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The Emerging Legal Concept of Investment

Mary E. Hiscock*

I. INTRODUCTION

In May 2007, an arbitrator not far from Singapore had to resolve a dispute between a salvage company and the government of Malaysia.¹ The company had entered into a contract to salvage a cargo of Chinese porcelain from a British ship that had sunk in the Straits of Malacca in 1817. The dispute turned on the amount payable to the salvage company under the terms of that contract. One might have thought that this was an everyday dispute that would be settled by a summary proceeding in a local court for the recovery of debt. It became an international investment dispute, however, alleged to be an international wrong as a breach of a treaty between the governments of the United Kingdom and Malaysia,² and settled by an arbitration established under yet another international treaty.³

How can this be? What does international law consider to be an investment? The answer to this question is important both to determine whether there has been a contravention of an investment regime, and also to determine whether and where jurisdiction exists for the settlement of any dispute.

The context of this paper is the current range of investment regulation regimes in Asia, but the issues are universal. Investment regulation in Asia is governed by multiple layers of legal norms, many of

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1. See *Malaysian Historical Salvors Sdn, Bhd v. Gov't of Malay.*, ICISD Case No. ARB/05/10 (May 17, 2007). Note that annulment proceedings for this award began on Mar. 31, 2008. See International Centre for Settlement of Investment Disputes ("ICSID"), Case Details, <http://icsid.worldbank.org> (last visited Feb. 1, 2009).

2. See *Agreement Between the Government of the United Kingdom of Great Britain & Northern Ireland & the Government of Malaysia for the Promotion and Protection of Investments, U.K.-Malay.*, May 21, 1981.

3. See *Convention on Settlement of Inv. Disputes Between States & Nationals of Other States*, Mar. 18, 1965, 4 I.L.M. 524.

which are external to the host State of the investment. These norms deal with both aspects of the issue: definition and dispute resolution.

There have been relevant multilateral government regimes since 1995. The General Agreement on Trade in Services (“GATS”) was an extension of regulation from goods to services and, although the supply of services does not always amount to investment, some does.⁴ Trade Related Investment Measures (“TRIMS”) codified earlier jurisprudence on how trade in goods can impact on investment regulation. Both emanated from the World Trade Organisation (“WTO”).⁵

There are also multilateral regional trade agreements⁶ that must comply with the regime of the WTO Agreements,⁷ such as the ASEAN Free Trade Area (2003) and the North American Free Trade Agreement (“NAFTA”) (1992).

There is also a proliferation of older-style bilateral investment agreements⁸ as well as the newer mode of preferential trade agreements

4. This relationship is discussed further below in note 5.

5. GATS and TRIMS are part of the Marrakesh Agreement 1994, which establishes the WTO and constitutes a single treaty undertaking for members of the WTO. *See* Agreement Establishing the World Trade Organization, Apr. 15, 1994. There is a unified dispute resolution regime for any breach of the Agreement, the Understanding on Dispute Settlement (“DSU”). *See id.* at Annex 2.

6. More than 40 percent of the total number of regional trade agreements have been made since 2000. Mexico, Chile, Singapore, the United States, and Australia have been the most active states. The European Free Trade Association (“EFTA”), the European Union (“EU”), and the Association of Southeast Asian Nations (“ASEAN”) are the most active country groups. According to the Asian Development Bank, as of December 2007, 220 active agreements have been notified to the WTO; there are a further 71 that have not been so notified, which cover East Asia, Oceania, and South Asia; a further 50 agreements have been proposed. *See* <http://aric.adb.org/2/php>.

7. *See* Gen. Agreement on Tariffs & Trade, art. XXIV, Apr. 15, 1994; *see also* Agreement Establishing the World Trade Organization, Annex 2, art. V, Apr. 15, 1994. These requirements apply to developing countries with less rigour than to developed countries. *See, e.g.*, Agreement Establishing the World Trade Organization, Annex 2, art. V(3), Apr. 15, 1994.

8. By the end of 2006, there were 2,651 such treaties, of which 110 had been renegotiated. *See* UNITED NATIONS CONFERENCE ON TRADE & DEVELOPMENT, INVESTOR-STATE DISPUTE SETTLEMENT AND IMPACT ON INVESTMENT RULEMAKING 3 (2007), available at <http://www.unctad.org/ia>. Despite their reciprocal nature, these treaties have always disproportionately benefited capital exporters. *See* Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and their Impact on Foreign Investment in Developing Countries* 24 INT’L LAW. 655, 662 (1990). Issues also arise from the older BITs for some EU members, notably Austria and Sweden, currently before the European Court of Justice to determine whether the BIT obligations are incompatible with their obligations as members of the EU. *See Advocate General Sides with European Commission in its Bid to Have European Court of Justice declare Austria & Sweden in Violation of EU Law for Failure to Remedy “Incompatibility” of Earlier BITs & EU Law*, INVESTMENT ARB. REP., July 16, 2008, at 8-10, available at www.iareporter.com. The Advocate-General has delivered opinions that they are incompatible. *See id.*

between States⁹. There are national laws, regulations, policies and guidelines, and courses of governmental conduct. As measures, these must comply with WTO obligations and with any treaty obligations. Finally, States frequently enter into contracts with investment implications.

