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Definition of Investment in International Investment Agreements

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Fair and Equitable Treatment

Mahnaz Malik

August 2009

Best Practice Advisory Bulletins

Foreign Investment for Sustainable Development Program

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1.0 Introduction

International investment agreements (IIAs) are designed to protect the investments of foreign investors in the state hosting the investment ("the host state"). The definition of the term *investment* in IIAs is critical because only the assets or interests of investors that fall within its scope are entitled to the protections of the treaty. The investor's asset or interest must qualify as an investment to form the subject-matter of an investor-state arbitration challenging violations by the host state of the treaty. Therefore, it is important that states define investment in their IIAs in a manner that reflects their understanding of the term rather than leaving arbitral tribunals with the discretion to decide the types of assets or interests that are protected investments under the treaty.

Almost all IIAs define the term investment. The definition of investment in most IIAs follows a broad, asset-based formulation created by capital exporting states to provide protection to an extensive range of their investors' assets. The recent rise of IIA arbitrations launched by investors against host states has revealed the expanse of assets that qualify as investments under the typical formulation. Respondent host states in IIA disputes have often challenged the jurisdiction of the arbitral tribunal by arguing that the investor's asset is not an "investment." For example, a contract between an investor and host state for the performance of certain pre-inspection services was held to constitute an investment under the treaty in question,[1] even though it would not have qualified as a foreign investment under the respondent state's law. States have often found that the definition of investment under their treaties does not match the definition of "foreign investment" under their domestic laws or their understanding of the term.

This advisory bulletin discusses the current practice in IIAs with respect to the definition of investment and the recent rulings of tribunals. It proposes a practical guide to the issues states may wish to consider when drafting the definition of investment in their treaties.

1.1 The Different Meanings of Investment

At first, defining investment may appear deceptively simple. The term forms part of everyday usage, which may give the impression that there is a common or shared understanding of the term. However, investment is a broad term invoking different meanings in everyday, economic and legal usage. In particular, the definition of investment has far-reaching legal implications in an IIA as it determines the scope of the treaty.

The commonly used terms *investment, foreign investment and foreign direct investment (FDI)* entail different meanings, varying in the breadth of assets they cover. The term *investment* is defined in *The Compact Oxford English Dictionary* as "1. the action or process of investing. 2. a thing worth buying because it may be profitable or useful in the future." Foreign investment is simply "investment originating from another country." The definition of investing[2] is similarly broad: "investing: the act of investing; laying out money or capital in an enterprise with the expectation of profit."

[1] Société Générale de Surveillance SA v. Pakistan, Decision on Objections to Jurisdiction, ICSID Case No ARB/01/13, (2003) 18 ICSID Rev—FILJ 301, IIC 223 (2003), (2003) 42 ILM 1290, (2005) 8 ICSID Rep 406, (2004) 131 Journal du Droit International Clunet 257, 6th August 2003, ICSID. The respondent state, Pakistan, argued that the investor, SGS's, activities under the Pre-Shipment Inspection (PSI) Agreement did not constitute an investment within the territory of Pakistan and within the meaning of *Article 2(1) of the Swiss-Pakistan BIT* because SGS's obligations were performed outside Pakistan. The tribunal held that the expenditures made by SGS pursuant to the PSI Agreement constituted an investment within the meaning of the *BIT and Article 25(1) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (18 March 1965) 575 UNTS 159, entered into force 14 October 1966* ("ICSID Convention," paragraph 140). The non-exhaustive definition of investment in the BIT was broad enough to encompass the PSI Agreement because the Agreement's performance gave rise to "claims of money." SGS was conferred with a public law concession, and the rights exercised by SGS. were "rights given by law" and by "contract."

[2] Source: Princeton University Wordnet, wordnet.princeton.edu/, accessed on September 21, 2009

On the other hand, FDI has a more specific and commonly understood definition in economic terms. *The OECD Benchmark Definition of Foreign Direct Investment Third Edition 1999: Main concepts and definitions* states:

> *Foreign direct investment reflects the objective of obtaining a lasting interest by a resident entity in one economy ("direct investor") in an entity resident in an economy other than that of the investor ("direct investment enterprise"). The lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise and a significant degree of influence on the management of the enterprise. Direct investment involves both the initial transaction between the two entities and all subsequent capital transactions between them and among affiliated enterprises, both incorporated and unincorporated.*[3]

It is the pursuit of foreign investment, usually FDI, which leads states to negotiate and conclude IIAs. FDI has a more restricted meaning than the general term of investment, although states often tend to use the term FDI and foreign investment interchangeably. In the majority of IIAs, the definition of investment goes beyond the meaning associated with FDI. For example, while the Turkish investment law contains a restricted definition of FDI, Turkey's IIAs often adopt the typical broad formulation for defining investment.

Turkey's *Foreign Investment Law No. 4875*,[4] Article 2(b) defines foreign direct investment as:

- b. *Foreign direct investment:*
  - i. *Establishing a new company or branch of a foreign company by foreign investor,*
  - ii. *Share acquisitions of a company established in Turkey (any percentage of shares acquired outside the stock exchange or 10 percent or more of the shares or voting power of a company acquired through the stock exchange) by means of, but not limited to the following economic assets:*

1. *Assets acquired from abroad by the foreign investor:*
   - *Capital in cash in the form of convertible currency bought and sold by the Central Bank of the Republic of Turkey,*
   - *Stocks and bonds of foreign companies (excluding government bonds),*
   - *Machinery and equipment,*
   - *Industrial and intellectual property rights;*

2. *Assets acquired from Turkey by foreign investor:*
   - *Reinvested earnings, revenues, financial claims, or any other investment-related rights of financial value,*
   - *Commercial rights for the exploration and extraction of natural resources.*

In contrast, the definition of investment in the Turkey-Netherlands BIT[5] is broader and follows the typical formulation found in such treaties. Article 2(b) of the Turkey-Netherlands BIT provides:

