
COMMENT

WHOSE DICTIONARY CONTROLS?: RECENT CHALLENGES TO THE TERM “INVESTMENT” IN ICSID ARBITRATION

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INTRODUCTION

In order to ensure respect for foreign investors' rights¹ and thus promote investment in developing countries,² the World Bank operates the International Centre for Settlement of Investment Disputes ("ICSID" or "Centre").³ ICSID facilitates resolution of disputes that arise over investments governed by bilateral investment treaties ("BITs") and free trade agreements ("FTAs"),⁴ pursuant to

1. See Brigitte Stern, *ICSID Arbitration and the State's Increasingly Remote Consent: Apropos the Maffezini Case*, in *LAW IN THE SERVICE OF HUMAN DIGNITY: ESSAYS IN HONOUR OF FLORENTINO FELICIANO* 246, 247 (Steve Charnovitz et al. eds., 2005) (posing the problem of "judge and party," in which the state acts both as a contractor and as a judge and thus cannot guarantee fairness).

2. See Convention on the Settlement of Investment Disputes between States and Nationals of Other States pmbl., Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention] (discussing the role private international investment plays in economic development).

3. See ICSID Convention, Regulations and Rules Intro, Apr. 10, 2006, available at <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp> [hereinafter ICSID Rules] (stating the World Bank administers ICSID through the International Bank for Reconstruction and Development).

4. See, e.g., Bilateral Investment Treaty, Isr.-Czech Rep., art. 2(2), Sept. 23, 1997, 2078 U.N.T.S. 297 [hereinafter Israel-Czech Republic BIT] (guaranteeing

the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention” or “Convention”).⁵ To do so, it provides the institutional infrastructure necessary for administering binding arbitration.⁶

Article 25(1) of the ICSID Convention extends the Centre’s jurisdiction to “any legal dispute arising directly out of an investment[] between a Contracting State . . . and a national of another Contracting State”⁷ Because member states can determine the classes of disputes that they would be willing to submit to ICSID,⁸ the Convention leaves undefined what, in fact, constitutes an “investment.”⁹ Consequently, ICSID tribunals have wrestled with whether to apply an objective or a subjective standard when evaluating claims.¹⁰

In April 2009, two ICSID tribunals once again split over the definition of the term “investment.”¹¹ The tribunal in *Phoenix Action*,

investors of each Contracting Party “fair and equitable treatment . . . in the territory of the other Contracting Party”).

5. See, e.g., Bilateral Investment Treaty, U.K.-Malay., art. 7(1), May 21, 1981, U.K.T.S. 16 (1989) [hereinafter U.K.-Malaysia BIT] (bestowing exclusive jurisdiction upon ICSID “for settlement . . . [of] any legal dispute” arising under the BIT).

6. See STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 45 (2009) (noting the Centre does not arbitrate disputes itself).

7. ICSID Convention, *supra* note 2, art. 25(1).

8. See *id.* art. 25(4) (affording Contracting States the ability to opt out of any class of disputes to which they do not consent provided that they make their disapproval known in advance).

9. See Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 1965, 1 ICSID Rep. 28, 28 (1993) [hereinafter Report on the Convention] (suggesting that requiring consent by both parties makes defining “investment” itself unnecessary).

10. Compare *Salini Costruttori S.p.A. v. Morocco*, ICSID Case No. ARN/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001), *reprinted in* 42 I.L.M. 609 (2003) (holding all “investments” have certain objective and “interdependent” hallmarks: (1) contribution, (2) “duration of performance,” (3) “participation in the risks of the transaction,” and (4) “contribution to the economic development of the host State”), with *Biwater Gauff Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award, ¶¶ 307-13 (July 24, 2008) (employing a broad subjective standard to define “investment” so as to include city water shares and shareholder loans).

11. Compare *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, ¶ 85 (Apr. 15, 2009) (maintaining Salini’s objective standard but only requiring inquiry into the “contribution of an international investment to the economy,” rather than the development of the host State), with Malaysian

*Ltd. v. Czech Republic*¹² elected to employ an objective standard for investment. Building upon the ubiquitous *Salini* hallmarks, the tribunal added the requirements that the assets be invested in accordance with the laws of the host state and *bona fide*.¹³ Yet in an annulment granted merely a day later, the *ad hoc* committee in *Malaysian Historical Salvors SDN BHD v. Malaysia (MHS)*¹⁴ minimized the importance of the *Salini* criteria, stating that they were not “fixed or mandatory as a matter of law.”¹⁵ Using a subjective standard, the it defined “investment” based almost entirely on the term’s definition in the applicable BIT.¹⁶ Since neither the Convention nor international law incorporates the concept of *stare decisis*, this vacillation will likely persist.¹⁷