Each type of treaty or measure has its own description or definition of the covered investment, and its own method of dealing with disputes.¹⁰ The rules of international law that limited participation in international legal disputes only to States and international organisations have given way under International Centre for Settlement of Investment Disputes 1966 (“ICSID”) and other treaties to permit non-State investors to pursue claims directly against States. International dispute resolution is much more widespread and the participants, as well as the process, are much more sophisticated. This has meant a great increase in the number of claims relating to investments that have been pursued over the last thirteen years.¹¹ The range of issues that has been thrown up in these disputes is very large. The jurisprudence that has emerged from the awards of tribunals and the scholarly writing thereon has recharged the field of investment law with some vibrant and critical debates.

There are far too many issues arising from these disputes to canvass in this paper. The focus, therefore, is on how and by whom the balance is being struck between the rights and obligations of investors and the policies and interests of States in the context of the modern investment regime. Is this balancing now an inherent part of the concept of investment?

II. A BRIEF SYNOPSIS OF THE LAST 65 YEARS

The phenomenon of foreign direct investment emerges from the chaos at the end of World War II and immediately thereafter. In the pre-war twentieth century world, colonialism and portfolio investment served the interests of primarily European States in providing income, commodities, resources, and food. As the British, French, Portuguese, and Dutch empires collapsed or faded away, post-colonial independent regimes continued to provide commodities and resources for the First World, but on somewhat different terms.

9. See *supra* note 6.

10. The United Nations Economic and Social Commission for Asia and the Pacific (“ESCAP”) has a database of trade agreements. See Asia-Pacific Trade & Investment Agreement Database, http://www.unescap.org/tid/aptiad/agg_db.aspx (last visited Feb. 2, 2009).

11. In 1995, the ICSID had four arbitrations. In 2005, it had 100 including 26 new claims.

There was a flurry of nationalisation of foreign property, as for example in Indonesia. This was as far-reaching in its effect on international law as had been the nationalisations of the Russian revolution thirty years earlier. There was no doubt that the newly-independent States needed foreign capital in all its forms: but capital-exporting States placed a very high priority on the need for protection of their investments, often by means of direct control of the investment and the political, economic, and legal infrastructure that supported it.

At the same time, the international institutions that have been so important in the field of investment came into existence, including the World Bank Group. This in turn was responsible for two fundamental pieces of international legal architecture: the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958¹² (the New York Convention) and the ICSID.¹³ The New York Convention produced an international framework for the enforcement of arbitral awards and agreements to submit to arbitration, and the ICSID restricted the rules of sovereign immunity from suit, so that a State could irrevocably waive that immunity and engage in arbitration of investment disputes. The Organisation for Economic Development ("OECD") moved to take a strong position to represent the interests and concerns of capital exporting States. The United Nations Conference for Trade and Development ("UNCTAD") became a platform for the countries of the Third World.

The tipping point came in the 1970s, with the growing strength and belief of the capital-importing States in their rights to control the use and development of their own resources. This is seen most clearly in the General Assembly Resolutions on the New International Economic order ("NIEO").¹⁴ There is a trend towards recognition of the importance of, and perhaps the right to, economic development in international instruments, beginning with ICSID,¹⁵ and culminating in express provisions in contemporary preferential trade agreements ("PTAs"). The latter, despite their name, usually contain substantial provisions in

12. See Convention on the Recognition & Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. There are 142 state parties to this Convention, and this covers most countries within this region.

13. See Convention on Settlement of Investment Disputes Between States & Nationals of Other States, Mar. 18, 1965, 4 I.L.M. 524. There are 143 Contracting States, with some exceptions in the region including Laos, Vietnam, Thailand, Myanmar, and India.

14. See G.A. Res. 3201, U.N. Doc. A/RES/S-6/3201 (May 1, 1974); G.A. Res 3281, U.N. Doc. A/RES/29/3281 (Dec. 12, 1974). The earlier GA Resolution 1803 of 1962 on Permanent Sovereignty over Resources began this process.

15. There were earlier relevant provisions in the unsuccessful Havana Charter seeking to establish the International Trade Organisation ("ITO"). See *infra* note 20.

relation to investment. It is in these provisions that the new concept of investment emerges. Many of these PTAs have East and Southeast Asian States as parties.¹⁶

Capital importing States are anxious to retain whatever hardy-gained leverage they have gained over investment within their territories. This anxiety is reflected in the continuing reluctance of States to put liberalisation of investment on a revised WTO agenda. At the Ministerial Meeting of the WTO in Singapore in 1996, it was agreed that investment would be so included. Subsequently, however, it was dropped in 2003 from the agenda for the Doha Development Round at the insistence of a group of developing countries. All governments are caught in this dilemma between attracting foreign capital and developing and controlling national policies to satisfy national needs and priorities.

III. HOW HAS THE MEANING OF INVESTMENT CHANGED?

There is not and never has been a single authoritative legal definition of investment. The meaning of the term varies according to the text and context of the international instrument in which it is found.¹⁷ In the earlier part of the twentieth century, the more commonly used term was “foreign property;” usually referring to the capital and real property of resident foreign nationals.¹⁸ There is not even a constant meaning of investment as an economic phenomenon. It has evolved as business practice has changed over the years; as wealth has moved in international transactions from tangible assets to intangible assets; and as cross-border wealth-producing transactions are increasingly made between related companies, rather than with third parties.