- b. *'investment' means every kind of asset such as equity, debt, claims and service and investment contracts and includes:*
  - i. *Tangible and intangible property, including rights such as mortgages, liens and pledges;*
  - ii. *Shares of stock or other interests in a company or interests in the assets thereof;*
  - iii. *A claim to money or a claim to performance having economic value and associated with an investment;*
  - iv. *Industrial property rights, including rights with respect to patents, trademark, trade names, industrial designs and know-how and goodwill and copyrights;*
  - v. *any right conferred by law or contract, and any licences and permits pursuant to law.*

[3] Fifth Edition (BPM5) (Washington, D.C., International Monetary Fund, 1993) and the Detailed Benchmark Definition of Foreign Direct Investment: Third Edition (BD3) (Paris, Organisation for Economic Co-operation and Development, 1996).
[4] Date of Passage: June 5, 2003; Date of Official Gazette: June 17, 2003.
[5] Agreement on Reciprocal Encouragement and Protection of Investments between the Kingdom of the Netherlands and the Republic of Turkey Trb. 1986, 53 (Date signed: March 27, 1986)

Summary remarks: States should be clear about the type of investment for which they wish to provide protection in the treaty (i.e., is it only for FDI or both direct and indirect forms of investment?) and ensure that the definition of investment in IIAs reflects their understanding of the term

1.2 The Typical Broad, Asset-based Definition of Investment

An observer of the universe of over 2600 BITs will find a striking similarity in most of the treaties on the definition of investment. This formulation has changed only slightly for almost half a century. Germany signed the first BIT ever with Pakistan in 1959, and subsequent IIAs have been modelled on the template created by Germany's BIT programme. However, it was Germany's BIT with Malaysia in 1960 that saw the creation of the typical formulation found in the majority of IIAs today. The German Model Treaty Concerning the Reciprocal Encouragement and Protection of Investment issued by the Federal Ministry of Economics and Labour in 2005 ("the German Model Treaty")[6] contains a definition of investment that is almost identical to the Germany-Malaysia Bilateral Investment Treaty (BIT) concluded in 1960.

Article 1 of the German Model Treaty defines investment as follows:

Investment shall comprise every kind of asset, in particular

I. *Movable and immovable property as well as any other rights in rem, such as mortgages, liens and pledges;*
II. *Shares of companies and other kinds of interest in companies;*
III. *Claims to money which has been used to create an economic value or claims to any performance having an economic value;*
IV. *Intellectual property rights, in particular copyrights, patents, utility-model patents, industrial designs, trade-marks, trade-names, trade and business secrets, technical processes, know-how, and good will;*
V. *Business concessions under public law, including concessions to search for, extract and exploit natural resources.*

The non-exhaustive asset-based definition in the German Model Treaty is typical of most BITs, in which investment is described as "every kind of asset," or "any kind of asset" with the listed categories only serving as examples of the types of assets covered. The German formulation of investment also mirrors those used by other European countries, such as the U.K., Netherlands and France in their BIT's. However, the adherence to this formulation extends beyond European countries. In fact, it can be found in the majority of IIAs across the world, including regional arrangements. For example, the Indian Model Text of the Bilateral Investment Promotion and Protection Agreement follows the German approach by using an open-ended definition of investment to mean "every kind of asset" with minor variations.

The rise of investor-state claims has brought into focus the broad range of assets that qualify as investments under the typical formulation found in IIAs. The findings of arbitral tribunals are discussed in the next section. States have reacted to these interpretations by drafting the definition of investment with greater detail and precision in recent texts. This advisory bulletin notes the approaches taken in the recent model texts of the United States and Canada. It also discusses the definition of investment in the COMESA and ASEAN regional investment agreements.

Summary remarks: While a large number of IIAs adopt the typical 50 year-old formulation, recent treaties have developed language to clarify the scope of the definition of investment.

[6] Sent by the German Federal Ministry of Economics and Labour to Stephanie Muche in January 2006.

2.0 How Tribunals Have Interpreted the Notion of "Investment" in IIAs

The rise of investment treaty awards has illustrated the implications of including a broad definition of investment in IIAs. Respondent states have often found themselves surprised at the type of asset that is considered investment under the IIA. The meaning of investment in IIAs has extended well beyond what is considered foreign investment under a host state's domestic laws and regulations in many cases. In fact, respondent states frequently challenge the jurisdiction of arbitral tribunals on the ground that the investor's asset or interest does not constitute an investment.

2.1 The Definition of Investment in IIAs

The typical formulation of investment in IIAs, which provides for "every kind of asset" with an illustrative list of examples has been interpreted by tribunals to protect a broad range of assets. Article 31 of the Vienna Convention on the Law of Treaties (1969)[7] provides that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Applying this approach, any asset belonging to an investor could potentially qualify as an investment under the typical formulation in IIAs. However, tribunals have usually matched the investor's interest with the types of assets defined as examples of investment under the IIA, rather than to base their decisions on the broad phrase "every kind of asset."[8] For example, the tribunals in *Petrobart v. Kyrgyz Republic*[9] and *Jan De Nul N.V. v. Arab Republic of Egypt*[10] did not base their decisions on the broad opening phrases in the investment definitions, "every kind of asset" and "any kind of assets" respectively. Instead, before deciding that the asset in question was an "investment," the tribunals sought confirmation from the non-exhaustive list following the introductory phrase. Still, the tribunal in the recent arbitration of *Saipem S.p.A. v. Bangladesh*[11] boldly relied on the general phrase "any kind of property," stating that:

> *Article 1(1) of the BIT gives a general definition of investment as 'any kind of property'. On its face this general definition is very broad. In the light of the conclusion reached above according to which Saipem made an investment within the meaning of Article 25 of the ICSID Convention, the Tribunal fails to see how the operation at issue could not be considered as a kind of property protected by the BIT.*

If the arbitration is administered under the ICSID Convention,[12] then the investment must not only qualify as an investment under the IIA but also satisfy the requirements of being an "investment" under the ICSID Convention. This is often described as a "double barrel" test, in which the investor will need to persuade the tribunal that the definition of investment is met under both the applicable IIA and Article 25 of the ICSID Convention. In fact, a number of arbitrations have turned on the issue of whether a particular interest is covered by the definition of investment under both these instruments. The answer to the question determines whether the tribunal has the jurisdiction to hear the "investment dispute." The challenge for arbitrators has been the fact that the ICSID Convention does not actually define investment, which has led to different interpretative approaches. The majority of known investment treaty arbitrations are filed at

[7] Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, p. 331

[8] For example, Petrobart v. Kyrgyz Republic, Award, DCC Case 126/2003 (SCC, 2005, Danelius c, Bright & Smets) and Jan De Nul N.V. v. Arab Republic of Egypt (Jurisdiction) ICSID Case No. ARB/04/13 (ICSID 2006, Kaufmann-Kohler P, Mayer & Stern).

