ABUSE OF PROCESS THROUGH CORPORATE RESTRUCTURING OF ASSETS: THE LEGAL STANDARD FOR THE MULTINATIONAL INVESTOR

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ABSTRACT

If the explosive growth of Foreign Direct Investment ("FDI") is any indicator of the continuing significance of investors in the global economy, then the next question is: from where are these investors coming? Corporations in the global economy have renewed their interest in preserving nationality because of how states codify the rules and procedures governing foreign investment: the Bilateral Investment Treaty ("BIT"). Through the array of BITs, investors are bound by different duties and granted different protections, naturally leading to treaty shopping. Although treaty shopping may be recognized as a perfectly legitimate process, arbitral tribunals resolve disputes arising from treaty shopping claims using one of two general tests: the strict adherence approach or the traditional characteristics of investments approach. This Note advances the Phoenix *standard, a subset of the traditional characteristics approach, as the correct standard arbitral tribunals should adopt.*

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INTRODUCTION

Steve Bannon, former Chief Executive of the Trump campaign and current White House Chief Strategist, summarized the backlash against globalism when he said, "People want more control of their country. They're very proud of their countries. They want borders. They want sovereignty. It's not just a thing that's happening in any one geographic space."[1] In the United States, this concern over globalism manifested itself in the election of a president who proposes to renegotiate the North American Free Trade Agreement ("NAFTA") and rejects large trade and investment treaties with Asia and Europe.[2] This concern implies that, at least in the foreseeable future, smaller and easier to renegotiate agreements such as bilateral investment and trade treaties will become increasingly

[1] *Trump Campaign CEO Steve Bannon on Breitbart News Daily*, SIRIUSXM NEWS & ISSUES (Nov. 2, 2016), https://soundcloud.com/siriusxm-news-issues/trump-campaign-ceo-steve-bannon-on-breitbart-news-daily.

[2] Megan Cassella, *Trump's first-day agenda: Kill TPP, renegotiate NAFTA*, POLITICO (Nov. 9, 2016), http://www.politico.com/tipsheets/morning-trade/2016/11/trumps-first-day-agenda-kill-tpp-renegotiate-nafta-217318.

important.[3]

Since the late 1950s, governments have become party to about 3,000 bilateral investment treaties ("BITs"), with international arbitration as the preferred forum for resolving investment disputes.[4] These treaties effectively give foreign investors and multinational corporations access to legal remedies based on their national origin.[5] BITs also provide assurances to investors from a contracting state who conduct business in another contracting state.[6] BITs typically consist of three parts: (1) a definitions part, usually defining "investment" and "investor," (2) a part on the "substantive standards for the protection of investments and investors,"[7] and (3) a part covering the method of dispute settlement, usually investor-state arbitration before an International Centre for the Settlement of Investment Disputes ("ICSID") tribunal or other form of arbitration.[8]

For foreign investors, the question of nationality is not only a source of information to guide their contract, but also a "means of accessing the power" afforded by a given nationality.[9] The power of corporate nationality has thus contributed to treaty shopping, which can be defined as an investor from one state benefiting from the legal protection provided by a BIT between the host state of the investment and a third state.[10]

In such investor-state disputes, states frequently challenge arbitral jurisdiction or admissibility by alleging that the investor engaged in

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[3] *See generally* Efraim Chalamish, *The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement*, 34 BROOK. J. INT'L L. 303, 354 (2009).

[4] *See* Clint Peinhardt & Rachel L. Wellhausen, *Withdrawing from Investment Treaties but Protecting Investment*, 7 GLOBAL POLICY 571, 571 (Nov. 2016) (citing Jandhyala, S. et al., *Three Waves of BITs: The Global Diffusion of Foreign Investment Policy*, 55 J. CONFLICT RESOL. 1047, 1048 (2011)); *see also* Yoram Z. Haftel and Alexander Thompson, *Delayed Ratification: The Domestic Fate of Bilateral Investment Treaties*, 67 INT'L ORG. 355, 356 (2013).

[5] RACHEL L. WELLHAUSEN, THE SHIELD OF NATIONALITY 4 (2014).

[6] *See* RUDOLF DOLZER AND CHRISTOPH SCHREUER, PRINCIPLE OF INTERNATIONAL INVESTMENT LAW 13 (2012).

[7] *Id.*

[8] *Id.*

[9] WELLHAUSEN, *supra* note 5, at 8.

[10] Yael Ribco Borman, *Treaty Shopping Through Corporate Restructuring of Investments: Legitimate Corporate Planning or Abuse of Rights?,* 24 HAGUE Y.B. INT'L L. 359, 359-60 (2011). This Note focuses on abuse of process through corporate restructuring in part because the highest number of cases raising an abuse of process claim fall within this subcategory. Ascensio, *infra* note 11, at 771. Additionally, this examines BIT cases under only the ICSID Convention since it governs the procedure of many investment treaty arbitrations. *See* ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 25 (2009).

procedural abuse, formally called "abuse of right," or "abuse of process."[11] In cases brought before arbitral institutions, such as an ICSID tribunal, respondent states may allege abuse of process in various forms.[12] This Note focuses on the abuse of process subcategory of "access to arbitration by tortious means claims," which includes treaty shopping.[13] While treaty shopping is not "illegal or unethical," *per se*, there are limits to its use.[14]

BACKGROUND TO INTERNATIONAL ARBITRATION

a. The ICSID Convention and the Role of Precedent

Investor-state arbitration is essentially the form of alternative dispute resolution used for contractual disputes between a foreign investor and the nation-state hosting the investment (often referred to as the "host government" or "host state").[15] Sources of law applicable in an investment treaty regime can arise from the FDI contract and its choice of law clause, and, in particular, prior awards as a form of precedent.[16] Although arbitral

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[11] Hervé Ascensio, *Abuse of Process in International Investment Arbitration*, 13 CHINESE J. INT'L L. 763, 764 (2014).

[12] According to Ascensio, the typical objections that fall within the category of abuse of process include "frivolous claims . . . , malicious claims . . . , access to arbitration by tortious means . . . , bypassing of a processual rule . . . , and . . . claims undermining the integrity of the arbitral process." *Id*. at 767-77.

[13] *Id.* at 771.

[14] DOLZER & SCHREUER, *supra* note 6, at 52.

[15] WELLHAUSEN, *supra* note 5, at 29.