In the still-born Havana Charter that was intended to establish the International Trade Organisation (“ITO”),¹⁹ and to regulate both international trade and international investment there was no definition

16. See INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS, Annex at 162-72 (OECD 2008) (Table 3.A1.1 Bilateral Investment Treaties). These include Australia-Singapore, Japan-Philippines, Korea-Singapore, Us-Singapore, Chile-China, Chile-Korea, EFTA-Singapore.

17. See Vienna Convention on the Law of Treaties arts. 31-32, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679; see generally DOMINIQUE CARREAU & PATRICK JUILLARD, DROIT INTERNATIONAL ECONOMIQUE (3d ed. 2007).

18. For example the term “investment” is referred to as “foreign property” in the Organisation for Economic Co-operation and Development (“OECD”) Draft Convention on the Protection of Foreign Property. See OECD Draft Convention on the Protection of Foreign Property, 7 I.L.M. 118 (1968) (Paris).

19. The Havana Charter was to be the third leg of the post-war architecture, together with the International Bank for Reconstruction and Development and the International Monetary Fund. The outbreak of the Cold War is usually seen as the reason for the Havana Charter’s demise, which came about when the US Congress refused to ratify it.

of, but simply a reference to, “international investment.”²⁰ It is noteworthy that the opening paragraph of Article 12 of the Havana Charter states that “[t]he Members recognise that: (a) international investment, both public and private, can be of great value in promoting economic development and reconstruction, and consequent social progress.”²¹ Although multilateral in structure, the Charter also envisioned the development of further bilateral and multilateral investment agreements between Members.²²

The International Monetary Fund (“IMF”) also developed a concept of investment for its purposes: the monitoring of balance of payments, but it was cast solely in economic terms that reflected the structure, the content, and control of investment. The IMF definition has also been adopted in some preferential trade agreements. Its definition of “direct investment” is used in the Thailand-Australia Free Trade Agreement of 2003 (“TAFTA”).²³

Older bilateral arrangements mostly defined investment by reference to national concepts, but in an international law context. Many Asian investment regimes e.g. Indonesia articulated their purposes and priorities.²⁴ The World Bank and UNCTAD monitored the balance.

To establish a jurisdictional basis for dispute resolution by arbitration, it has been the ICSID through Article 25(1) that has used the definition of investment. The dispute must arise directly from an investment; and it must be of a legal nature, that is, claiming a legal remedy and founded on legislation or a treaty.²⁵ The Rules on Commercial Arbitration of the United Nations Commission on International Trade Law (“UNCITRAL”), the International Chamber of Commerce (“ICC”), and the Stockholm Chamber of Commerce (“SCC”), which are all widely used both in treaties and in ad hoc arbitration, do

20. The obligations of Members were to provide reasonable opportunities for investment and to have due regard to avoid discrimination against and between foreign investments. See United Nations Conference on Trade and Employment: Havana Charter art. 12(2)(a), Mar. 24, 1948, available at <http://www.worldtradelaw.net/misc/havana.pdf>.

21. See *id.* art. 12(1)(a).

22. See *id.* art. 12(1)(d).

23. See Thailand-Australia Free Trade Agreement, Thai.-Aus., art. 901(c), July 5, 2004 (providing that “‘direct investment’ means a direct investment as defined by the International Monetary Fund under its Balance of Payments Manual, fifth edition (BMP 5), as amended.”) This is the same meaning as that in the OECD Benchmark Definition of Foreign Direct Investment (4th ed). The BMP is presently being reviewed. It is a more restricted definition of investment than is found in most Australian preferential trade agreements.

24. These policies and the need for balance are seen in the preambles to Indonesia’s Law No.1/1967 Concerning Foreign Investment and Law No.25/2007 on Capital Investment Regulation.

25. See CHRISTOPHER H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY*, 89, ¶ 3 (2001).

not “filter claims through their own autonomous notion of investment as a condition of jurisdiction *ratione materiae*.”²⁶ So it is only ICSID arbitration that presents the issues in their most acute form, as *Malaysian Historical Salvors Sdn, Bhd v. Gov't of Malay.*, ICISD Case No. ARB/05/10 (May 17, 2007) illustrates.²⁷

In the late 20th century, two different models of investment agreement emerged. The investment provisions in agreements such as the North American Free Trade Agreement (“NAFTA”) became the template for subsequent US preferential trade agreements. These include the US agreements with Australia, Singapore, and Korea. There are more in the pipeline for Asia. The NAFTA text enlarged the scope of activity regarded as “investment”²⁸ and made it the focus of extensive and rigorous protection. This is typically done by having separate chapters dealing with investment and with liberalisation of trade in services, with limited interaction between them. Based on its domestic experience of NAFTA, the US subsequently sought in the Australian-US Free Trade Agreement (“AUSFTA”), although not in other PTAs with the region, to limit the dispute resolution options for investors.

The second model of investment agreement is based on the structure of the GATS. The purpose of GATS is to liberalise trade in services by supporting multilateral negotiations between Members of the WTO. There is no positive definition of services in GATS, but there are some exclusions. The relevant triggers of the application of GATS are the cross-border modes of supply of services. Those particularly relevant to investment include the supply of services through a commercial presence of a service provider in the territory of a service consumer, although these do not always amount to investment.²⁹ As a result of the jurisprudence, the cross-border supply of services electronically is also

26. Stephen Jagusch & Anthony Sinclair, *The Limits of Protection for Investments and Investors under the Energy Charter Treaty*, in INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY 75 (Clarisse Ribeiro ed., 2006).