[9] Award, DCC Case 126/2003 (SCC, 2005, Danelius c,Bright & Smets)

[10] Jurisdiction ICSID Case No. ARB/04/13 (ICSID 2006, Kaufmann-Kohler P, Mayer & Stern).

[11] Decision on Jurisdiction and Recommendation on Provisional Measures, March 21, 2007, Saipem S.p.A. v. The Peoples Republic of Bangladesh, ICSID Case No. ARB/05/07, available on-line at: www.investmentclaims.com

[12] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (signed 18 March 1965), entered into force 14 October 1966 ("the ICSID Convention")

ICSID. Article 25 of the ICSID Convention limits the Centre's jurisdiction to legal disputes arising "directly out of an investment." As the term investment has not been defined in the ICSID Convention, tribunals have used their discretion to interpret it. The recent rise of investor-state arbitration has revealed a diverse range of assets that have satisfied the test of being an "investment" under the appropriate treaties as well as the ICSID Convention.

It is possible for a particular asset to constitute an investment under an investment treaty but not one under Article 25 of the ICSID Convention. While in an ICSID arbitration, the definitional threshold must be met under both the IIA and the ICSID Convention, non-ICSID arbitrations only require the test in the IIA to be completed. In *Petrobart v. Kyrgz Republic*,[13] a Stockholm Chamber of Commerce (SCC) arbitration arising out of the Energy Charter Treaty (ECT),[14] the tribunal found an investment to exist under the treaty. The dispute in Petrobart arose out of a contract to sell 200,000 tons of gas condensate over a period of a year. The tribunal made reference to Fedax[15] to support the proposition that the term investment can have a wide meaning, but it nevertheless approached the issue differently because in contrast to Fedax, this arbitration was administered under the SCC Arbitration Rules, and not ICSID. Accordingly, the tribunal relied solely on the broad definition of investment in the ECT, which expressly included such contracts. The tribunal therefore did not consider any "limiting phrases," such as requiring the asset to display the characteristics of an investment as required in the ICSID arbitration. A number of states, including the United States, are now adding such qualifying language to the definition of investment in treaties to create conformity between jurisdictional threshold of ICSID and non-ICSID arbitrations.

2.2 Investment Pursuant to the ICSID Convention

As a large number of IIA arbitrations are held pursuant to the ICSID Convention, tribunals have had to grapple with the issue of defining investment under the Convention in addition to the IIA. The awards available so far reveal that the approaches of arbitral tribunals to defining investment under the ICSID Convention can be grouped under either a subjective or an objective test.

2.2.1 The objective approach

The so-called objective test states that the ICSID Convention entails objective requirements to define an investment. Thus, state parties in the treaty cannot determine the definition of investment for the purposes of the ICSID Convention for tribunals following the objective test to determine investment. In contrast, the subjective approach relies on the parties' consent to ICSID arbitration to determine the notion of investment as set out in their IIA (see for example: *Antoine Goetz and others v. Republic of Burundi*[16]).

The first publicly known award to consider the meaning of investment in a detailed manner was *Fedax NV. v. Republic of Venezuela*.[17] The investor, Fedax, was the beneficiary, by way of endorsement, of debt instruments issued by Venezuela. The respondent state, Venezuela, argued that Fedax had not made a direct investment into its territory involving a long term transfer of financial resources. The tribunal rejected this argument and adopted an approach to the effect, that

[13] Petrobart v. Kyrgyz Republic, Award, DCC Case 126/2003 (SCC, 2005, Danelius c,Bright & Smets)

[14] The ECT's broad definition of investment includes "Economic Activity in the Energy Sector," which in turn refers to a further term, "economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products." Thus, marketing and sale were explicitly covered by the ECT's definition of investment with no exclusion based upon concepts such as duration or importance for the host state economy.

[15] Fedax NV. v. Venezuela, Decision on Jurisdiction, ICSID Case No ARB/96/3, IIC 101 (1997), (2002) 5 ICSID Rep 183, (1998) 37 ILM 1378, (1999) XXIVa YB Com Arb 23, (1999) 126 JDI 278, 11 July 1997, ICSID

[16] ICSID Case No ARB/95/3; 15 ICSID Rev—FILJ 457 (2000), 10 February 1999, at para 83

[17] Fedax NV. v. Republic of Venezuela (Jurisdiction) 5 ICSID Rep 183 (ICSID, 1997, Orrego Vicuna P, Heath & Owen)

the basic features of an investment have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host state's development.

The tribunal noted, in particular, the significant relationship between the transaction and the host state's development. Another important finding by the tribunal was the rejection of Venezuela's contention that the dispute did not arise directly out of an investment because the disputed transaction was not a direct foreign investment. The tribunal stated that the term *directly* in Article 25 of the ICSID Convention related to the fact that the dispute should arise directly out of the investment, and did not apply to the definition of the investment itself. Accordingly, the tribunal in Fedax held that jurisdiction could exist even with respect to investments that are not made directly into the host state's economy, as long as the dispute arises directly from the investment in question.

Although there is no concept of binding precedent in international investment law, the Fedax approach was followed by a number of awards, for example in *Consortium RFCC v. Kingdom of Morocco*[18] and more famously *Salini Costruttori S.p.A. v. Kingdom of Morocco*.[19] In *Salini v. Morocco*, the tribunal, while recognizing that the parties could, in principle, agree on the kind of disputes that could be submitted to arbitration under the treaty, went a step further than in Fedax and explicitly recognized the existence of objective criteria that have to be met if a particular asset is to be considered an "investment" for the purposes of the ICSID Convention. The tribunal considered that its jurisdiction depended upon not only the existence of an "investment" within the meaning of the applicable IIA, in this case the BIT between Italy and Morocco (1990), but also on the basis of the ICSID Convention, in accordance with case law. *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco*[20] is often quoted as the key case espousing the objective. *Salini* required five conditions to identify such an investment under the ICSID convention:

i. Duration;
ii. Regularity of profit and return;
iii. Assumption of risk;
iv. Substantial commitment; and
v. Significance for the host state's development.