[16] DOUGLAS, *supra* note 10, at 40-44; *see* William Tetley*, Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 719 (2000) ("With each passing year, there is an ever-increasing volume of reported arbitral awards (particularly in civil law jurisdictions, as well as in the United States), and arbitrators are tending more and more to refer to previous awards rendered in similar cases, thus gradually developing a system of arbitral precedent."); Klaus Peter Berger, *International Arbitration Practice and the Unidroit Principles of International Commercial Contracts*, 46 AM. J. COMP. L. 129, 149 (1998) (stating that "arbitral awards more and more assume a genuine precedential value within the international arbitration process"); Kenneth Michael Curtin, *Redefining Public Policy in International Arbitration of Mandatory National Laws*, 64 DEF. COUNS. J. 271, 279 (1997) ("Publication of arbitral awards . . . is becoming more common, thus alleviating the difficulties associated with a lack of precedent."). *Cf.* Bernard H. Oxman, *International Decisions*, 96 AM. J. INT'L L. 198, 205 (2002) (noting that with regard to non-commercial contexts "the [ICJ] has invoked other international arbitral awards, on [some] occasions, and has even brought some within the ambit of 'precedents' that it will consider on a par with its own prior decisions"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 103 (AM. LAW INST. 1986) (noting that while adjudicative opinions are not formally treated as stare decisis under international law, arbitral awards and other international court decisions have been treated as highly persuasive evidence of customary international law).

awards "fail to 'command *stare decisis* respect,'"[17] arbitrator decisions do provide guidance of precedential value.[18] For instance, international investment tribunals rely on both vertical and horizontal precedence.[19] Vertical precedence signifies the approach that international investment tribunals take to decisions by the International Court of Justice ("ICJ").[20] Although not formally bound to ICJ decisions, international investment tribunals often cite decisions of the ICJ as "authoritative statements of existing international legal rules."[21] In contrast, horizontal precedence captures how international investment tribunals approach the decisions of fellow investment tribunals.[22] Though international investment tribunals are not subject to prior decisions, they regularly follow "an accretion of rulings on the same subject matter" and created a *de facto* practice of precedence.[23] This Note will focus primarily on horizontal precedence because it seeks to argue in favor of the *Phoenix* standard for determining disputes arising from treaty shopping.

The primary purpose of the ICSID Convention is to "facilitate the settlement of disputes between States and foreign investors" and stimulate "a larger flow of private international capital into those countries which wish to attract it."[24] The ICSID Convention provides standard clauses for use by the parties, detailed rules of procedure, and institutional support.[25] Procedural rules of the ICSID Convention apply when the relevant BIT between the investor and host state agree to this option.[26] An ICSID tribunal notably differs from common law courts on the degree of reliance

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[17] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES, COMMENTARY AND MATERIALS 100 (1994).

[18] *See* Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT'L L. REV. 957, 999-1000 (2004-2005) (stating that even in the absence of a formal system of stare decisis, and despite the confidential and "private" nature of international arbitration, arbitration proceedings generate procedural rules and practices, and to a lesser extent substantive rules, that serve as precedent for future arbitrations and beyond).

[19] Moshe Hirsch, *The Sociology of International Investment Law*, *in* THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 143, 158 (Zachary Douglas ed. et al. 2014) (citing Jeffrey C. Dobbins, *Structure and Precedent,* 108 MICH. L. REV. 1453, 1460-61 (2010)).

[20] *Id.* at 158.

[21] *Id.* at 161.

[22] *Id.* at 158.

[23] *Id.* at 160.

[24] Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 87 (Apr. 15, 2009) (citing International Bank for Reconstruction and Development, *Report of the Executive Directors on the ICSID Convention*, §12 (Mar. 18, 1965) (Report of the Executive Directors).

[25] DOLZER & SCHREUER, *supra* note 6, at 238.

[26] DOUGLAS, *supra* note 10, at 25.

on precedent.[27]

Arbitrators, unlike judges of a common law system, are not constrained by decisions of other tribunals.[28] However, the decisions of other similarly situated arbitral tribunals are often taken into consideration and comprise a "corpus of principles" representing the "litigants' shared expectations."[29] However, the ICSID Convention has features that promote a "coherent jurisprudence."[30] The tribunal in *AES Corp. v. The Argentine Republic* noted this balancing between the tribunal's autonomous decision-making and reliance on precedent by stating:

> Each tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem; but decisions on jurisdiction dealing with the same of very similar issues may at least indicate some lines of reasoning of real interest; this Tribunal may consider them in order to compare its own position with those already adopted by its predecessor and, if it shares the views already expressed by one or more of these tribunals on a specific point of law, it is free to adopt the same solution.[31]

Thus, while precedent does not bind tribunals, consideration of past decisions and of the interpretations implemented in them is "a regular feature in almost every decision."[32]

CONDITIONS FOR ICSID TO HAVE JURISDICTION ACCORDING TO ARTICLE 25

For the ICSID tribunal to have jurisdiction over a claim, four conditions must be satisfied: *ratione personae, ratione materiae, ratione voluntatis,* and *ratione temporis.*[33] *Ratione personae* requires that the "dispute must

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[27] Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitors,* 2 J. INT'L L DISP. SETTLEMENT 5, 16 (2011). Unlike common law courts, international investment tribunals are distinct in that: (i) they are consistently established on an "ad hoc basis"; (ii) they do not include an appeal mechanism to challenge arbitral investment awards; and (iii) the decentralized characteristic of international investment tribunals "exacerbates" the difficulty of avoiding "inconsistent decisions." *See* Hirsch, *supra* note 19, at 158-59.

[28] *See* William W. Park, *Arbitrators and Accuracy,* 1 J. INT'L DISPUTE SETTLEMENT 25, 49 (2010).

[29] *Id.* Professor Park notes that prior awards do not have the force of common law precedent, but they may "provide information about what the relevant community considers the rights approach to similar problems." *Id.*

[30] Guillaume, *supra* note 27, at 16.

[31] DOLZER & SCHREUER, *supra* note 6, at 34 (citing AES Corp v. The Argentine Republic, ICSID Case No. ARB/02/17, Decision on Jurisdiction, ¶ 30, (April 26, 2005)).

[32] DOLZER & SCHREUER, *supra* note 6, at 33 (citations omitted).

[33] Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, ¶

oppose a Contracting State and a national of another Contracting State."[34] *Ratione materiae* mandates that the dispute be a legal dispute "arising directly out of an investment."[35] *Ratione voluntatis* requires the Contracting State and the investor to "consent in writing that the dispute be settled through ICSID arbitration."[36] Finally, *ratione temporis* stipulates the ICSID Convention must have been "applicable at the relevant time," meaning the time when the arbitration agreement, as a part of the investment contract, was signed.[37]

a. Ratione Personae Requirement for Jurisdiction

Ratione personae within investor state arbitration requires a private investor of a nationality to oppose a host state of a different nationality.[38] Under Article 25(1) of the ICSID Convention, the host state and the state in which the investor claims nationality both must be Contracting States. Otherwise, the requirement of *ratione personae* is not satisfied and there is no ICSID jurisdiction.[39]

A host state is considered a contracting state to the ICSID Convention if it has ratified the convention and is included in the List of Contracting States and Other Signatories of the Convention.[40] A state that is not a Contracting State at the time of the arbitration proceedings is not subject to ICSID's jurisdiction, regardless of whether it has consented to jurisdiction.[41]

For purposes of the investor, the ICSID Convention's Preamble addresses private international investment.[42] The Preamble's language suggests that the investor must be a private individual or corporation, thus implying that investment arbitration is designed for the protection of private investors.[43] Regarding the investor's nationality, the ICSID Convention

54 (Apr. 15, 2009).

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*; *see also* DOLZER & SCHREUER, *supra* note 6, at 249.

[38] DOLZER & SCHREUER, *supra* note 6, at 249.

[39] *Id.* at 253.

[40] *Id.* at 249.

[41] *Id.*

[42] The Preamble to the ICSID Convention addresses private investors in the following: "Considering the need for international cooperation for economic development, and the role of private international investment therein." Convention on the Settlement of Investment Disputes Between States and Nationals of Other States [ICSID Convention] (Washington, 18 March 1965), 575 U.N.T.S. 159; 17 U.S.T. 1270; T.I.A.S. No. 6090, *entered into force* 14 Oct. 1966.