27. See *supra* note 1.

28. For example, Article 1139 provides for a broad and exhaustive list of assets with specific exclusions. The assets include foreign direct investment (“FDI”), equity securities, partnerships and other interests, and tangible and intangible property acquired “in the expectation . . . of economic benefit.” Loans are included only when debt is long-term (more than 3 years) or is the movement of funds within related companies. Contract rights are covered only when there is a commitment of capital or equivalent resources, and the specific exclusions cover money claims arising from commercial contracts for the sale of goods and services.

29. See Patrick Mitchell v. The Democratic Republic of Congo, ICSID Case No. ARB/99/7 (2006). This was the annulment of an earlier ICSID award holding that there was jurisdiction where a law firm had been expropriated. The final hearing decided that a law firm is not “readily recognisable” as an investment either under the ICSID or under the US law.

included within GATS.³⁰ Typically, investment disciplines are divided between chapters on trade in services and investment, and the chapters interact more closely.

The difference in the results achieved by each of these models can be exaggerated, but they do have different effects in terms of liberalisation of investment regimes. The NAFTA-type agreements call for non-discrimination and transparency in more economic sectors, and they have a capacity to expand coverage through the application of most-favoured nation (“MFN”) clauses, although these may be limited. The GATS-type agreements are more often used when countries are developing an investment infrastructure, and want a higher degree of flexibility. Expansion is through the negotiation of specific commitments, which may be positive or negative in terms of sectors. GATS-type agreements also usually do not permit MFN to apply to third parties. The OECD has concluded that MFN is not a significant factor in liberalisation of investment regimes.³¹

This leads to a convergence in regulation between trade (which had been the only area of regulation under GATT and its successor, the WTO) and investment, where previously there had been no multilateral regulation. The overlap between the obligations of Members to uphold the provisions of the GATT and their impact on national regulation of investment is spelled out in the TRIMS, where a number of practices that limit liberalisation of investment are set out as examples of breaches of GATT obligations. This potential overlap had already been recognised when the GATT had ruled that the implementation of the Canadian Foreign Investment Act was not consistent with Canada’s obligations under the GATT.³²

As well as introducing new requirements for States, their extension made the WTO dispute resolution system available to disputants³³. The

30. See Arbitrator Opinion, *United States-Measuring Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/ARB (Dec. 21, 2007), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm.

31. See generally Marie-France Houde, Akshay Korse-Patil & Sebastien Miroudot, *The Interaction Between Investment and Services Chapters in Selected Regional Trade Agreements* (OECD Trade Policy Working Paper No. 55 June 19, 2007), available at [http://www.ois.oecd.org/olis/2006doc.nsf/LinkTo/com-daf-inv-td\(2006\)40-final](http://www.ois.oecd.org/olis/2006doc.nsf/LinkTo/com-daf-inv-td(2006)40-final). MFN has, however, been significant in extending other substantive and procedural rights. See Emilio Agustin Maffezini v. Kingdom of Spain, ICISD Case No. ARB/97/7 (Jan. 25, 2000).

32. See Canada Administration of the Foreign Investment Review Act, BISSD 30S/140 (1983), available at www.worldtradelaw.net/reports/gattpanels/canadafira.pdf.

33. This will mean that there may well be a number of different avenues of dispute resolution open to States and investors, depending on their range of legal relationships. Who gets to make the controlling decision is an issue that is greater if a State chooses to pursue a claim on behalf of an investor? Are there intrinsic priorities? The decision in

objectives of the WTO are consistently liberalization, and market access. Whereas the history of investment agreements and modes of dispute resolution demonstrated that protection of foreign investment against the actions of host States were the principal objectives.

Globally, the jurisprudence of investor disputes is evolving, but not in a homogenous way. The extent to which there should be a concept of guidance from earlier precedents is a contentious issue amongst international commercial arbitrators.³⁴ Article 53 (1) of the ICSID states that awards are binding only on the parties to the awards. Some continuity of reasoning comes from the overlapping participation of arbitrators in a number of awards. For example, of the awards cited in note 37 below, two arbitrators (Professors Francisco Orrego Vicuna and Gabrielle Kaufmann-Kohler) acted in four of those eight cases. It is however argued that this personal continuity is not enough, and that an appellate framework should be developed, given that the arbitration of these disputes has a core public international law aspect in interpreting the provisions of treaties, and that arbitration is usually viewed as a private matter only of interest to the parties concerned.

There are three aspects for consideration. The first is that a qualitative element has been introduced into the concept of investment. This is part of a transition from an economic concept to a legal concept, but one responsive to its own legal and factual context. It is not an essential element in defining those kinds of investment that have been traditionally accepted as such, but it has been critical when the position is more ambivalent. Then what is required is a judgment that the putative investment contributes to the economic development of the State. The criteria to be satisfied come from the policies of the host State.

