴ Schreuer, p. 140.

⁷⁵ Rubins, p. 298.

⁷⁶ See above under chapter 2.1.2.

⁷⁷ Rubins, p. 298.

⁷⁸ Delaume, *Le Centre International*, pp. 801,805.

⁷⁹ Rubins, p. 299.

⁸⁰ Delaume, p. 70.

4.3 ICSID Jurisprudence

4.3.1 Fedax N.V. v Venezuela

In *Fedax N.V. v Venezuela*⁸¹ the tribunal tried whether indirect investments were covered by the scope of ICSIDS jurisdiction under article 25 (1) of the Convention. The claimant had purchased promissory notes, issued by Venezuela, from a Venezuelan company. The respondent objected to ICSID jurisdiction, as the acquiring of promissory notes not could be considered a direct investment. The tribunal however, (referring to the *Holiday Inns v Morocco*⁸² decision) held that they were comparable to a loan, and therefore constituted an investment. In addition, the tribunal implied that jurisdiction can exist even in respect of investments that are not direct, as long as the dispute arises directly from such a transaction.⁸³ The tribunal also argued that the notion of investment must be interpreted in the light of the negotiating history of the Convention. Furthermore, the tribunal referred to the Netherlands-Venezuela BIT and noted that the signatories had intended a broad meaning for the term investment. Despite the fact that the BIT did not include indirect investments, the tribunal deduced a general global trend recognizing the validity of indirect investment and decided the BITs jurisdictional scope to include indirect investments. The arbitrators also looked at the importance of such transactions to international development in their assessment.⁸⁴

4.3.1.1 Conclusion of the case

The tribunal applied objective criteria and recognized the need for a modern interpretation of investment, and considered the role of international development. Also an indirect investment may constitute an investment for purposes of ICSID jurisdiction, given that the legal dispute is reasonably closely related to the underlying investment transaction.

⁸¹ *Fedax N.V. v Venezuela*, ICSID case no. ARB/96/3, Award of 11 July 1997.

⁸² *Holiday Inns S.A. and others v Morocco*, case no ARB/72/1, Decision on Jurisdiction, 12 May 1974.

⁸³ *Fedax N.V. v Venezuela*. See *inter alia* para. 40.

⁸⁴ *Ibid.* para. 34-35.

4.3.2 Mihaly v Sri Lanka

Many investment treaties do not extend to cover pre-investment expenditures. At the same time, there are cases where the parties explicitly have agreed upon the consent of allowing the ICSID arbitration clause to cover pre-investment expenditures. Yet, the establishment phase will not fall under the jurisdiction of the Washington Convention.⁸⁵ In the case of *Mihaly v Sri Lanka*⁸⁶, the claimant had signed a letter of intent with the government of Sri Lanka for the purposes of the construction of a power plant. After the claimant had made pre-investment expenditures during negotiations amounting to 2-4 per cent of the total projected investment value, the Sri Lankan government then refused to sign the agreement. The tribunal held that pre-investment expenditures, although rising to a level of several million dollars, did not constitute an investment under the US- Sri Lanka BIT or the Convention in order for the dispute to fall within the jurisdiction of the Centre. The tribunal relied largely on the fact that a letter of intent does not create a binding obligation for the parties. However, the tribunal carefully indicated that their decision was not made categorically and stated that:

“[If] the negotiations/.../had come to fruition/.../the moneys expended during the period of negotiations might have been capitalised as part of the cost of the project and thereby become part of the investment”.⁸⁷

One of the arbitrators, David Suratgar, argued that although there was no contractual liability arising from the letter of intent, Sri Lanka *could* still have been liable under Sri Lankan or international law, on the basis of its conduct after the award of the letter of intent. He then noted that had the expenditures been made through its local subsidiary, had the shareholdings in the operating company been considered as an investment under both the

⁸⁵ Schreuer, p. 130.

⁸⁶ *Mihaly International Corp. v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, 15 March 2002.

⁸⁷ *Ibid.* at 40.

Convention and the US-Sri Lanka BIT.⁸⁸ As Rubins concludes, the resulting value would have been imbued to a large degree in the market value of shares.⁸⁹ Although the outcome in *Mihaly v Sri Lanka* seems to correspond to the intention of the drafters of the Convention, i.e. for pre-investment expenditures not to be covered by the Convention, it seems to me the reasoning of the *magnitude* of the expenditures, is merely a method for reaching the decision. I further agree with Rubins who also states, the decision to some extent conflicts with the *lex specialis* of modern investment treaties stating that contractual rights, loans, permits and intellectual property should be considered investments. These are all “investment activities” that could be used long before formalising a made agreement.⁹⁰

4.3.2.1 Conclusion of the case

Expenses arising from planned or prospective investments are not covered by the scope of ICSID jurisdiction. A project must be commenced or formalized in order to qualify as an investment.