[43] DOLZER & SCHREUER, *supra* note 6, at 250.

calls for a positive and negative nationality requirement.[44] The positive requirement mandates that an investor must be a national of another Contracting State to the ICSID Convention.[45] Next, the negative requirement stipulates that the investor must not be a national of the host state.[46] In an arbitration based on a BIT scenario, the host state must be one of the parties to the BIT and the investor must demonstrate that it is a national of a different Contracting State of the ICSID convention.[47] If an investor holds nationality of the host state, even as a dual national, then ICSID bars tribunals from hearing the investor's claims.[48]

In abuse of process cases, the respondent (usually the host state) first objects to an investor's claim by raising abuse of process as a defense, asserting the tribunal lacks jurisdiction.[49] The tribunal in *Chevron* stated that, in abuse of process cases, the claimant (usually the investor) is not required to prove that his claim is asserted in a non-abusive manner; rather, the burden to prove the existence of abuse of process is on the respondent.[50]

For purposes of international investment arbitration, the investor is often a corporate entity formed under the laws of one contracting state, whereas its investment is "a bundle of rights acquired pursuant to the municipal law of a different contracting state."[51] The source of the investment's capital is not relevant to determining the existence of a foreign investment.[52] Rather, the investor's nationality determines the treaty from which he may benefit.[53] Dolzer and Schreuer explain the decisiveness of investor nationality by stating:

> The investor's nationality is relevant for two purposes. The substantive standards guaranteed in a treaty will only apply to the respective nationals. In addition, the jurisdiction of an international tribunal is determined, inter alia, by the claimant's nationality. In particular, if the host state's consent to jurisdiction is given through a treaty, it will only apply to nationals of a state that is a party to the

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[44] *Id.* at 252; *see also* ICSID Convention, *supra* note 42, at art. 25 (detailing the ICSID's jurisdiction).

[45] DOLZER & SCHREUER, *supra* note 6, at 252.

[46] *Id.* (citing ICSID Convention, art. 25).

[47] DOLZER & SCHREUER, *supra* note 6, at 252.

[48] *Id.* at 252-53.

[49] Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on the Respondents Jurisdictional Objections, ¶ 2.14, (June 1, 2012) (citing Chevron Corporation (USA) v. The Republic of Ecuador, UNCITRAL, PCA Case No. 34877, Interim Award, ¶ 138 (Dec.1, 2008)).

[50] Chevron Corporation (USA), UNCITRAL, PCA Case no. 34877, at ¶ 139.

[51] DOUGLAS, *supra* note 10, at 40.

[52] DOLZER & SCHREUER, *supra* note 6, at 44.

[53] *Id.*

treaty.[54]

b. Ratione Voluntatis Requirement for Jurisdiction

To meet the *ratione voluntatis* requirement for jurisdiction, the contracting state and the investor must have consented in writing to any dispute arising between them being settled through ICSID arbitration.[55] As previously mentioned, most investment arbitration cases have been based on jurisdiction through BITs,[56] with most investor-state dispute settlement clauses containing clear consent to arbitration.[57] This applies when the BIT says that each party "hereby consents" or it says that the dispute "shall be submitted" to arbitration.[58]

c. Ratione Materiae Requirement for Jurisdiction

Under the ICSID Convention, the *ratione materiae* condition to jurisdiction requires the tribunal must inquire whether the dispute between the parties is "a legal dispute arising directly out of an investment."[59] The elements of this requirement are: (a) the existence of a dispute, (b) the legal nature of the dispute, (c) the directness of the legal dispute, and (d) the existence of an investment.[60] Each of these elements may create jurisdictional issues.[61]

ICSID Tribunals adopted the definition of dispute created by the ICJ.[62] According to the ICJ, a dispute is a "disagreement on a point of law or fact, a conflict of legal views or interests between parties."[63] Next, a dispute requires a "minimum of communication" between the parties.[64] For example, the tribunal in *Railroad Development Corp. v. Republic of Guatemala* defined the concept of a dispute as "a conflict of views on

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[54] *Id.* at 45.

[55] Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 54 (Apr. 15, 2009).

[56] DOLZER & SCHREUER, *supra* note 6, at 257.

[57] *Id*. at 258.

[58] *Id.*; *see also* CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY, Preamble, ¶ 35 (2d ed. 2009).

[59] *Phoenix*, ICSID Case No. ARB/06/5, at ¶ 54 (citing ICSID Convention, Art. 25(1)).

[60] DOLZER & SCHREUER. *supra* note 6, at 245.

[61] *Id.*

[62] SCHREUER, THE ICSID CONVENTION: A COMMENTARY, *supra* note 58, at Art. 25, ¶ 42 (citations omitted).

[63] *Id*. (citing Mavrommatis Palestine Concession, Judgment No. 2, P.C.I.J., Series A, No. 2 (1924)).

[64] SCHREUER, THE ICSID CONVENTION: A COMMENTARY, *supra* note 59, at Art. 25, ¶ 43.

points of law or fact which requires sufficient communication between the parties for each to know the other's views and oppose them."[65]

The existence of a legal dispute concerning an investment is a fundamental prerequisite for a tribunal to have *ratione materiae* condition to jurisdiction.[66] Disputes are "legal disputes" if they "concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation."[67] The tribunal in *Burlington v. Ecuador* discussed two elements required for a dispute to be considered legal: "(i) a disagreement between the parties on their rights and obligations, an opposition of interests and views, and (ii) an expression of this disagreement so that both parties are aware of the disagreement."[68] Finally, a legal dispute requires that legal remedies such as restitution or damages are sought and "if legal rights based on, for example, contracts, treaties or legislation are claimed."[69]

The third element, the directness of the legal dispute, refers to the relation of the dispute to the investment, not to the investment in itself.[70] For example, the tribunal in *Fedax v. Venezuela* rejected the respondent's argument that the disputed transaction, debts instruments issued by Venezuela, did not satisfy the "directness" requirement.[71] The Tribunal held that jurisdiction can exist "even in respect of investments that are not direct, so long as the dispute arises directly from such transaction.[72]

Finally, one of the cornerstones of an ICSID tribunal's jurisdiction is the existence of an investment.[73] However, Article 25 of the ICSID Convention fails to define the term "investment."[74] During negotiations of the ICSID Convention, delegates proposed various definitions, leading to a lack of

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[65] DOLZER & SCHREUER, *supra* note 6, at 245 (citing Railroad Development Corp (RDC) v. Republic of Guatemala, Case No. ARB/07/23, Second Decision on Jurisdiction, ¶¶ 126-38 (May 18, 2010)).

[66] Christoph Schreuer, *What is a legal dispute?, Transnational Dispute Management*, *in* INVESTOR-STATE DISPUTES – INTERNATIONAL INVESTMENT LAW 959, 960 (2009).

[67] DOLZER & SCHREUER, *supra* note 6, at 245-46 (citing Report of the Executive Directors to the ICSID Convention, ¶ 26, 1 ICSID Reports 28).

[68] Borman, *supra* note 10, at 372 (citing Burlington Resources Inc v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Jurisdiction, ¶ 289 (June 2, 2010)).

[69] SCHREUER, THE ICSID CONVENTION: A COMMENTARY, *supra* note 58, at Art. 25, ¶ 60.

[70] *Id.* at Art. 25, ¶ 88.

[71] *Id.* (citing Fedax v. Venezuela*,* ICSID Case No. ARB/96/3, Decision on Jurisdiction, ¶ 24 (June 11, 1997).