Although there is no concept of binding precedent in investment treaty jurisprudence, subsequent tribunals have referred to the Salini approach. The tribunal in *Joy Mining v. Egypt*[21] further developed the Fedax and Salini approaches to find that the investor's assets, in this case bank guarantees, had failed to satisfy the test of what constituted an investment under the ICSID Convention. The tribunal was clear in holding that: "[t]he parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention."

Thus, according to this ruling the parties' definition of an investment under the IIA must also meet the objective criteria of a definition under the ICSID Convention.

[18] Consortium RFCC v. Morocco, Award, ICSID Case No ARB/00/6, IIC 76 (2003), (2005) 20 ICSID Rev. - FILJ 391, despatched 22nd December 2003, ICSID

[19] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan, Award, ICSID Case No ARB/02/13, IIC 208 (2006), despatched 31 January 2006, ICSID

[20] ICSID Case No ARB/00/4; 42 ILM 609 (2003), 23 July 2001, at para 53

[21] Joy Mining Machinery Ltd v. Egypt, Award on jurisdiction, ICSID Case No ARB/03/11; IIC 147 (2004); 19 ICSID Rev—Foreign Investment L J 486 (2004); (2005) 132 Journal du droit international 163

Recently, a number of decisions have also determined whether the investment was made within the definition of Article 25 of the ICSID Convention. In *Saipem S.p.A. v. Bangladesh*[22], the tribunal applied the so-called Salini test[23] in order to hold that the investor had made an investment within the meaning of Article 25 of the ICSID Convention. However, not all awards have been aligned with the Salini criteria.

The recent *Phoenix v. Czech Republic*[24] award disqualified a claim by the Israeli-based Phoenix Action Ltd., concluding that its purchase of two Czech companies was solely a pretext for exploiting the Israel-Czech Republic BIT. The tribunal held that although at first sight the investor's operation appeared to be an investment, it could not be a protected investment under the treaty because it was not made in good faith and constituted an abuse of rights under the investment treaty regime. The tribunal started with the so-called Salini criteria but modified this significantly as follows: [25]

> *To summarize all the requirements for an investment to benefit from the international protection of ICSID, the Tribunal considers that the following six elements have to be taken into account:*
>
> *1— a contribution in money or other assets;*
> *2— a certain duration;*
> *3— an element of risk;*
> *4— an operation made in order to develop an economic activity in the host State;*
> *5— assets invested in accordance with the laws of the host State;*
> *6— assets invested bona fide.*

The Phoenix tribunal took issue with the fourth criterion in the Salini test—contribution to the host state's development—on the premise that determining an investment's contribution to development is "impossible to ascertain." Instead, the tribunal favoured "a less ambitious approach," and proceeded to consider if there had been a contribution to the economy of the host state. The Phoenix tribunal unanimously rejected the notion that a contribution to development should be criteria of an ICSID investment. The tribunal also added two further criteria to the Salini test, that is, whether the assets were invested in accordance with the laws of the host state and whether there was a bona fide investment of those assets. Phoenix Action's claim failed to meet the tribunal's benchmark for of bona fide investment as the investment. The tribunal stated:

> *It is the duty of the Tribunal not to protect such an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs. It is indeed the Tribunal's view that to accept jurisdiction in this case would go against the basic objectives underlying the ICSID Convention as well as those of bilateral investment treaties.*[26]

The Phoenix award shows that tribunals will freely modify Salini criteria even if following the so-called objective approach.

[22] Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, available on-line at: www.investmentclaims.com
[23] The Salini criteria was: (i) duration; (ii) regularity of profit and return; (iii) assumption of risk; (iv) substantial commitment; and (v) significance for the host state's development
[24] Phoenix Action Limited v. Czech Republic, Award, ICSID Case No ARB/06/5, IIC 367 (2009), 9 April 2009, despatched 15th April 2009, ICSID
[25] Para 114, Ibid
[26] Para 144, Phoenix Action Limited v. Czech Republic, Award, ICSID Case No ARB/06/5, IIC 367 (2009), 9th April 2009, despatched 15th April 2009, ICSID

In another case, *Malaysian Historical Salvors Sdn, Bhd v. Malaysia*[27] (which has been the subject of a recent annulment decision as discussed below), the sole arbitrator emphasized the apparent divergence in the arbitral practice with regard to the definition of "investment" for the purposes of ICSID jurisdiction. However, he adopted a "fact-specific and holistic assessment." The arbitrator concluded that the investor's asset—an underwater salvaging project in Malaysia—failed the definitional test of "investment" under Article 25 of the ICSID Convention. The arbitrator noted that "the question of contribution to the host State's economic development assumes significant importance because the other typical hallmarks of "investment are either not decisive or appear only to be superficially satisfied." He then found that the project "did not benefit the Malaysian public interest in a material way or serve to benefit the Malaysian economy in the sense developed by ICSID jurisprudence, namely that the contributions were significant."

This jurisdictional decision in Malaysian Historical Salvors has been annulled by the ICSID Annulment Committee's recent award,[28] however. The majority in the ICSID Annulment Committee ruling on the Malaysian Historical Salvers decision concluded that the sole arbitrator had "manifestly exceeded" his powers as arbitrator by concluding that the investment in a marine salvage operation had not made a significant contribution to the Malaysian economy, and therefore fell outside the scope of the ICSID Convention. The dissenting member of the Committee found that the contribution to the host state's economic development was an essential hallmark of an investment under the ICSID Convention.