4.3.3 CSOB v Slovak Republic

In *CSOB v the Slovak Republic*⁹¹, the tribunal addressed the question if a loan could be considered an investment. The Czech and Slovak Republic, both being shareholders in the bank CSOB concluded a Consolidation Agreement as part of its privatization. The CSOB then transferred its non-performing loans in Slovakia to a Slovak collection agency. A loan was extended to the agency at the same time, for the transfer price. In order for the Slovak collection agency to be able to repay the extended loan to CSOB, the Slovak Republic agreed to cover the losses of the agency. The claimant, CSOB, argued that Slovakia was in breach of a contractual obligation, as it did not manage to cover the agency’s losses, hence disabling the collection agency to meet its loan obligations towards CSOB. Slovakia, in its turn,

⁸⁸ *Ibid.* Individual Concurring Opinion of David Suratgar, published at 16 ICSID Rev-FILJ 161 (2001).

⁸⁹ Rubins Noah, p. 303.

⁹⁰ *Ibid.* pp. 303-304.

⁹¹ *Ceskoslovenska obchodny banka a.s. v Slovak Republic*, ICSID case no. ARB/97/4, Decision on Jurisdiction, 24 May 1999.

argued that the loan from CSOB to the Slovak collection agency did not involve a transfer of resources into the Slovak Republic, and could therefore not be considered to constitute an investment. The tribunal concluded that the Czech-Slovak BIT was applicable as the parties had made a cross-reference to this in the underlying contract. It also held that the loan was to be considered an investment under the Czech-Slovak BIT as the treaty referred to a broad definition such as “assets” and “monetary receivables or claims”.⁹² For the purposes of the Convention, the tribunal held that Slovakia’s undertaking did not in itself constitute an investment, as it did not involve any “spending, outlays or expenditure of resources by CSOB in the Slovak Republic”⁹³, although an investment does not require “a physical transfer of funds”.⁹⁴ The tribunal also found that a transaction that forms an integral part of an overall operation could qualify as an investment.⁹⁵ Having established a close link between the Slovak Republic’s undertaking and the loan from CSOB to the collection agency, the tribunal then noted that loans, in principle, were not excluded from the scope of investment under the Convention, but that not all loans automatically qualify as an investment.⁹⁶ The tribunal instead tried the overall operation by the use of the “objective criterion” above, and found that the activities of CSOB were intended to *produce return*, were subject to an *element of risk* and involved a significant contribution by CSOB to the economic *development* of the Slovak Republic. The claim and the related loan were therefore considered to constitute an investment under the BIT as well the Convention.

4.3.3.1 Conclusion of the case

Loans and other similar transactions may qualify as investments if they to a certain extent meet the objective criteria described above, i.e. *substantial* contribution, *risk*, *duration* and relevance to economic *development*.

⁹² *Ibid.* para 77.

⁹³ *Ibid.* para. 69.

⁹⁴ *Ibid.* para. 78.

⁹⁵ *Ibid.* para. 72.

⁹⁶ *Ibid.* para. 75-77.

4.3.4 Salini v Morocco

In the above-mentioned case of *Salini v Morocco*, the claimant had entered into a contract for the construction of a highway in Morocco. The tribunal held that the construction contract qualified as an investment under the Italy-Morocco BIT as the treaty contained broad definition covering “rights to any contractual performance having economic value” and “any economic right conferred by law or contract”.⁹⁷ In considering the construction contract as an investment under the Convention, the tribunal applied the four following “objective criteria”: a substantial contribution, certain duration, an element of risk and a significant contribution to the economic development of Morocco. The tribunal found that all criteria were met. Regarding the element of risk, the tribunal noted that despite the parties had freely agreed to the risks of such a long term project, the investment fulfilled the criterion of risk as it was subject to the risk of increase in labour costs, changes of law and accident or damage to property, inter alia.⁹⁸ It is in my opinion, an interesting and broad way of finding a way for the investment to meet the criterion, as is the reasoning behind the fulfilment of substantial contributions. The tribunal found that as the claimant’s use of know-how (which had not been transferred) for the purposes of the highway construction in combination with a 3 % bank guarantee that the claimant had issued to cover performance as well as a bank loan, was enough to meet the criterion. Although the tribunal does not deal with the criterion of profit or return, it appears to me that there is a keenness to apply the “objective criteria”, even though this is done by stretching the reasoning behind the applicability of these. As there were no doubts the construction contract constituted an investment for the purposes of the BIT, it seems the tribunal strived to find a solution in line with the parties’ autonomy.