[72] Fedax v. Venezuela*,* ICSID Case No. ARB/96/3, Decision on Jurisdiction, ¶ 24 (June 11, 1997).

[73] Report of the Executive Directors to the ICSID Convention, *supra* note 24, at ¶ 23.

[74] *Id* at ¶ 27.

consensus over which to adopt.[75] Eventually, the United Kingdom delegate proposed omitting any definition of "investment" because the lack of consensus would create jurisdictional difficulties.[76] This proposal ultimately won by a large majority.[77] The absence of a definition of "investment" within the ICSID Convention essentially accounts for the substantial requirement of consent to arbitrate while allowing Contracting States to a BIT to determine, in advance, which disputes would go to arbitration.[78]

The consequences of the ICSID Convention providing no definition for investment has led tribunals to follow one of two approaches to determine what constitutes an investment: the Strict Adherence Approach and the Typical Characteristics Approach, when interpreting Article 25 of the ICSID Convention.[79] This Note advances a subset of the Typical Characteristics Approach as elaborated *infra* in Section VI.

d. Ratione Temporis for Jurisdiction

In general, treaties apply only to acts or events that occurred after they enter into force.[80] For a tribunal to satisfy *ratione temporis* for jurisdiction, "the ICSID Convention must have been applicable at the relevant time."[81] This principle is expressed in Article 28 of the Vienna Convention on the Law of Treaties:

> Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.[82]

The ICSID Convention distinguishes between natural persons, meaning individuals, and juridical persons, meaning companies.[83] For natural persons, Article 25(2)(a) has two requirements: (i) the investor must have the nationality of a state party to the Convention both on the date of consent and on the date of the request for arbitral proceedings, and (ii) the investor

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[75] SCHREUER, *supra* note 58, at ¶ 115.

[76] *Id*.

[77] *Id.*

[78] DOLZER & SCHREUER, *supra* note 6, at 65.

[79] DOUGLAS, *supra* note 10, at 164.

[80] DOLZER & SCHREUER, *supra* note 6, at 36.

[81] Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 54 (Apr. 15, 2009).

[82] DOLZER & SCHREUER, *supra* note 6, at 36 (citing Vienna Convention on the Law of Treaties, art. 28 (Vienna, 23 May 1969) 1155 U.N.T.S. 331, *entered into force* 27 Jan. 1980).

[83] DOLZER & SCHREUER, *supra* note 6, at 40.

must not have the host state's nationality on either date.[84] For juridical persons, Article 25(2)(b) only requires satisfaction of nationality at the date of consent, which is usually the date of initiation of proceedings.[85] On the date of consent, the juridical person must have the nationality of a party to the Convention other than the host state.[86]

Another factor in the *ratione temporis* analysis is the time in which the dispute had arisen.[87] The time of the dispute is not the same as the time of the events leading to the dispute.[88] Therefore, disputes occurring before a BIT came into force "should not be read as excluding jurisdiction over events occurring before that date."[89] Under normal circumstances, the allegedly illegal acts occur some time before the dispute.[90] The tribunal's decision in *Jan de Nul v. Arab Republic of Egypt* serves as a guide on how ICSID tribunals apply this aspect of *ratione temporaris*.[91] In *Jan de Nul*, the date of the BIT's entry into force barred claims that had arisen prior to this date.[92] The BIT came into force in 2002, but the dispute existed before this date.[93] Subsequently, a local Egyptian court rendered an adverse decision in 2003, about one year after the BITs entry into force.[94] The tribunal, however, accepted jurisdiction, reasoning that the intervention of a new actor, the Egyptian court, was a decisive factor and the original dispute was "(re)crystallized into a new dispute," now under the BIT and satisfying *ratione temporaris* under the ICSID Convention.[95]

To distinguish investments from "ordinary commercial transactions," the investor's commitment to the host State's economy must usually be at least "a certain duration" of performance of the contract.[96] The duration requirement envisions a two-year "minimal duration" of performance of the contract[97] as part of its quantitative analysis. The qualitative analysis

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[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.* at 42 (citations omitted).

[88] *Id*.

[89] *Id.*

[90] *Id.*

[91] *Id.* at 43 (citing Jan de Nul v. Arab Republic of Egypt*,* ICSID Case No. ARB/04/13, Decision on Jurisdiction, ¶ 117 (June 16, 2006)).

[92] *Id.*

[93] *Jan de Nul*, ICSID Case No. ARB/04/13, at ¶ 122.

[94] *Id.*

[95] *Id.*

[96] Hanno Wehland, *The Transfer of Investments and Rights of Investor under International Investment Agreement – Some Unresolved Issues*, 30 ARB. INT'L 565, 566 (2014) (citations omitted).

[97] Emmanuel Gaillard, *Identity or Define? Reflections on the Evolution of the Concept*

examines whether the contract appears to promote "the economy and development of the host state."[98] Additionally, investors are not obligated to hold on to their investments for an indefinite period.[99] Rather, they must "have the possibility to sell the assets underlying their investments with a view to repatriating the proceeds."[100] As a result, at least one tribunal has characterized a transfer of investments through a sale of assets as a "normal feature of a global economy."[101]

PRELIMINARY FINDINGS TO ABUSE OF PROCESS

a. The Exhaustion of Local Remedies Rule

It should be noted that the "exhaustion of local remedies rule" falls outside of the ICSID Convention and is not a condition for arbitration under the Convention unless specifically required by the host State.[102] The exhaustion of local remedies rule requires that a claimant must first bring his claim to the domestic courts in the country in which the violation occurred before he may petition an international court.[103] Unless Contracting States specifically place an exhaustion of local remedies provision in their BIT, tribunals have "uniformly dispensed with the local remedies rule" as a procedural barrier to granting jurisdiction.[104] Most notably, Article 26 of the ICSID Convention specifically excludes the requirement to exhaust local remedies "unless otherwise stated."[105]

b. The Denial of Benefits Clauses and the Good Faith Analysis

Prior to assessing whether a corporate restructuring of investments is either a legal fiction[106] or a perfectly legitimate goal,[107] the tribunal will

of Investment in ICSID Practice, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 403, 404 (Christina Binder et al., eds., Oxford Univ. Press 2009) (citing Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 23, 2001)).

[98] Malaysian Historical Salvors Sdn, Bhd v. The Government of Malaysia, ICSID Case No. ARB/05/10, Award, ¶ 111 (May 17, 2007).

[99] Wehland, *supra* note 96, at 566.

[100] *Id*.

[101] *Id.* (citing Societe Générale v. Dominican Republic, LCIA Case No. UN 7927, Decision on Jurisdiction, ¶ 44 (Sep. 19, 2008)).

[102] SCHREUER, THE ICSID CONVENTION: A COMMENTARY, *supra* note 58, at Preamble, ¶ 22.

[103] DOUGLAS, *supra* note 10, at 28-29.

[104] *Id.* at 29 (citation omitted).

[105] DOLZER & SCHREUER, *supra* note 6, at 264.