A related issue is whether a damaging economic effect of government policies on foreign interests is a wrong when the policy is transparent and non-discriminatory across a whole sector affecting foreigners and nationals alike. This has arisen frequently over the last fifteen years. It reflects the regulatory concerns of States, which have expanded to emphasise issues such as sustainable development, the environment, and public health³⁵.

Mexico - Taxes on Soft Drinks and Other Beverages, WT/DS308/AB/R (Mar. 6, 2006), would seem to indicate that the WTO does not accept that its jurisdiction is so restricted. At what point do parties take the decisive “fork in the road,” which precludes the pursuit of any other possibility? Article 26 of the ICSID Convention covers this issue, but in the context of the WTO, this is being left to future jurisprudence.

34. See Professor Gabrielle Kaufmann-Kohler, Keynote Address at the Inaugural Conference of the Society of International Economic Law (July 17, 2008); see also *infra* note 40.

35. See Jan Paulsson, *Indirect Expropriation: Is the Right to Regulate at Risk?* (Dec. 12, 2005) (Symposium Co-Organised by ICSID, OECD, and UNCTAD, Making The

The third issue relates to the consequences of settling these matters by arbitration panels? Is this controversy a harbinger of fundamental change so that the legal definition of investment requires a dynamic element of achieving public policy?

IV. INVESTMENT MUST CONTRIBUTE TO DEVELOPMENT

In the *Malaysian Salvors* case, the arbitrator considered seven decisions of ICSID tribunals³⁶ relating to the definition of investment to decide whether the salvage contract between the Government of Malaysia and the company was an investment. In reviewing these cases and scholarly writings, the arbitrator, Michael Hwang SC, looked for “the hallmarks of investment”³⁷. He began with Schreuer’s analysis in his Commentary on ICSID.³⁸ Based on the words of the Convention and earlier decisions, Schreuer summarised the “typical characteristics” of an investment as the following:

- A certain duration
- The regularity of profit and return
- Mutual assumption of risk
- A substantial commitment
- The significance of the operation for the host government.

Most of International Investment Agreements: A Common Agenda), available at <http://www.oecd.org/dataoecd/5/52/36055332.pdf>.

36. See generally *Salini Costruttori SpA & Italstrade SpA v. Kingdom of Morocco*, ICSID Case No. ARB/00/4 (Jul. 23, 2001) (“*Salini*”); see also *Joy Mining Machinery Ltd v. Arab Republic of Egypt*, ICSID ARB/03/11 (Jul. 30, 2004); *Jan de Nul NV Dredging International NV v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13 (Nov. 6, 2008). See generally *Consorzio Groupement LESI-DIPENTA v. Peoples Democratic Republic of Algeria*, ICSID Case No. ARB/03/08 (Jan. 10, 2005); *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, ICSID Case No. (ARB/03/29) (Nov. 14, 2005); *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4 (Dec. 29, 2004). See *Patrick Mitchell*, *supra* note 29. The first case where a jurisdictional controversy arose was *FedEx v. Venezuela*, ICSID Case No. ARB/96/3 (1997). Although the tribunal regarded the promissory notes in dispute as an investment, the tribunal importantly laid the foundation for subsequent awards by regarding investment as an objective concept, not one wholly determined by the will of the parties as expressed in their treaty. Later cases, particularly *Salini*, have considerably refined the ambit of discussion. *Saipem SpA v. Peoples Republic of Bangladesh*, ICSID Case No. ARB/05/07 (Mar. 21, 2007), also raises the jurisdictional issue but was not cited in *Malaysian Salvors*. It applies the *Salini* test and found there was an investment. However, economic contribution was not an issue. It is noteworthy, however, that Professors Gabrielle Kaufmann-Kohler and Christopher Schreuer were members of the panel of arbitrators.

37. *Malaysian Salvors*, *supra* note 1, ¶ 44.

38. See SCHREUER, *supra* note 25, ¶ 40.

The arbitrator subsequently contrasted this analysis (which he called the typical characteristics approach) with an alternative (which he called the jurisdictional approach).³⁹ The jurisdictional approach calls for a number of mandatory elements, all of which must be present before there is jurisdiction in an ICSID tribunal. However, the typical characteristics approach is more flexible, and takes a “holistic” approach to balance off strength in one element against weakness in another, possibly even to find jurisdiction if one element were missing. Given the range of facts that might come before ICSID, an empirical rather than a doctrinal approach is preferable. This has been the pattern with ICSID tribunals, and even though there is no doctrine of precedent with the decisions of tribunals,⁴⁰ their guidance is important.

The tribunal analyzed each of the ICSID decisions in turn, looking to see how each related to the two approaches set out above.

Salini Costruttori SpA & Italstrade SpA v. Kingdom of Morocco, ICSID Case No. ARB/00/4 (Jul. 23, 2001), concerned a construction contract to build fifty kilometers of a highway from Rabat to Fes. The contract was with a company working on the project under a concession agreement with the government of Morocco. The two Italian contractors had submitted a joint tender, which was accepted. The duration of the work according to the contract was to be thirty-two months. In fact, it took thirty-six months. The tribunal considered that the contractors had made contributions in money (through performance guarantees), in kind (through equipment and personnel), and in industry and skill. The length of the commitment fell in an acceptable range of two to five years. Each side assumed risks. Finally, there was no doubt that the work contributed to the economic development of the host state. Although looking at each factor in turn, the tribunal made a general assessment. However, the language used by them was consistent with either approach. The relevant laws were the Italian-Morocco BIT and also the ICSID.