The majority of the ICSID Annulment Committee in the Malaysian Historical Salvers case took issue with the jurisdiction award:

1. First, for its failure to consider the Malaysia-UK BIT, which provided a broad definition of investment. The sole arbitrator had considered it unnecessary to apply the Malaysia-UK BIT, reasoning that the ICSID Convention formed the "outer-limits" of ICSID's jurisdiction, and therefore the definition given to investment in the BIT would not alter his decision. However, according to the majority of the ICSID Annulment Committee, ignoring the BIT's definition of investment undermined the importance of these treaties in granting jurisdiction to ICSID.
2. Second, while the majority acknowledged that there were arbitration awards that considered economic development as an important criteria for an ICSID investment, they believed that the sole arbitrator erred by elevating it to a jurisdictional condition.
3. Third, in concluding that an ICSID investment must make a significant contribution to economic development, the majority Committee members found that the sole arbitrator had failed to account for the fact that the drafters of the ICSID Convention purposely decided not to establish a monetary baseline for ICSID investments.

The dissenting member of the Annulment Committee made the case for investments to demonstrate a significant contribution to economic development if an ICSID tribunal is to hold jurisdiction. He took account of the fact that ICSID operates under the auspices of the World Bank, an intergovernmental organization that offers financing to governments in an effort to alleviate poverty. He also referred to the Preamble of the ICSID Convention, which considers "the need for international operation for economic development, and the role of private international investment therein."

The dissenting member believed that these facts distinguish ICSID from other international arbitration institutions, as its overarching objective is economic development. The emphasis future tribunals will place on the development requirement when ascertaining investment remains to be seen.

[27] Award on jurisdiction; *Malaysian Historical Salvors Sdn Bhd v. Malaysia*, ICSID Case No ARB/05/10; IIC 289 (2007), 10 May 2007

[28] Malaysian Historical Salvors Sdn Bhd v. Malaysia, Decision on the Application for Annulment, ICSID Case No ARB/05/10; IIC 372 (2009)

2.2.2 The subjective approach

Other tribunals have explicitly rejected the objective test, which requires the definition of investment to meet an independent criterion under the ICSID Convention, and have followed the so-called *subjective approach*. The subjective approach focuses on the state parties' definition of investment in the IIA, and does not enforce an independent requirement to be met for the purposes of the ICSID Convention. For example, in *M.C.I. Power Group L.C. v. Ecuador*,[29] which concerned a power plant investment in Ecuador, the tribunal concluded that the dispute at hand indeed arose out of an "investment" as defined by Article 25 of the ICSID Convention. The tribunal held:

From a simple reading of Article 25(1), the Tribunal recognizes that the ICSID Convention does not define the term "investments". The Tribunal notes that numerous arbitral precedents confirm the statement in the Report of the Executive Directors of the World Bank that the Convention does not define the term "investments" because it wants to leave the parties free to decide what class of disputes they would submit to the ICSID [. . .] The BIT indicates in its Article 1 which investments are to be protected under it. Thus, the BIT complements Article 25 of the ICSID Convention, for purposes of defining the Competence of the Tribunal with respect to any legal dispute arising directly out of an investment.

The majority of the ICSID Annulment Committee in the Malaysian Historical Salvors case was also clear on their rejection of the Salini criteria:

> *While this Committee's majority has every respect for the authors of the Salini v. Morocco Award and those that have followed it, such as the Award in Joy Mining v. Egypt, and for commentators who have adopted a like stance—and, it need hardly add, for its distinguished co-arbitrator who attaches an acute Dissent to this Decision—it gives precedence to awards and analyses that are consistent with its approach, which it finds consonant with the intentions of the Parties to the ICSID Convention.*

As a basis for its view, the Malaysian Historical Salvors Annulment Committee members quoted the following passages from the *Biwater v. Tanzania*[30] award as follows:

> *The Criteria for an 'Investment': An initial point arises as to the relevant test to be applied. In advancing submissions on Article 25 of the ICSID Convention, parties not infrequently begin with the proposition that the term 'investment' is not defined in the ICSID Convention, and then proceed to apply each of the five criteria, or benchmarks, that were originally suggested by the arbitral tribunal in Fedax v. Venezuela, and re-stated (notably) in Salini v. Morocco, namely (i) duration; (ii) regularity of profit and return; (iii) assumption of risk; (iv) substantial commitment; and (v) significance for the host State's development [citations omitted].*
>
> *In the Tribunal's view, there is no basis for a rote, or overly strict, application of the five Salini criteria in every case. These criteria are not fixed or mandatory as a matter of law. They do not appear in the ICSID Convention. On the contrary, it is clear from the travaux préparatoires of the Convention that several attempts to incorporate a definition of 'investment' were made, but ultimately did not succeed. In the end, the term was left intentionally undefined, with the expectation (inter alia) that a definition could be the subject of agreement as between Contracting States. Hence the following oft-quoted passage in the Report of the Executive Directors: [. . .] [citations omitted].*

[29] MCI Power Group LC and New Turbine Incorporated v. Ecuador, Award, ICSID Case No ARB/03/6, IIC 296 (2007), 26th July 2007, despatched 31st July 2007, ICSID

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

> *Given that the Convention was not drafted with a strict, objective, definition of 'investment', it is doubtful that arbitral tribunals sitting in individual cases should impose one such definition which would be applicable in all cases and for all purposes…*
>
> *Further, the Salini Test itself is problematic if, as some tribunals have found, the 'typical characteristics' of an investment as identified in that decision are elevated into a fixed and inflexible test, and if transactions are to be presumed excluded from the ICSID Convention unless each of the five criteria are satisfied. This risks the arbitrary exclusion of certain types of transaction from the scope of the Convention. It also leads to a definition that may contradict individual agreements (as here), as well as a developing consensus in parts of the world as to the meaning of 'investment' (as expressed, e.g., in bilateral investment treaties). If very substantial numbers of BITs across the world express the definition of 'investment' more broadly than the Salini Test, and if this constitutes any type of international consensus, it is difficult to see why the ICSID Convention ought to be read more narrowly.*
>
> *The Arbitral Tribunal therefore considers that a more flexible and pragmatic approach to the meaning of 'investment' is appropriate, which takes into account the features identified in Salini, but along with all the circumstances of the case, including the nature of the instrument containing the relevant consent to ICSID.*
>
> *The Arbitral Tribunal notes in this regard that, over the years, many tribunals have approached the issue of the meaning of 'investment' by reference to the parties' agreement, rather than imposing a strict autonomous definition as per the Salini Test [citation omitted].*

The above-mentioned findings of tribunals raise concerns for states defining investment in their treaties when opting for arbitration under the ICSID Convention as the tribunals have a wide discretion to determine if the covered investment under the IIA also meets the test of an investment under Article 25. The fact that the ICSID Convention does not define the term investment leaves tribunals with considerable discretion in determining if the particular asset or interest satisfies the criteria of an investment under both instruments, in order to determine their jurisdiction.