[106] Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 143 (Apr. 15, 2009).

examine any denial of benefits ("DOB") clause and conduct a good faith analysis.[108] A DOB provision in an investment agreement denies the benefits of that investment agreement to a company that does not have "substantial business activities" in the state upon whose nationality it depends.[109] Factors relevant to determining substantial business activities include: (i) office space in the state from which the claimant alleges to derive nationality, (ii) the number of employees located in such state, (iii) whether the claimant pays taxes to the state, and (iv) whether the claimant owns any tangible property or produces anything in the state.[110]

If the tribunal determines either that the BIT does not contain a DOB clause, or that the claimant has sufficiently substantial business activities to prevent triggering a DOB clause, the tribunal next analyzes whether the claimant acted in good faith.[111] As applied to investor-state disputes, the principle of good faith governs the relations between states, "as well as the legal rights and duties of investors seeking to assert an international claim under a treaty."[112] Under a good faith analysis of the investor's intentions, a violation of the international principle of good faith coincides with the national principle of good faith.[113] At least one tribunal has titled this dual good faith analysis the "Janus concept."[114]

The Janus concept is one method to determine whether an investor breached his good faith duty.[115] A tribunal begins its analysis by looking into the domestic principles determining good faith.[116] Common factors of a breach of good faith may include the investor falsifying facts to meet the

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[107] Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶ 204 (June 10, 2010).

[108] Borman, *supra* note 10, at 364, 368.

[109] *Id*. at 364.

[110] *See*, *e.g.*, Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on the Respondents Jurisdictional Objections, ¶ 4.8 (June 1, 2012); *see generally* Jordan Behlman, *Out on a Rim: Pacific Rim's Venture Into CAFTA's Denial of Benefits Clause*, 45 U. MIAMI INTER-AM. L. REV. 397 (2013).

[111] Ascensio, *supra* note 11, at 777.

[112] Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 107 (Apr. 15, 2009).

[113] *Id.* at ¶ 109.

[114] *Id.* The *Phoenix* tribunal describes the Janus concept as "one face looking at the national legal order and one at the international legal order . . . And in most cases . . . a violation of the international principle of good faith and a violation of the national principle of good faith go hand in hand." *Id.*

[115] *Id.*

[116] Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 113 (Apr. 15, 2009).

jurisdiction criteria of a tribunal,[117] committing fraudulent misrepresentation,[118] or bribing host state officials as determined by the host state's national laws.[119] Regarding the international principal of good faith, parties are required respect the rights granted by treaties and follow the "implied clause" to not abuse these rights.[120]

Following these preliminary findings, tribunals apply one of two tests: a six-element textual analysis based on the BIT and the ICSID convention, or a strict textual analysis of the BIT in question.[121]

THE DEFINITION OF PROTECTED INVESTMENT WITHIN ICSID: THE ABSENCE OF A DEFINITION AND THE ALTERNATIVE APPROACHES

a. The Double-Barrel Test for Protected Investments

If the investment survives the preliminary DOB clause analysis and good faith analysis, a tribunal facing an abuse of process claim must decide whether the investment before them is a protected investment or a sham transaction.[122] To qualify as a protected investment, some tribunals hold that the investment must meet the "double-barrel" test, which is satisfaction of the definitional standard of "investment" in the BIT and the ICSID convention.[123] As there is no generally accepted definition of "investment" within the ICSID Convention, the tribunal in *Milhaly* held that the "double-barrel" test required an examination of prior ICSID tribunal decisions and state practice as demonstrated in their BIT.[124] The "double-barrel" test, by using prior ICSID decisions, is an example of tribunals going outside of the

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[117] *Id.* at 111 (citing Inceysa Vallisoletana, S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award, ¶ 239 (Aug. 2, 2006)).

[118] Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 112 (Apr. 15, 2009) (citing Plama Consortium Limited v. Bulgaria, ICSID Case No. ARB/03/24, Award, ¶ 143 (Aug. 27, 2008)).

[119] World Duty Free Company Limited v. The Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶ 157 (Oct. 4, 2006).

[120] Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 107 (Apr. 15, 2009)

[121] DOUGLAS, *supra* note 10, at 164.

[122] Borman, *supra* note 10, at 370.

[123] Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 74 (Apr. 15, 2009) (citing Malaysian Historical Salvors Sdn, Bhd v. The Government of Malaysia, ICSID Case No. ARB/05/10, Award, ¶ 55 (May 17, 2007)).

[124] Diane A. Desierto, *Deciding international investment agreement applicability: the development argument in investment*, *in* INVESTMENT LAW WITHIN INTERNATIONAL LAW INTEGRATIONIST PERSPECTIVES 240, 243 (Freya Baertens ed., 2013) (quoting Milhaly International Corporation v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2, Award, ¶ 58 (2002)).

strict definition of "investment" within a given BIT. In this way, the "double-barrel" test is further evidence of support for the Typical Characteristics of Investment Approach as opposed to the Strict Adherence Approach.

b. Introduction to the Strict Adherence Approach and Typical Characteristics of Investment Approach to Determine Ratione Materiea

The lack of a definition of "investment" in the ICSID convention has created two general methods of reconciling this deficiency: a Strict Adherence to the definition of "investment" as provided in the investment treaty (the party-defined approach) and a Typical Characteristics of Investment (self-contained) approach.[125] Although the two tests may not always reflect the different interpretations of an investment adopted by tribunals[126] it would be a mistake to consider both approaches as in a relationship of opposition.[127] Instead, the approaches account for the different variations adopted by tribunals when interpreting "investment" under Article 25 of the ICSID Convention.[128]

Under a Strict Adherence Approach, the definition of "investment" comes from a strict adherence to the terms section of the investment treaty.[129] In other words, the concrete terms by which an "investment" is understood are those established by the parties either "in a BIT or in a special agreement between the host state and the investor."[130] Proponents of this approach claim that adhering only to the BIT's definition of investment requires "no further interpretive search for the proper meaning of the term [investment]."[131]

In contrast to the Strict Adherence Approach, the Typical Characteristics Approach is embodied by the characteristics of an investment as articulated in the *Salini v. Morocco* decision.[132] Supporters of the Typical Characteristics Approach argue that parties to a dispute cannot by treaty define something as an "investment" that does not satisfy the objective requirements of Article 25 of the Convention simply to create ICSID jurisdiction.[133]

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[125] DOUGLAS, *supra* note 10, at 164. *See also* DOLZER & SCHREUER, *supra* note 6, at 74.

[126] DOUGLAS, *supra* note 10, at 164 (citing *Malaysian Historical Salvors*, ICSID Case No. ARB/05/10, Award, ¶ 70 (May 17, 2007)).

[127] DOUGLAS, *supra* note 10, at 164.

[128] *See* DOLZER & SCHREUER, *supra* note 6, at 74.

[129] DOUGLAS, *supra* note 10, at 164.

[130] DOLZER & SCHREUER, *supra* note 6, at 74.

[131] *See* DOUGLAS, *supra* note 10, at 190.

[132] *Id.* at 164.