In *Joy Mining Machinery Ltd v. Arab Republic of Egypt*, ICSID ARB/03/11 (Jul. 30, 2004), the contract was with a government agency for the provision of mining equipment at a cost of 13.3 million pounds sterling. The sellers also entered into performance guarantees of 9.6 million pounds sterling. The dispute was over the release of the

39. See *Malaysian Salvors*, *supra* note 1, ¶ 70.

40. The difficulty in reconciling the decisions even on a single treaty, not only of ICSID but of all tribunals with jurisdiction, has led some to believe that there is a need for a global investment arbitral appellate body. See Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521 (2005); but cf. Sir Anthony Coleman, *The Question of Appeals in International Arbitration* (July 12, 2007) (paper presented to the UNCITRAL Congress, Modern Law for Global Commerce, Vienna).

guarantees. The tribunal regarded this as a normal commercial transaction, with no regularity of profit and return. There were no risks apart from those normally associated with a sale transaction, and no particular benefit to Egypt. Nor was it a significant commitment. The tribunal proceeded on the basis that all the features of investment should be satisfied, although conceding that the extent to which this would happen would depend on the facts of each case. The decision of the tribunal was that the guarantees were not an investment within the meaning of the UK-Egyptian BIT.

Consortio Groupement LESI-DIPENTA v. Peoples Democratic Republic of Algeria, ICSID Case No. ARB/03/08 (Jan. 10, 2005), arose out of a concession agreement to build a dam. The language of the tribunal was not ambiguous. It favored the jurisdictional approach and squarely laid down three elements of jurisdiction: that the operation made a contribution to the country; that it had a certain duration; and that it involved risk. Specifically, a contribution to the economic development of the country is not required. They then went on to say that contribution in most cases would be covered by establishing the other elements.

On this latter point, the tribunal in *Patrick Mitchell* disagreed and said that such a contribution was an essential, but not a sufficient, characteristic of an investment, and the tribunal pointed out that in *CSOB* a loan was regarded as an investment because it did make a contribution to the economic development of the country. The language of the tribunal in *CSOB* was consistent with the typical characteristics approach. The *Mitchell* tribunal also reiterated that these broad concepts would vary in their nature depending on the facts of the case.

Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan, ICSID Case No. (ARB/03/29) (Nov. 14, 2005), a highway construction contract dispute, also exemplified the typical characteristics approach in that it took a holistic view of the facts of the case and saw the matter turning on the facts.

Jan de Nul NV Dredging International NV v. Arab Republic of Egypt, ICSID Case No. ARB/04/13 (Nov. 6, 2008), expressly followed *Salini* and used the typical characteristics approach, including a contribution to the economic development of the country. This was a dredging contract to deepen and widen the Suez Canal. The tribunal indicated that the length of time of the contract was also a likely pointer to economic benefit. Again, each element interacts with the other.

The conclusion of the tribunal in *Malaysian Salvors* was that, in the end, it would not make much difference which approach was taken by a tribunal. The decision is primarily a factual decision, and the language will reflect where the strength of the case lies. The tribunal will then

adopt the expression of a “Newtonian” or a “Cartesian” approach—depending on whether one moves from the particular to the general or the general to the particular, respectively.

The tribunal then looked at the facts of the salvage contract and concluded that the elements as spelled out in *Salini* could be made out here, but only at a superficial level. That made the economic contribution to the economy of Malaysia a decisive factor in the balance. All seven cases regarded economic development as an important, but not necessarily major, contribution where other factors were conclusive. The tribunal concluded that, even were the claimant to make out its best case, this would not make the contract an investment. This award is now subject to an annulment process. What happens in many cases at this point is that parties reach an agreed settlement. So it remains to be seen what will happen.

On the basis of this emerging jurisprudence, it is clear that particular issues arise from claims arising out of contract. A breach of contract can give rise to varying types of claims: denial of due process or failure to give fair and equitable treatment; lack of transparency; discriminatory behavior; and expropriation.⁴¹ Each of these types of claims has been successful in the past depending on its facts. So the mere fact of the claim arising from contract does not mean that it cannot meet the criteria set out above to be an investment. It is just that this one did not.

There is a related controversy about the characterization of claims as arising out of contract or out of a treaty breach where the treaty contains an “umbrella clause.” This controversy occurs when a state assumes responsibility for every undertaking with respect to investment, so that a breach of a contract becomes a breach of a treaty. This is presently a highly contentious area of legal debate, with arbitral decisions going in a number of directions.⁴² But, the important point to remember is that not every breach of a treaty, nor every breach of contract, gives rise to an investment dispute.⁴³

V. CONTRIBUTION TO ECONOMIC DEVELOPMENT

The awards in *Salini*, *Joy Mining*, *Bayindir*, and *CSOB* all speak of the requirement of the measure of the contribution to the economy of the host state being significant, or even, as in *Jan de Nul*, of being of

41. See *Amco Asia Corp. and Others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, 23 I.L.M. 351 (Nov. 20, 1984); see also *Mondev Int'l Ltd. v. United States of America*, ICSID Case No. ARB (AF)/99/2, 42 I.L.M. 85 (Oct. 11, 2002).