States have reacted to this uncertainty by providing detailed criteria for defining investments in the IIAs themselves. To some extent, recent treaties reflect the first three criteria in the Salini test, such as for example the U.S. Model BIT.

Summary remarks: The definition of investment in IIAs should be drafted in a way that takes into account the diverging views found in arbitral decisions. If states opt for ICSID arbitration they should bear in mind that some tribunals may apply an objective test approach, requiring the investor's asset to meet the definition of investment pursuant to the ICSID convention in addition to the criteria under the IIA. However, some tribunals apply a subjective approach that builds entirely on the language used in the IIA. The language of the IIA will be therefore be the determining factor and must be carefully thought through and drafted. Further, since IIAs typically allow the investor to choose among arbitral rules in addition to ICSID, the definition of investment in the IIA will be of additional importance. Consequently, it is essential for states to design the definition of investment in the IIA with sufficient detail to reflect their understanding of its scope.

3.0 The Definition of Investment in Recent Treaties

3.1 The Classical Broad Definition of Investment

The last few years have seen states define "investment" with greater detail, albeit to different degrees and to suit their particular objectives, in IIAs. Some recent IIAs have rejected the typical formulation, which states that investment includes "every kind of asset." This formulation is typically accompanied by a non-exhaustive list of examples of the types of assets covered by this definition. The shortcomings of the typical formulation is obvious; it does not bring in the criteria often associated with even the common, everyday understanding of investment, such as an expectation of profit, an element of risk and a certain duration. The impact of this very general and broad formulation for defining of investment ultimately leads to a wide scope of application of the IIA.

An example of a typical formulation is contained in the German Model BIT that describes investment as "every kind of asset" and provides for the following examples of assets deemed to qualify as investments:

- *Movable and immovable property and any other property rights such as mortgages, liens or pledges*

Both movable and immovable properties are covered. Property rights are broadly defined without any qualification that this property be linked to an enterprise or used for a business purpose. Similarly, an extensive list of movable property, such as from vehicles to computers, may also be covered without there being a requirement for a connection with a business or enterprise.

- *Shares of a company and other kinds of interest in companies*

Not only shares in companies are termed as an investment, but a broader variety of interests and rights in companies are also included. This can be interpreted to cover a wide variety of modern commercial interests in companies. The reference to "other kinds of interests in companies" is wide and may be interpreted to extend beyond proprietary or participatory interests in companies, in particular, for example, debentures and other debt-type instruments. Moreover, it would also include portfolio investment. For example, the COMESA Investment Agreement expressly excludes portfolio investment from this category (see below).

- *Claim to money that has been used to create an economic value or to any performance having an economic value*

The reference to claims to money or to any performance having an economic value potentially covers a variety of commercial contracts and transactions, including even those for the sales of goods transactions and sovereign loan agreements, which are not commonly associated with FDI. The inclusion of sovereign debt could be of particular concern to developing states with heavy external debt. There is no qualification specifically providing that investment does not cover claims to money derived from the sale of goods or services contracts or sovereign loans.

- *Intellectual property rights, in particular copyrights, patents, utility-model patents, industrial designs, trademarks, trade names, trade and business secrets, technical processes, know-how, and good will*

The German Model Treaty covers intellectual property rights *per se*, without any requirement that these intellectual property rights be connected to an investment operating in the host state. There has not been an arbitration under a BIT premised on an intellectual property right (IPR) asset. However, there is a view that it will only be a matter of time before IPR issues find their way into BIT arbitration claims. This may be of particular concern to those host states where IPR protection is weak. The COMESA Investment Agreement provides that the IPR has to be connected with an investment in the host state.

- *Business concessions under public law, including concessions to search for, extract and exploit natural resources*

The German Model Treaty's definition of investment covers business concessions conferred by public law, including concessions to search for, extract or exploit natural resources in the host state. Therefore, a concession, for example to search for gas, in itself would be an investment even if the investor has not yet laid out any funds or resources for actual exploration.

Overall, the definition of investment in the German Model Treaty is broad, reflecting the approach in the majority of the German as well as of other EU and North American BITs. Investment in the German Model Treaty includes a range of tangible and intangible property and contractual rights beyond the classic forms of foreign direct investment, i.e. "the laying out of money or property in business ventures so that it may produce a revenue or income." Returns on the investment are also offered varying degrees of protection.

Although the German Model BIT is dated 2005, it reflects the approach developed half a century ago in the early 1960s. Indeed, a large number of states continue to use the traditional formulation in their treaties. For example, the Japan-Laos BIT (2008)[31] and the Japan-Cambodia BIT (2007)[32] follow the traditional approach:

Article 1[33]

For the purposes of this Agreement,

(1) The term "investments" means every kind of asset owned or controlled, directly or indirectly, by an investor, including:

- *a. an enterprise;*
- *b. shares, stocks or other forms of equity participation in an enterprise, including rights derived therefrom;*
- *c. bonds, debentures, loans and other forms of debt, including rights derived therefrom;*
- *d. rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;*
- *e. claims to money and to any performance under contract having a financial value;*
- *f. intellectual property rights, including copy rights and related rights, patent rights and rights relating to utility models, trademarks, industrial designs, layout-designs of integrated circuits, new varieties of plants, trade names, indications of source or geographical indications and undisclosed information;*
- *g. rights conferred pursuant to laws and regulations or contracts such as concessions, licences, authorizations, and permits, including those for the exploration and exploitation of natural resources; and*
- *h. any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges.*

Investments include the amounts yielded by investments, in particular, profit, interest, capital gains, dividends, royalties and fees. A change in the form in which assets are invested does not affect their character as investments.