[133] Malaysian Historical Salvors Sdn, Bhd v. The Government of Malaysia, ICSID

THE *SALINI* TEST FOR PROTECTED INVESTMENT: MERITS, CRITICISMS AND REVISIONS

In *Salini*, the Tribunal had to decide whether a public works contract was an investment in order to satisfy the *ratione materiae* element for jurisdiction.[134] The decision in *Salini* relies on the award in *Fedax N.V. v. The Republic of Venezuela*, which influenced the understanding of "investment."[135] The *Fedax* Tribunal held that Article 25 of the ICSID Convention allowed a broad framework of "investment" and created a five-point criteria approach to determine the basic features of a protected investment subject to ICSID jurisdiction.[136] Based on these factors, the *Salini* Tribunal adopted four of the five factors, creating what became known as the "*Salini* criteria" for investment.[137] Thus, a number of investment tribunals, for purposes of determining whether a claimant made an investment, have used the *Salini* test and focused solely on these four criteria.[138] The *Salini* test requires the presence of the following elements in order to constitute a protected investment: (i) a contribution of money, (ii) a certain duration, (iii) an element of risk, and (iv) a contribution to the host State's development.[139]

The *Salini* Tribunal held "contribution of money" to mean adequate contributions made by the investor in the form of expertise, personnel, and equipment to accomplish the investment.[140] Next, "a certain duration" encompassed both a quantitative and qualitative analysis according to later tribunals adopting *Salini*.[141] As previously stated, the duration requirement envisions a two-year "minimal duration" of performance of the contract as part of its quantitative analysis and a qualitative analysis by looking whether the contract appears to promote "the economy and development of

Case No. ARB/05/10, Award, ¶ 55 (May 17, 2007) (citing Joy Mining Machinery Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award, ¶ 50 (Aug. 6, 2004)).

[134] Gaillard, *supra* note 97, at 404 (citing Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 2 (July 23, 2001)).

[135] DOLZER & SCHREUER, *supra* note 6, at 66 (citing Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3, Decision on Jurisdiction, ¶¶ 21-33 (July 11, 1997)).

[136] *Fedax*, ICSID Case No. ARB/96/3, at ¶ 22.

[137] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001).

[138] *See* Maria Gritsenko, *Host State's Development Status*, *in* INVESTMENT LAW WITHIN INTERNATIONAL LAW INTEGRATIONIST PERSPECTIVES 341, 342 (Freya Baetens ed., 2013).

[139] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001).

[140] *Id.* at ¶ 53.

[141] Malaysian Historical Salvors SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Award, ¶ 110 (May 17, 2007).

the host state."[142]

The third element, "an element of risk," requires a fact intensive process, with relevant factors such as the investor subject to sudden increase in the cost of labor or any accident or damage caused to property during performance of the work[143] Finally, and perhaps the most controversial of the *Salini* criteria,[144] "a contribution to the host State's development" is determined by looking at whether the investor accomplished or contributed to a task that is traditionally in the hands of the state, such as construction of domestic infrastructure.[145]

a. Criticisms of the Salini Criteria in ICSID Case Law and Scholarship

Although some tribunals have accepted the *Salini* criteria,[146] it has also faced criticism within ICSID case law[147] and scholarship.[148] The first rejection of the *Salini* criteria came in *Biwater Gauff v. Tanzania,* which rejected the *Salini* approach based on two points.[149] First, the *Biwater* Tribunal argued that the text of Article 25 of the ICSID Convention has no reference to the *Salini* criteria.[150] Second, the *Biwater* Tribunal noted that the negotiating history clearly establishes that the definition of "investment" is intentionally vague.[151] In similar fashion, the *Pantechniki v. Albania* Tribunal rendered an award that supported party autonomy in the definition of "investment," holding the *Salini* criteria as introducing elements of subjective judgment and leading to unpredictability.[152] *Malaysian Salvors* directly attacked the *Salini* test, stating:

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[142] *Id*. at ¶¶ 110-11.

[143] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 55 (July 23, 2001).

[144] DOUGLAS, *supra* note 10, at 202.

[145] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 57 (July 23, 2001)

[146] *See* Jan de Nul v. Arab Republic of Egypt*,* ICSID Case No. ARB/04/13, Decision on Jurisdiction, ¶¶ 90-96 (June 16, 2006); Inceysa Vallisoletana, S.L. v. Republic El Salvador, ICSID Case No. ARB/03/26, Award, ¶ 187 (Aug. 2, 2006).

[147] DOUGLAS, *supra* note 10, at 190-91 (citing Malaysian Historical Salvors SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Award, ¶ 106(e) (May 17, 2007)).

[148] DOUGLAS, *supra* note 10, at 401.

[149] DOLZER & SCHREUER, *supra* note 6, at 68 (citing Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*,* ICSID Case No. ARB/05/22, Award, ¶ 312 (July 24, 2008)).

[150] *Biwater Gauff,* ICSID Case No. ARB/05/22, at ¶ 312.

[151] *Id*.

[152] DOLZER & SCHREUER, *supra* note 6, at 69 (citing Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania, ICSID Case No. ARB/07/21, Award, ¶ 43 (July 20, 2009)).

> The classical *Salini* hallmarks are not a punch list of items which, if completely checked off, will automatically lead to a conclusion that there is an 'investment.' If any of these hallmarks are absent, the tribunal will hesitate (and probable decline) to make a finding of 'investment.' However, even if they are all present, a tribunal will still examine the nature and degree of their presence in order to determine whether, on a holistic assessment, it is satisfied that there is an ICSID 'investment.'[153]

Finally, the *Inmaris v. Ukraine* Tribunal stated that the *Salini* criteria may be useful to identify "investments" in BITs that define the term so broadly that the provision deviated from any reasonable definition.[154]

Within scholarship, Douglas, for example, argues that if one accepts that the purpose of an investment treaty is to grow investments, then the concept of an investment "cannot be one in search of meaning in the pleadings submitted to an investment treaty tribunal that is established years . . . after the decision to commit capital to the host state was made."[155] In addition, Douglas argues a competing test to find the concept of an investment.[156] First, under Rule 22, there must be legal materialization of an investment as created by the relevant BIT.[157] This investment must be recognized by local host state laws or adopted international laws.[158] Second, under Rule 23, the economic materialization of an investment requires "the commitment of resources to the economy of the host state by the claimant entailing the assumption of risk in expectation of a commercial return."[159]

Other scholars argue that the Typical Characteristics Approach, as articulated in the *Salini* test, goes beyond the understanding of the parties and needs to find support for its interpretation outside the understanding of the drafters of the ICSID Convention.[160] In particular, Dolzer and Schreuer argue that tribunals employing this approach rely on their view of "investment" either from everyday language or definitions found in dictionaries.[161]

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[153] DOUGLAS, *supra* note 10, at 400-02 (citing Malaysian Historical Salvors SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Award, ¶ 106(e) (May 17, 2007)).

[154] DOLZER & SCHREUER, *supra* note 6, at 70 (citing *Inmaris v. Ukraine*, Decision on Jurisdiction, ¶131. (Mar. 8, 2010)).

[155] DOUGLAS, *supra* note 10, at 190.

[156] *Id.* at 164.

[157] *Id.* at 170-71.

[158] *Id*.

[159] *Id.* at 189.

[160] DOLZER & SCHREUER, *supra* note 6, at 74.

[161] *Id.*

ANALYSIS: MERITS OF THE *SALINI* CRITERIA AND THE RISE OF THE *PHOENIX* STANDARD

a. Issues with the Strict Adherence Approach for Protected Investment

While the criticisms to the *Salini* criteria are well founded, its critics do not fully consider the deficiencies of a strict adherence to the BIT. First, the current trend of case law shows that neither a Typical Characteristics Approach of investment nor a Strict Adherence Approach may be suitable to determine whether something is an investment.[162] Critics of the subjectivity inherent in the *Salini* criteria neglect to consider that tribunals apply different standards, with some holding on to a strict analysis of investment per the relevant BIT, others adopting a highly discretionary *Salini* criteria, and yet others employing a more flexible and central *Phoenix* standard.[163] Criticism that employing a pure Typical Characteristics Approach, like the *Salini* criteria, results in using secondary sources to determine a protected investment is too focused on a rigid application of this standard. Thus, a combination of the flexible version of the two approaches arrives at the best method for determining whether something constitutes an investment.