42. Compare, for example, *Joy Mining* and *LESI-DIPENTA*, where the tribunals reached opposite views on the issue whether such clauses transform all contract disputes into treaty disputes.

43. *Joy Mining*, cited *supra* note 36, is an excellent example of this.

“paramount significance” in order for it to be an investment. In *LESI-DIPENTA*, the tribunal saw economic contribution as being implicit in the other elements of an investment, and thus it did not need to be separately assessed. In *Patrick Mitchell*, the tribunal spoke of a contribution not needing to be “sizable or successful . . . [but] to contribute in one way or another.”⁴⁴ Furthermore, as Schreuer maintains, the investment must make a positive impact on a host state.⁴⁵

The kinds of infrastructure works in *Salini, Bayindir*, and *LESI-Dipenta* can easily be seen to make a positive impact on a state. At one remove are guarantees in connection with sale of the equipment, as in *Joy Mining*, or financial rehabilitation, as in *CSOB*. Running a law firm, as in *Patrick Mitchell*, or salvaging a ship is another matter. The question must be objectively answered. It is not enough to say that this is a matter of state choice and decision and that consequently forecloses the matter.

In *Malaysian Salvors*, points concerning the benefits of employment to Malay nationals, the preservation of cultural and historical artifacts, the know-how of marine salvage especially where preservation is critical, the benefits to tourism, and the financial benefit to the Treasury through taxes and charges were all argued, but unsuccessfully. These arguments were regarded as insignificant, ephemeral, and even speculative.

One way of assessing feasibility is by looking at the post investment implementation compliance reports done by the World Bank when it finances an investment.⁴⁶ The report requires a joint statement of what benefits are expected, and is followed by a review to see how much has been accomplished. If the benefits are objective, then it would seem desirable that the state decide what will be a contribution, and whether that contribution is significant. With both the World Bank and the ADB, it is to the host state’s own policies that the assessment is directed.

It has more recently been argued that the criterion of benefit should not be that of economic benefit alone. Marek Jezewski, in a paper recently given to the inaugural meeting of the Society for International Economic Law,⁴⁷ put forward the proposition that “contribution to economic benefit” should include contribution to areas of social policy and human rights, as happened in Poland under the guise of “solidarity”

44. *Patrick Mitchell*, *supra* note 29, ¶ 94.

45. See SCHREUER, *supra* note 25, ¶ 90.

46. See Economic Evaluation of Investment Operations, World Bank Policies OP 10.04 ¶ 1 (1994); Environmental Assessment, World Bank Policies BP 4.01 ¶ 23 (1999). The Asian Development Bank (“ADB”) has a similar accountability mechanism.

47. Marek Jezewski, *There is No Freedom Without Solidarity: Towards a New Definition of Investment in International Economic Law* (paper presented to Society of International Economic Law Inaugural Conference) (July 14, 2008), available at <http://ssrn.com/abstract=1159816>.

and with the same effect. This would be a way of shoring up the rights to development of transitional and developing countries.

Another strategy that has been adopted in several PTAs within the region is the inclusion of a provision that protects the host state against claims where there has been a decision to introduce a policy that will adversely affect a section of the economy, including foreign interests. In the absence of such a provision, it may be argued that the decision would amount to expropriation, with the further consequence that the state must compensate some, but not all, those affected.⁴⁸ These clauses have been most visible in the area of environmental protection,⁴⁹ but it is likely that similar clauses will appear in relation to public health. In the WTO context, the issue of who decides such policies has become very heated since the dispute between the U.S. and the EU over the prohibition of imports of hormone fed beef,⁵⁰ and the delays in establishing a regime for inspection and approval for the import of genetically modified foodstuffs.⁵¹ One can also anticipate that anti-terrorist and security measure will lead to the same debates over the relationship between the principles of state responsibility in international law, treaty obligations, and the desire of a national government to make decisions about the health and safety of its citizens.

VI. CONCLUSIONS

Why does it matter? The consequences exist at a number of levels. Internationally, in commercial transactions, we have a clash of

48. As happened under NAFTA with *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB (AF) 97/1, 40 I.L.M. 36 (Aug. 30, 2000), where a U.S. hazardous waste investor in Mexico made a successful claim after the responsible authority had denied planning approval. The grounds of the decision was breach of the transparency obligation. The award was partially set aside by the Supreme Court of British Columbia on the ground that the tribunal had exceeded its jurisdiction in its understanding of international customary law. See *United Mexican States v. Metalclad Corp.*, [2001] B.C.S.C. 664 (Can.). But, the context of the claim would have been different in terms of the expectations engendered.

49. The "Investment and Environment" article of the Free Trade Agreement, U.S.-Singapore, art. 15.10, May 6, 2003, available at http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/Section_Index.html, states that "[n]othing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."

50. Appellate Body Report, *United States—Continued Suspension of Obligations in the EC—Hormones Dispute*, WT/DS526. This dispute began in 1996, and the procedures have not yet been concluded.

51. Three separate cases were brought by Argentina, Canada and the US against the EC (respectively DS 293, 292 & 291). The final determination was issued in 2006. Appellate Body Report, *European Communities—Approval and Marketing of Biotech Products*, WT/DS291, WT/DS292, WT/DS293 (Sept. 29, 2006).

regimes—of regulatory systems and of values—between trade, investment, and banking and financial services. There is a core understanding of what trade has meant for millennia: exchange for value of items that can be traded. The nature of the exchange and of the items has varied, as has the underlying rationale of the legal effect of trade. It is now seen fundamentally as a consensual transaction.