[31] Agreement between Japan and the Lao People's Democratic Republic for the Liberalization, Promotion and Protection of Investment (Date signed: 16 January 2008)
[32] Agreement between Japan and the Kingdom of Cambodia for the Liberalization, Promotion and Protection of Investment (Date signed: 14 June 2007)
[33] Article 1 of the Japan-Cambodia BIT (2007)

A number of recent treaties have qualified or modified this definition to improve clarity and reduce the tribunal's scope of discretion. The torch bearers in this process have been Canada and U.S., who revised their model IIAs in the wake of investor challenges under Chapter 11 of NAFTA.

3.2 The Canadian Exhaustive Approach

The Canadian Model Foreign Investment Protection Agreement or FIPA (2003) sets out an exhaustive or closed list of assets that qualify as investment. It also contains specific exclusions, such as claims to money arising out of commercial contracts for the sale of goods or services between national enterprises in different party states and financial transactions that do not involve the acquisition of property. This approach ensures that anything not listed in the definition of investment cannot qualify as an investment. The approach is therefore more predictable than the typical broad non-exhaustive asset-based definition.

Canadian FIPA definition:

Investment means:

(I) an enterprise;

(II) an equity security of an enterprise;

(III) a debt security of an enterprise

(i) where the enterprise is an affiliate of the investor, or
(ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise;

(IV) a loan to an enterprise

(i) where the enterprise is an affiliate of the investor, or
(ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise;

(V)

(i) notwithstanding subparagraph (III) and (IV) above, a loan to or debt security issued by a financial institution is an investment only where the loan or debt security is treated as regulatory capital by the Party in whose territory the financial institution is located, and
(ii) a loan granted by or debt security owned by a financial institution, other than a loan to or debt security of a financial institution referred to in (i), is not an investment;
for greater certainty:
(iii) a loan to, or debt security issued by, a Party or a state enterprise thereof is not an investment; and
(iv) a loan granted by or debt security owned by a cross-border financial service provider, other than a loan to or debt security issued by a financial institution, is an investment if such loan or debt security meets the criteria for investments set out elsewhere in this Article;

(VI) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

(VII) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraphs (III) (IV) or (V);

(VIII) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and

(IX) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or
(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise; but investment does not mean,

(X) claims to money that arise solely from

(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party, or
(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraphs (IV) or (V); and

(XI) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (I) through (IX);

3.3 The U.S. Non-exhaustive Approach

The U.S. Model BIT does not adopt an exhaustive approach like the Canadian FIPA but qualifies the typical classically broad asset-based formulation. One such example is the recently concluded U.S.-Rwanda BIT (2008),[34] based on the U.S. Model BIT (2004),[35] which adopts a more detailed approach in comparison to the traditional European models. The U.S.-Rwanda BIT includes an important qualification that the "investment" should have "the characteristics of an investment," which is absent in most BITs. The requirement that the asset should have the characteristics of an investment is a limiting phrase in the BIT itself, and is in keeping with the general U.S. approach to draft treaty provisions with greater detail than found in traditional BITs. As the requirement of the asset to have the characteristics of an investment is in the BIT itself, this test would need to be satisfied even before a non-ICSID arbitration forum. It is notable the U.S.-Rwanda BIT does not expressly refer to the fifth element in the Salini test to assess an investment under the ICSID Convention, the contribution to the host state's development. It states:

"Investment" means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

[34] Signed on 19 February 2008, www.ustr.gov

[35] The U.S. Model BIT contains provisions developed by the U.S. Administration to address the investment negotiating objectives of the Bipartisan Trade Promotion Authority Act of 2002, which incorporated many of the principles from existing U.S. BITs. The U.S. Model BIT is substantively similar to the investment chapters of the free trade agreements the U.S. has concluded since the 2002 Act. Source: www.ustr.gov

(a) an enterprise; [1]
(b) shares, stock, and other forms of equity participation in an enterprise;
(c) bonds, debentures, other debt instruments, and loans;[2]
(d) futures, options, and other derivatives;
(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
(f) intellectual property rights;
(g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;[3 4] *and*
(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.

> [1] *For greater certainty, where an enterprise does not have the characteristics of an investment, that enterprise is not an investment regardless of the form it may take.*
> [2] *Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.*
> [3] *Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.*
> [4] *The term "investment" does not include an order or judgment entered in a judicial or administrative action."*

3.4 The ASEAN and COMESA Approaches

Two recently concluded regional investment agreements from Asia and Africa have also reflected the trend towards greater detail and precision. The Investment Agreement for COMESA (CCIA[36]) attempts to limit the expansive coverage of assets ordinarily found in the definition of investment in BITs.

The CCIA definition of investment creates an important limitation on the coverage of intellectual property rights (IPR) by requiring that these be associated with a business operating in the host state territory. Most BITs cover IPRs *per se*, without any additional requirement that the IPRs be associated a business or enterprise in the country. Although an investor-state arbitration has not been launched as yet in reliance solely on an IPR right, commentators believe that such an occurrence is a matter of time. Thus, providing coverage to IPRs per se can give coverage to a potentially very broad range of investments under the treaty.

The CCIA investment definition also contains an important list of what is expressly excluded from the definition of investment, such as market share and loans to governments.

[36] The Twelfth Summit of COMESA Authority of Heads of State and Government, held in Nairobi, Kenya, on 22nd and 23rd May 2007, adopted the Investment Agreement for the COMESA Common Investment Area (CCIA).