4.3.4.1 Conclusion of the case

Construction work may qualify as investment provided it meets the objective criteria, especially that of *risk*.

⁹⁷ The at the time applicable Italy-Morocco BIT article 1(c) and (e) and *Salini v Morocco*, para. 45-49.

⁹⁸ *Salini v Morocco*, para. 56.

4.3.5 Joy Mining v Egypt

In *Joy Mining v Egypt*⁹⁹, the Claimant had entered into a contract with the General Organization for Industrial and Mining Projects of the Arab Republic of Egypt (“IMC”) for the replacement of mining equipment, as well as the engineering, design and installation of the new equipment in Egypt. The claim upon Egypt concerned failure to release a bank performance guarantee, and the question arose if the guarantee could be considered an investment under the 1976 UK-Egypt BIT and the Convention. For the purposes of the BIT, the tribunal noted that bank performance guarantees are contingent liabilities, and that the guarantee in question had the feature of most complex sales contracts. Thus, it did not constitute an investment under the BIT. The tribunal then noted that there are limits as to how the parties may define an investment for ICSID purposes. By use of the objective criteria mentioned above, the tribunal then went on to try the contract between Joy and IMC on the whole, and noted that it constituted a sales contract, and not an investment. The related bank performance guarantee could therefore not be considered an investment under the Convention.

4.3.5.1 Conclusion of the case

By the use of objective criteria, the tribunal concluded that the underlying contract for a bank performance guarantee constituted a sales contract. Sales contracts do not fall under the jurisdiction of the Centre.

4.3.6 Autopista Concesionada v Venezuela

In *Autopista Concesionada v Venezuela*¹⁰⁰, the tribunal *sua sponte* examined if a transaction related to a construction project of building and operating a highway in Venezuela could fall within the scope of investment

⁹⁹ *Joy Mining Machinery Ltd. v The Arab Republic of Egypt*, ICSID case no. ARB/03/11, Award on Jurisdiction, 6 August 2004.

¹⁰⁰ *Autopista Concesionada de Venezuela C.A. v Bolivarian Republic of Venezuela*, ICSID case no. ARB/00/5, Award on Jurisdiction, 27 September 2001.

under the Convention. The tribunal noted that the parties in their contract expressly had stated the road works constituted an investment. It then went on to note that the *magnitude* of the resource commitment and the extended *duration* of the project, which clearly qualified the works as an investment under the Convention.¹⁰¹

4.3.6.1 Conclusion of the case

In considering the objective criteria *substantial* expenditure and *duration*, the tribunal held that construction activities were considered investments.

¹⁰¹ *Ibid.* para 101.

5 Closing comments

Considering that the Centre was a “sleeping beauty” for many years, investment disputes brought before the Centre are still a rather new phenomenon. Although this may serve as an explanation to why it has been so difficult to find the perfect interplay between BITs and the Washington Convention in recent years, the problem is serious, causing costly as well as lengthy preliminary hearings in determining the jurisdiction of the tribunal. Theory and reality are today divergent, in the sense that the theory behind the treaties is not always in line with the outcome of jurisprudence. To a certain extent, this may be a cause of treaty drafters’ attempt to broaden the jurisdiction of the Centre by widening the definition of investment. As stated earlier, this is not possible under the Convention. On the other hand, the lack of a clear definition in the Convention, may be a contributing factor there of.

The basic framework provides that state signatories are allowed to narrow the scope of investment by way of treaty. On the contrary, they are not allowed to extend the jurisdiction of the Centre by widening the definition. In practice, this outline is not always expressly followed. The tribunals have in cases such as *Salini v. Morocco*, regarded party autonomy, and by the use of objective criteria and far-fetched reasoning attempted to “match” investment under purposes of the BIT and the Convention. Thus, they have to some extent, indirectly disregarded the basic framework. At the same time, there is some feeling the notion of investment is becoming more narrow. This leaves investors uncertain as to whether an investment under a BIT will be regarded as an investment for the purposes of the Convention in ICSID arbitration.