This Comment analyzes the bases of ICSID tribunals’ authority to define “investment” given the *Phoenix* tribunal’s supplementation to the *Salini* factors, and the *MHS* tribunal’s rejection thereof.¹⁸ After concluding that Article 25 of the ICSID Convention requires that tribunals assign an expansive definition to the term “investment,” the analysis shifts to the *Phoenix* tribunal’s failure to apply basic principles of equity and international law in reaching its decision and to the *MHS* tribunal’s correct derivation of “investment” from both the ICSID Convention and the U.K.-Malaysia BIT.¹⁹ This Comment contends that, in order to sufficiently eliminate legal risk and induce private international investment, ICSID tribunals’ jurisdiction over investment disputes must lie in the intersection of its Convention and applicable member states’ BITs and FTAs.²⁰

Historical Salvors SDN BHD v. Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶¶ 60-61 (Apr. 16, 2009) [hereinafter *MHS Annulment*] (discarding an objective standard and imposing a no “development” requirement).

12. ICSID Case No. ARB/06/5.

13. *Id.* ¶ 143 (basing its decision on the principle of good faith).

14. *MHS Annulment*, *supra* note 11.

15. *Id.* ¶ 79 (quoting *Biwater Gauff*) (finding no overly strict interpretation was necessary).

16. *See id.* ¶ 60 (concluding that a salvage contract is an “investment”).

17. *See* SCHILL, *supra* note 6, at 288-93 (postulating that, in the absence of internal control mechanisms, inconsistent decisions should abound).

18. *See* discussion *infra* Part II.A (concluding no “development” requirement is necessary).

19. *See* discussion *infra* Part II.A.2.

20. *See* discussion *infra* Part II.B.

Part I of this Comment discusses the historical basis for the protection of foreign investors' rights and ICSID's role in the protection thereof by providing an accepted channel of redress.²¹ Part I also establishes the Centre's jurisdiction for arbitration of investment disputes and explains the rulings in *Phoenix* and *MHS*.²² Part II analyzes the jurisdiction of those two ICSID tribunals, given their seemingly incongruent definitions of investment, under the applicable international instruments. Part III recommends that great deference be given to parties' contractual definitions of "investment."²³ It also calls for the creation of some form of precedent, at minimum a *jurisprudence constante*, thereby yielding regularity in tribunal decisions and eliminating needless arbitration.²⁴

I. BACKGROUND

A. THE ORIGINS OF FOREIGN INVESTMENT PROTECTION AND THE CREATION OF ICSID

Before the establishment of international investment arbitration, injured foreign private persons, including corporations, could seek redress for a violation of their legal rights, such as contract interference or expropriation, only through diplomatic protection.²⁵ Diplomatic protection was born out of the simple fact that a private person lacked standing to raise an international claim in its own right.²⁶ In order to overcome this obstacle, a state would take up a claim on its citizen's behalf.²⁷ A valid claim presented a violation of

21. See discussion *infra* Part I.A.

22. See discussion *infra* Parts I.B-C.

23. See discussion *infra* Part III.A.

24. See discussion *infra* Part III.B.

25. See generally Marek Jeżewski, *There Is No Freedom Without Solidarity: Towards a New Definition of Investment in International Economic Law* 2-4 (Soc'y of Int'l Econ. Law, Working Paper No. 51/08, 2008), available at <http://www.ssrn.com/link/SIEL-Inaugural-Conference.html> (elucidating the protections given to individual investors under two classical schemes: minimum protection and the Calvo Doctrine).

26. See Peter Muchlinski, *The Diplomatic Protection of Foreign Investors: A Tale of Judicial Caution*, in *INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER* 341, 342-43 (Christina Binder et al. eds., 2009) (asserting that individuals lack the capacity to bring claims as they are not the subjects of *public* international law).

27. See *id.* (acknowledging that, while the claim is predicated upon legal

the individual's rights under international law.²⁸ These rights were determined under minimum protection or the Calvo Doctrine. Minimum protection required that host nations accept international norms on property and personal rights.²⁹ For developing nations whose laws were not as expansive, the Calvo Doctrine provided an attractive alternative.³⁰ It required a national treatment standard where, for example, aliens were at most afforded the same rights as nationals.³¹ While many remnants of the Calvo Doctrine still exist in trade agreements,³² movement in favor of developing countries, such as applying the laws of the less protective state, has been limited.³³ Because disputing nations asserted their respective standards of protection and the national state retained discretion to pursue the claim,³⁴ diplomatic protection proved unworkable in the context of private international investment.³⁵

fiction (the primary rights giving rise to the claim are the citizen's), international law endows the national state with discretion in pursuing the claim). *See generally* Jeżewski, *supra* note 25, at 3 (premising a state's claim on its resident's behalf on the idea "that an alien who leaves his State carries with him the protection of his State").