For more than sixty years, there has been international regulation of trade in goods by restricting the ability of governments to put certain restraints on trade through national law, practice, and policies. The values have been liberalization of trade and equality of market access through a concept of most favored nation. The mode of increasing the scope of regulation has been multilateral negotiation. In 1995, with the creation of the WTO, there was a critical global extension of regulation to include some, but not all trade in services and transactions in intellectual property related to trade. This brought most of the wealth gained in world trade under the WTO regulation, with new values of transparency as well as liberalisation and equal treatment. This is bound together by an apparently efficient dispute resolution system.

Investment as such has no such global counterpart. Yet, especially in the international sphere, it serves the same economic function and purpose as trade, and often it is a commercially logical extension of international trading activity. Investment is regulated in manner and scope in international law wholly by treaties—negotiated multilaterally or bilaterally. Critically, methods of dispute resolution will vary from treaty to treaty. The values expressed in those treaties for the last 50 years have been the protection of foreign investment and the liberalisation of investment regimes and market access. There is a growing acceptance of a need for balance with host state interests, as more and more countries both invest abroad and receive investments.

So the possibility of a transaction falling within the categories both of trade and of investment in international law may cause and has caused difficulties, particularly when a dispute arises.

There are some triggers for the appearance of these issues within the last 10 years. There is a great increase in the numbers of BITs and PTAs because of the apparent likely failure of the current round of WTO negotiations, where some of these issues were foreshadowed.

All of the relevant activities in trade and in investment concern the activities of governments. In most cases, if an individual trader or investor is affected, it is its government that takes up the issue, and the individual has no standing to pursue any claim. Dispute resolution is consultation, negotiation, arbitration with a hierarchy of panels and appeals. The results are published, and the hearings are increasingly open to the public.

The remedies developed within investment treaties, however, are significantly different from those developed by private law. International commercial arbitration has as its hallmarks, privacy, and confidentiality. Results are available only if the parties consent to publication, and those parties may now include non-State as well as State actors. There is no appellate review in many treaties and there is universally no acceptance of precedent. Public non party contributions to the arguments (*amicus curiae* briefs) may or may not be accepted.

So we have a phenomenon of investment decisions made by privately selected arbitrators, developing law of national and international significance, but without the safeguards of the comparable publicity of courts or legislators. If interpreting the scope of "investment" includes assessing the relevance and significance of national social and economic goals, then the problem is worse. Similar issues have arisen in WTO trade disputes, e.g. the dispute between the US and the EU over the banning of hormone fed beef, but there was no lack of publicity and debate in that case.

So are we seeing, through the dispute resolution regime, a convergence of public and private law in international trade and investment? Are private law processes affecting the rights and obligations of States towards non-State actors or other States? International commercial arbitration has well-developed international infrastructure, institutions, and practice for disputes between private parties and also States and non-State parties. The most important institution is the ICSID, which is now widely used as an agreed method of dispute resolution for disputes arising under BITs and PTAs.

ICSID itself is more than 40 years old and is based on settled principles of international law. States must consent to the exercise of the ICSID jurisdiction, and that consent is irrevocable. The consent is for agreed remedies where ICSID has jurisdiction under its own Rules. ICSID gives non-State actors standing in its arbitral proceedings.

So the fact that the core of the debate arises within arbitral awards of ICSID is extremely significant. The 8 arbitral awards are ICSID awards. They are all made within the last 7 years, and each is an investment dispute arising out of a contract. Several of these awards are currently under review within the processes of ICSID seeking annulment of the award. So the situation is fluid.

The example is the case of Malaysian Salvors—a dispute over money owing under a contract to salvage a historically important wreck; to catalogue and to sell the contents; and to divide the proceeds of sale between the Salvor and the Malaysian government. The dispute is an everyday argument over a debt. But it is claimed to be an international wrong, a breach of the UK—Malaysian BIT, and it is submitted for

arbitration to ICSID under that treaty after negotiations had failed. But ICSID declined jurisdiction because it found no element of benefit to Malaysia arising from this contract. It was a normal trading transaction, but it was not an investment. Because the parties chose ICSID arbitration, thus precluding litigation, there is no other formal method of dispute settlement open to them now, other than seeking the review of the award within ICSID.

The trend of reasoning from these cases leads to a conclusion that economic benefit to a host State is critical only if the transaction is not a “readily recognisable investment.” Given the width of scope of the text in many investment treaties, it is not as easy to make this judgment now as it was originally in the 1960s when there was a debate about whether investment should be defined in ICSID. Before the 1960s, some investment contracts were still seen as based on public, rather than private, law principles. But the ICSID Convention itself gives such contracts private law features such as autonomy in choice of law.

So are we seeing here a real blurring of public and private law values and remedies, and the final decline of Westphalian sovereignty, as the depth of intrusion into domestic commercial law by international law and its institutions grows? Are we moving from a world where our starting point is that foreign investment is always protected to one where it is protected only if it makes a contribution to the host State? Who will set the parameters of that debate? Who will make the decisions? To whom are the decision makers accountable?