As I see it, there are two main improvements that can be done in order to find an interplay between the different legal frameworks; BITs, the Convention and ICSID case law. The Centre can by consistent use of the

objective criteria presented, establish a firm body of case law as a guidance for interpretation of the Convention. This must however be done by consequent application of the same criteria in all cases. The criteria ought to be cumulative and should gradually clarify the extent of the criteria. This way it would be possible to tell what requirement there is regarding the magnitude of an investment for example. Furthermore, treaty drafters ought to use the same criteria as provided in jurisprudence, in creating new treaties. *Host States* would benefit from this as it would partially limit the scope of investments in the sense of liability. Investors of the *Home State* would also profit from this, as they would be able to figure out if they are protected under the treaty or not.

As investors not are signatories to BITs, there is not much they can do to protect themselves from this uncertainty. They do however have to alternative options. Some treaties contain with provisions enabling investors to choose dispute settlement under various sets of rules. One such option may be to use *ad hoc* arbitration under the UNCITRAL rules. As these rules do not contain a definition of investment, the definition will be based upon the wording of the treaty. Investors who know their type of investment is listed in a non-exhausting list of forms an investment may take, may therefore have greater chances to jurisdiction under alternative rules for dispute resolution. Investors may also enter into private agreements directly with a state. Such an agreement could contain a wording specific for the investment at question and refer to *ad hoc* arbitration under a chosen set of rules. The protection investors are entitled to under principles of international law and BITs would not necessarily automatically be excluded by such an agreement. Regarding the circumstances in *CME v the Czech Republic*¹⁰², it is however uncertain what position a State would take to such an agreement. In the case at hand, two arbitration proceedings were initiated in London and Stockholm by different claimants on the basis of two different BITs. The Czech Republic argued that the arbitration award in

¹⁰² *CME Czech Republic B.V. v The Czech Republic*, Final Award in UNCITRAL proceedings, 14 March 2003.

London had *res judicata* effect on the partial award issued in Stockholm. The tribunal noted that it was the Republic that had refused to consolidate the two proceedings. The Republic had argued that it was inappropriate as the proceedings concerned two different claimants and two different treaties. The tribunal in Stockholm thus held that the Republic had waived its right to a *res judicata* defense. Had this not been the case, it is still somewhat unclear what decision the tribunal would have reached. *Host States* may therefore want to be cautious about entering into such private agreements as stated above.

The lack of interplay between the Convention, BITs and jurisprudence opposes the purposes of the Convention. It is also contradictory to the objective of most BITs; to protect, promote and liberalize investments. In the long run this may limit where and when investors choose to make an investment. Today, the lack of interplay may serve as an explanation for why investment decisions seldom are enhanced by the existence of BITs.

Taking into consideration the enormous amounts of damages that may be awarded in investment disputes, there has for the past few years been a debate proposing the establishment of an appeal facility. In a paper of 2004, the ICSID Secretariat recognises that an “appeal mechanism would be intended to foster coherence and consistency in the case law”.¹⁰³ Although the Secretariat then goes on to argue that there has been no significant inconsistencies as a general feature of ICSID jurisprudence, I believe there is a desire from the Centre to foster consistency in ICSID case law.¹⁰⁴

Bearing in mind the US-Uruguay and Canada-Costa Rica BIT, there also appears to be a corresponding tendency in the BIT-movement, as treaties are becoming more favourable to the Host State. Whether this trend is good or not, may be hard to evaluate. However, it is important to keep the

¹⁰³ Possible Improvements of the Framework for ICSID Arbitration (22 October 2004) available on the Internet: <http://www.worldbank.org/icsid/highlights/improve-arb.htm> (accessed on 6 April 2007).

¹⁰⁴ *Ibid.*

Convention in mind, and for this reason, there is a point in narrowing the scope to cover investments of a certain calibre only. For disputes falling outside the scope of investment there are, as previously mentioned, other means of recourse. Nonetheless, there still needs to be flexibility in the notion of investment for new investment concepts, not forgetting the economic and political aspects of investments. Despite the arguments presented against the consistent use of objective criteria, I think it is a good way of allowing for flexibility, yet sharpening the definition.

The exact relation between a BIT and the Convention is interesting out of another point as well. The role of a BIT is to act as a legal framework for investments made by an investor from a *Home State* within the territory of the *Host State*. The question of their legal significance thusly creates further predicament, as it is arguable that BITs shall be considered as *lex specialis*, in which case the BIT would overrule the Convention.

On a final note, I would like to emphasize that the provided account for problems relating to jurisdictional objections on the basis of the notion of investment, is by all means non-exclusive. Nevertheless, I hope it serves as a guidance as to what obstacles an investor may encounter in considering judicial recourse in an investment dispute. It may also serve as a reminder for treaty drafters as well as State parties as to what ambiguities there are causing difficulties resulting from BITs and contrary wishes of the parties.

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