Arguments posed by some of the case law, such as the *Biwater* Tribunal argument that the text of Article 25 of the ICSID Convention has no reference to the *Salini* criteria[164] and the negotiating history suggests the term "investment" was left intentionally vague,[165] are not completely accurate. For example, a definition of investment within the ICSID convention was left intentionally vague because having one rigid definition would create jurisdictional problems.[166] Thus, the ICSID Convention did allow the parties to decide what kinds of investments they desired to take to arbitration.[167] Given this power, parties in most BITs define the term "investment" broadly, recognizing that investment forms constantly change.[168] Supporters of the Strict Adherence Approach may base their argument on clear text, but the actual practice of states, as seen in most

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[162] *Id.* at 76.

[163] *Id.*

[164] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, ¶ 312 (July 24, 2008).

[165] *Id*.

[166] SCHREUER, *supra* note 58, at ¶ 115 (citing History, Vol. II).

[167] *Id.*

[168] Jeswald W. Salacuse & Nicholas P. Sullican, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARVARD INT'L LAW J. 67, 80 (2005).

BITs, suggests that this interpretation is erroneous.[169] Thus, the argument that arbitrators should be confined strictly to the BIT isn't realistic because they must interpret broad language, creating a role for them to decide a protected investment.

Under a Strict Adherence Approach, arbitrators are confined to the definition of "investment" provided by the BIT.[170] Proponents of the Strict Adherence Approach favor this view because the definition of investment under the BIT most accurately captures the intent of the parties.[171] As already stated, in practice, most BITs define "investment" broadly, acknowledging that investment forms frequently change.[172] This broad construction of "investments" produces an "expanding umbrella" of protection to investors and investments.[173]

The concern of unpredictability, as articulated by the *Pantechniki* Tribunal,[174] does not properly account for safeguards in the ICSID Convention.[175] As stipulated by the *Phoenix* Tribunal, parties may not define "investment" for the purposes of ICSID jurisdiction in their BITs.[176] For example, a sale of goods would clearly fall outside the protection of a BIT, even if explicitly stated by the parties in their BIT, because ICSID Convention does not cover trade.[177] Finally, proponents of the Strict Adherence Approach neglect to consider the compromise reached by the *Phoenix* tribunal when it adopted its revised version of the *Salini* test.[178]

Apart from the discretion given to arbitrators in deciding whether there was an investment, a recurrent criticism of the *Salini* test concerns its last element: "a contribution to the host State's development."[179] Proponents of this factor draw the support for their position from the reference in ICSID's preamble to "the development of the host State."[180] In response, critics of this factor of the *Salini* test point out the weak evidentiary support for this

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[169] *Id.*

[170] DOLZER & SCHREUER, *supra* note 6, at 74.

[171] *Id.*

[172] Salacuse & Sullican, *supra* note 168, at 80.

[173] *Id.*

[174] Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania, ICSID Case No. ARB/07/21, Award, ¶ 43 (July 20, 2009).

[175] Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 82 (Apr. 15, 2009).

[176] *Id.* The Tribunal famously states that, for example, parties may not put in their BIT that a sale of goods or a dowry would be an investment for purposes of ICSID jurisdiction. *Id.*

[177] *Id.*

[178] *Id*. at ¶ 114.

[179] *See* DOUGLAS, *supra* note 10, at 201.

[180] DOLZER & SCHREUER, *supra* note 6, at 75 (citing ICSID Convention *Preamble*).

factor in the negotiating history or the text of Article 25 of the ICSID Convention.[181] Particularly, critics state the uncertainty associated with this approach, and cite to cases such as the *Bayview v. Mexico* decision:

> When the investment is made in a different country which has concluded an investment protection treaty covering that investment, the investor is entitled to rely upon the fact that the State Parties to the treaty have decided to commit themselves to give a minimum level of legal protection to such foreign investments[182]

In addition, critics allege that the contribution to development factor depends on a subjective assessment by the tribunal, violating the sovereign right for each state to decide which foreign investments will encourage the development of its economy through the BIT.[183] Although this criticism of *Salini* may be warranted, this issue is resolved with the *Phoenix* Standard comprise.

THE *PHOENIX* STANDARD AS THE COMPROMISE BETWEEN THE TWO GENERAL APPROACHES

a. The Facts

In early 2001, the Czech Republic began a criminal investigation into Vladimir Beno, a Czech national who owned two ferroalloy Czech companies, for tax and custom duty evasions.[184] Beno then fled to Israel, where he registered a new Israeli company, Phoenix Action Ltd. ("Phoenix").[185] Shortly thereafter, Phoenix purchased the two legally troubled ferroalloy Czech companies.[186] In early 2003, Phoenix informed the Czech Republic of an investment dispute relating to the now frozen accounts of Beno's two Czech companies.[187] Finally, in early 2004, Phoenix initiated ICSID arbitration proceedings against the Czech Republic pursuant to the Czech Republic-Israel BIT.[188] Upon the formation of the tribunal and arbitrators, the Czech Republic stated its objection to the jurisdiction of the Tribunal, asserting abuse of process.[189]

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[181] *Id.*

[182] DOUGLAS, *supra* note 10, at 190 (citing Bayview Irrigation District et al. v. United Mexican States, ICSID Case No. ARB(AF)/05/1, Award, ¶ 99 (June 19, 2007)).

[183] DOLZER & SCHREUER, *supra* note 6, at 75.

[184] Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 32 (Apr. 15, 2009).

[185] *Id.*

[186] *Id*. at ¶ 28.

[187] *Id*. at ¶ 2.

[188] *Id*. at ¶ 1.

[189] *Id.* at ¶ 34. The Czech Republic stated that "Phoenix is nothing more than an *ex post*

The *Phoenix* decision is monumental to ICSID arbitration as it was the first time a claimant's case was dismissed for lack of jurisdiction because of an abuse of process.[190] The Tribunal ultimately determined, "[t]o change the structure of a company complaining of measures adopted by a State for the sole purpose of acquiring an ICSID claim that did not exist before such change cannot give birth to a protected investment."[191] Although other tribunals have relied on the *Phoenix* standard to different degrees, it serves to emphasize that arbitration tribunals are dependent upon all available precedent.[192]

b. The Phoenix Standard for Protected Investment

The importance behind the *Phoenix* award centers on how that tribunal adapted the *Salini* criteria for a protected "investment" to reconcile its main criticisms. First, the *Phoenix* Tribunal directly addressed the controversy over "development" from the original *Salini* criteria by replacing this condition with "economy."[193] The *Phoenix* Tribunal held that a contribution to the development of the state was not required because it was "impossible to ascertain."[194] In effect, the *Phoenix* Tribunal, placing the burden of proof on the claimant,[195] adopted the following test to determine whether an investment may benefit from protection of the ICSID Convention: (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; and (6) assets invested *bona fide*.[196]

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facto creation of a sham Israeli entity created by a Czech fugitive from justice, Vladimír Beno, to create diversity of nationality." *Id*.

[190] Ascensio, *supra* note 11, at 772.

[191] Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 92 (Apr. 15, 2009).

[192] Guillaume, *supra* note 27, at 20.

[193] *See* Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 85 (Apr. 15, 2009).