The CCIA defines investment as follows:[37]

> *"investment" means assets admitted or admissible in accordance with the relevant laws and regulations of the COMESA Member State in whose territory the investment is made, and includes:*
>
> *(a) moveable and immovable property and other related property rights such as mortgages, liens and pledges;*
>
> *(b) claims to money, goods, services or other performance having economic value;*
>
> *(c) stocks, shares and debentures of companies and interest in the property of such companies;*
>
> *(d) intellectual property rights, technical processes, know-how, goodwill and other benefits or advantages associated with a business operating in the territory of the COMESA Member States in which the investment is made;*
>
> *(e) business concessions conferred by law or under contract, including:*
>
> > *(i) build, operate, own/transfer, rehabilitate, expand, restructure and/or improve infrastructure;*
> > *(ii) concessions to search for, cultivate, extract or exploit natural resources; and*
>
> *(f) such other activities that may be declared by the Council as investments;*
>
> *but excludes: goodwill market share, whether or not it is based on foreign origin trade, or rights to trade; claims to money deriving solely from commercial contracts for the sale of goods and services to or from the territory of a Member State to the territory of another Member State, or a loan to a Member State or to a Member State enterprise; a bank letter of credit; or the extension of credit in connection with a commercial transaction, such as trade financing.*

Similarly, the ASEAN Comprehensive Agreement concluded in February 2009 adopts a more detailed approach on the definition of investment, quite different from the earlier ASEAN Investment Agreement of 1987.

Article 4(c) of the ASEAN Agreement contains a traditional formulation of the investment definition, which is clarified by the accompanying footnotes that provide for the asset exhibiting the characteristics of an investment. The characteristics of the investment in the ASEAN Agreement do not take account of the "contribution to the host state's development" found in the Salini test, similar to the approach in the U.S.-Rwanda BIT. Article 4 (c) of the ASEAN Agreement provides:

> *(c) "investment"[2] means every kind of asset, owned or controlled, by an investor, including but not limited to the following:*
>
> > *(i) movable and immovable property and other property rights such as mortgages, liens or pledges;*
> > *(ii) shares, stocks, bonds and debentures and any other forms of participation in a juridical person and rights or interest derived therefrom;*
> > *(iii) intellectual property rights which are conferred pursuant to the laws and regulations of each Member State;*
> > *(iv) claims to money or to any contractual performance related to a business and having financial value;[3]*
> > *(v) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts; and*
> > *(vi) business concessions required to conduct economic activities and having financial value conferred by law or under a contract, including any concessions to search, cultivate, extract or exploit natural resources. The term*

[37] Article 1(9) of the COMESA CCIA

"investment" also includes amounts yielded by investments, in particular, profits, interest, capital gains, dividend, royalties and fees. Any alteration of the form in which assets are invested or reinvested shall not affect their classification as investment;

[2]Where an asset lacks the characteristics of an investment, that asset is not an investment regardless of the form it may take. The characteristics of an investment include the commitment of capital, the expectation of gain or profit, or the assumption of risk.
[3] For greater certainty, investment does not mean claims to money that arise solely from:

(a) commercial contracts for sale of goods or services; or
(b) the extension of credit in connection with such commercial contracts.

Further, Article 4 (a) of the ASEAN Agreement provides that "covered investment" means,

with respect to a Member State, an investment in its territory of an investor of any other Member State in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter, and has been admitted according to its laws, regulations, and national policies, and where applicable, specifically approved in writing[1] by the competent authority of a Member State;" However, the process of approval is clearly defined in an annex as follows:

[1]For the purpose of protection, the procedures relating to specific approval in writing shall be as specified in Annex 1 (Approval in Writing).

ANNEX 1 provides details on the Approval in Writing as follows:

Where specific approval in writing is required for covered investments by a Member State's domestic laws, regulations and national policies, that Member State shall:

(a) inform all the other Member States through the ASEAN Secretariat of the contact details of its competent authority responsible for granting such approval;
(b) in the case of an incomplete application, identify and notify the applicant in writing within 1 month from the date of receipt of such application of all the additional information that is required;
(c) inform the applicant in writing that the investment has been specifically approved or denied within 4 months from the date of receipt of complete application by the competent authority; and
(d) in the case an application is denied, inform the applicant in writing of the reasons for such denial. The applicant shall have the opportunity of submitting, at that applicant's discretion, a new application.

Texts of recent IIAs show a mixture of approaches, with some states still following the traditional approach to defining investment, while others limit its scope. It is difficult to identify a single approach among the recent IIAs that will benefit all developing countries. Each of the treaties is designed keeping in view of a state's particular needs.

Summary remarks: Rather than relying on a particular model or template, it may be useful for states to adopt a definition of investment in a manner that reflects the state's objectives and needs, and makes the scope of application of the IIA more predictable.

4.0 Conclusion

The findings of arbitral awards have revealed the expansive remit of the typical broad formulation of investment in IIAs. It has also revealed the dangers of taking a "one size fits all" approach to defining investment as developing countries that are primarily capital importers will need to ensure that a predictable range of assets are protected as investment under the treaty. Moreover, such countries may wish for the definition of investment in IIAs to reflect their domestic policies on attracting foreign investment or FDI in particular.

However, even developed countries like Canada and the United States have modified the typical formulations of investment in their model texts. The Canadian Model FIPA adopts an exhaustive approach by creating a closed list of assets that are covered under the definition of investment. While retaining a non-exhaustive approach, the U.S. Model expressly excludes certain types of assets from the definition, and requires the asset to exhibit "characteristics of an investment." Similarly, two major regional investment treaties, the ASEAN and COMESA investment agreements, have qualified the typical definition of investment. The COMESA Investment Agreement creates a detailed list of exclusions and limits the broad language in the defining the types of assets covered by the agreement. The ASEAN Agreement contains a list of excluded assets, and requires the assets to exhibit the characteristics of an investment in a manner similar to the U.S. Model. At the same time, a large number of countries, including the U.K., Germany and Japan, have maintained the broad asset based formulation of investment in their IIAs without any exclusions or qualifications.

The limitation to the definition of investment in some recent IIAs shows an evolution from the traditional formulation. However, it is not recommended that these definitions are adopted whole-sale by developing countries. The model texts identified above may be reviewed by countries as they embark upon developing their own models or negotiate treaties. However, states should not feel limited by the language or scope in the current definitions. The definition of investment in a treaty should conform to a state's own understanding of the term. If a state does not define investment with sufficient detail and clarity, it runs the risk of being "surprised" by arbitral tribunals over the range of assets that are protected under the treaty, even though this may not be the case under that state's domestic law.

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