[194] *Id.*

[195] Although the burden of proof in abuse of process cases typically lies on the respondent (usually the state) because they raise it as a defense, this is not always a uniform rule. *See* Chevron Corporation (USA) v. The Republic of Ecuador, UNCITRAL, PCA Case No. 34877, Interim Award, ¶ 138 (Dec.1, 2008)). The *Phoenix* Tribunal placed the burden on the claimant because the question of a protected investment came at the phase when the claimant tried to establish jurisdiction. *See* Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 61 (Apr. 15, 2009). After determining that the claimant failed the six-element test, the Tribunal noted that granting jurisdiction in spite of this would be an abuse of process. *Id.*

[196] *Id*. at ¶ 114. The tribunal qualified the elements by emphasizing that an extensive scrutiny of all the elements is not always necessary. *Id.*

Under the first element of "a contribution in money or other assets," the Tribunal examined (i) the amount Phoenix (the Israeli company owned by Beno) paid for the Czech assets, and (ii) the acquisition of a local company by a foreign company.[197] First, the Tribunal noted that even though the low price Beno paid for the Czech assets raised questions whether this was an "investment," Beno contributed "some" money and thus does not fail the first element on this ground. Next, although Beno once held the two Czech companies as a Czech national himself, the Tribunal held that Phoenix made a *prima facie* acquisition as a foreign investor.[198] In other words, the first element does not conduct an extensive inquiry, but instead focuses on whether the investor made an acquisition and there was a transfer of funds.

Phoenix and its second element of "certain duration" is a direct borrowing from the *Salini* standard.[199] As stated earlier, the duration requirement envisions a two-year "minimal duration" of performance of the contract.[200] As applied to the *Phoenix* decision, the Tribunal held that holding on to assets for at least two years satisfies the "certain duration" element.[201]

Next, the third element of "risk" may be satisfied when an investor buys a company (the investment) in bad financial shape.[202] The Tribunal noted that foreign investors often purchase bankrupt companies for a low price and then try to make them profitable.[203] Again, the Tribunal here shows a flexible standard by adopting a test that allows arbitrators to account for the many different types of investments types.

The fourth element is satisfied when the investor has "the intention to engage in economic activities, and made good faith efforts to do so and that its failure to do was a consequence of the State's interference."[204] The Tribunal here rejected the Respondent's argument that an investment's lack of profitability made it ineligible as an economic activity.[205] The Tribunal noted that many investments may not initially be profitable, especially when an investor faces adverse intervention by a host state.[206]

Fifth, an investment is "made in accordance with laws of the host State"

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[197] *Id.* at ¶ 119.

[198] *Id.* at ¶ 123.

[199] *Id.* at ¶ 124.

[200] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 54 (July 23, 2001)).

[201] Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 124 (Apr. 15, 2009).

[202] *Id.* at ¶ 127.

[203] *Id.*

[204] *Id.*

[205] *Id.* at ¶ 133.

[206] *Id.*

when the investment properly followed local laws.[207] For the *Phoenix* Tribunal, this part of the inquiry proved to be the simplest because the Czech Republic (the Respondent) did not contend that Phoenix violated Czech laws when it bought the Czech assets.[208]

The sixth factor is divided further into five considerations: (i) timing of the investment, (ii) the initial request to ICSID, (iii) timing of the claim, (iv) substance of the transaction, and (v) true nature of the operation.[209] These five sub-elements allow arbitrators the much needed discretion to account for the fact intensive process of the substance of a transaction while accounting for crucial dates, such as the timing of a claim relative to the restructuring of assets.

One direct criticism of the Typical Characteristics Approach, and specifically against the *Salini* approach, centers on investors needing a predictable and objective test regarding a protected investment.[210] However, the *Phoenix* standard directly incorporates these objective elements, and thus provides a flexible and objective test. For example, the proposal that an objective test looks first to the BIT's definition of investment and that the investment be recognized under the laws of the host state are addressed by the *Phoenix* holding:

> It is the Tribunal's view that in referring [the Israel-Czech Republic BIT] expressly to the necessity to invest "in connection with economic activities" and to make the investment "in accordance with the laws and regulations" of the host State, the BIT does not modify in any way the ICSID notion, but only explicitly expresses two necessary elements of the test—4 and 5—implicit in the rules of interpretation.[211]

In other words, the *Phoenix* standard provides a tribunal elements to determine an "investment," but recognizes that some states provide explicit elements in their BITs. In these cases, the flexibility of the *Phoenix* standard makes the BIT elements "necessary elements" in its analysis.[212] Next, the condition raised by critics, that the investment be recognized under the laws of the host state, is addressed in the *Phoenix* standard's fifth element: assets must be invested in accordance with the laws of the host state.[213]

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[207] *Id*. at ¶ 134.

[208] *Id.*

[209] *Id.* at ¶¶ 135-40.

[210] DOUGLAS, *supra* note 10, at 191.

[211] Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 116 (Apr. 15, 2009).

[212] *Id.*

[213] *Id.* at ¶ 114.

Finally, the alternative to the *Salini*'s subjectivity stipulates that an investment requires: (i) commitment of resources to the economy of the host state, (ii) assumption of risk, and (iii) expectation of a commercial return.[214] The *Phoenix* standard again addresses these concerns systematically. For example "a commitment of resources to the economy of the host state" is directly addressed by *Phoenix* element one, a contribution in money or other assets.[215] Next, an "assumption of risk" is satisfied by *Phoenix*'s third element, that of risk.[216] Finally, an "expectation of a commercial return" is also satisfied by *Phoenix* sixth element, that of assets invested *bona fide*.[217]

CONCLUSION

As already established, under the ICSID Convention, the term "investment" is not defined in Article 25.[218] Considering that investments must meet the "double-barrel" test,[219] this shows that the ICSID Convention structurally creates a role for tribunals to determine a protected investment. Moreover, ICSID tribunals are not bound to the same constraints as common law courts when it comes to holding to its own precedent.[220] However, discussion of previous cases and of the interpretations adopted in them is a regular feature in almost every decision.[221] Unlike the Strict Adherence Approach, the *Phoenix* Standard incorporates this discretion given to tribunals but at the same time guided by the relevant BIT.[222] This, in effect, allows tribunals to determine what an "investment" means but at the same time binds them to the intent of the parties as articulated in the relevant BIT.

The *Phoenix* standard, of the current standards in the abuse of process literature, is the most flexible standard, adaptable to the fact intensive nature of abuse of process claims. Although critics may rightfully worry about straying too far from the text of a BIT,[223] the *Phoenix* standard

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[214] DOUGLAS, *supra* note 10, at 191.

[215] Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 114 (Apr. 15, 2009).

[216] *Id.*

[217] *Id.*

[218] SCHREUER, *supra* note 58, at ¶ 121.

[219] Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 74 (Apr. 15, 2009).

[220] Guillaume, *supra* note 27, at 16.

[221] *Id.*

[222] Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, ¶¶ 115-16 (Apr. 15, 2009).

[223] *See* DOUGLAS, *supra* note 10, at 191.

ameliorates this concern. What has been shown repeatedly is that tribunals have a role in determining "investment" for purposes of jurisdiction. Investments and the vehicles under which they are carried out constantly changing,[224] thus a tribunal cannot find all answers in the BIT alone. In effect, the *Phoenix* standard addresses the criticisms of highly subjective *Salini* test, and provides a clearer test that is guided by the intentions of the parties.

[224] Salacuse & Sullican, *supra* note 168, at 80.