28. *See* ANDREW NEWCOMBE & LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 10-12* (2009) (citing the international consensus that foreign nationals possessed rights under *customary* international law).

29. *See id.* at 12 (stating this requirement imposed the law of "civilized" nations, such as the United States and the United Kingdom, on developing nations).

30. *See* JAMES C. BAKER, *FOREIGN DIRECT INVESTMENT IN LESS DEVELOPED COUNTRIES: THE ROLE OF ICSID AND MIGA 90* (1999) (explaining the premise of the Calvo Doctrine is to assert that the imposition of foreign law is an impermissible interference in the internal affairs of the host state).

31. *See id.* at 91 (adding that Calvo clauses, the contractual embodiment of the Doctrine, require foreign investors "to waive all rights to diplomatic protection").

32. *See, e.g.,* Israel-Czech Republic BIT, *supra* note 4, art. 3(1) ("Neither Contracting Party shall . . . subject . . . investors of the other Contracting Party to treatment less favorable than that which it accords to . . . its own investors . . .").

33. *See* BAKER, *supra* note 30, at 90 (claiming that, even though asserted by many Latin American nations, the Calvo Doctrine never became customary international law).

34. *See* Muchlinski, *supra* note 26, at 343 (emphasizing that this discretion is shaped by the political goals of the protecting state and, furthermore, that the protecting state was under no legal duty to hand over any reparations received to the claimant).

35. *See* Jeżewski, *supra* note 25, at 5 (describing how the evolution of "the international dispute settlement mechanism" led to international arbitration becoming the most appropriate forum to regulate and resolve investment claims).

To find a reasonable solution for developed and less developed nations alike, a World Bank study proposed the creation of an agency to facilitate resolution of international investment disputes.³⁶ This proposal led to the drafting of the ICSID Convention.³⁷ On October 14, 1966, the Convention entered into force with the ratification of twenty countries, thus creating ICSID.³⁸ As of April 10, 2006, 143 countries are parties to the Convention.³⁹

B. PROCEDURAL CONDITIONS FOR JURISDICTION UNDER THE ICSID CONVENTION

Article 25 of the ICSID Convention confers jurisdiction upon the Centre to preside over investment disputes.⁴⁰ It provides, in part:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.⁴¹

Therefore, in order for the Centre to possess jurisdiction: (1) there must be a legal dispute; (2) the dispute must arise directly out of an underlying transaction; said transaction must (3) qualify as an investment and (4) be between a Contracting State and a national of another Contracting State (diverse); and (5) the parties must have consented to ICSID arbitration.⁴²

36. See BAKER, *supra* note 30, at 42 (observing that the World Bank did not wish to be directly involved in mediating disputes).

37. See *id.* at 42-43 (asserting that advocates believed private international investment would increase with such an institution).

38. ICSID Rules, *supra* note 3, at intro.

39. *Id.*

40. See generally CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 82-344 (2001) (providing a comprehensive account of Article 25 jurisprudence).

41. ICSID Convention, *supra* note 2, art. 25(1).

42. See *id.* (implying three procedural conditions must be met: a condition *ratione materiae*, a condition *ratione personae*, and a condition *ratione voluntatis*). Jurisdiction *ratione temporis* must also exist. See Phoenix Action, Ltd. v. Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 54 (Apr. 15, 2009) (explaining the condition *ratione temporis* derives from a general principle of law, the principle of non-retroactivity, and requires that the Convention have been/be applicable at the

1. Subject-Matter Jurisdiction (Jurisdiction Ratione Materiae)

Subject-matter jurisdiction comprises the first three elements of Article 25(1) of the Convention.⁴³ Because ICSID tribunals generally find the presence of the first two elements, their discussion will be more limited.⁴⁴ The first element is meant to ensure the existence of a dispute that is both genuine and legal.⁴⁵ The dispute must entail a conflict of rights; in other words, the dispute must concern either a legal obligation or reparation for breach of such an obligation.⁴⁶ The second element, one of directness, requires that the dispute “be reasonably closely connected” to an investment.⁴⁷ While ICSID jurisprudence has failed to delineate the difference between disputes arising directly and those arising merely indirectly, tribunals take into account “the general unity of an investment operation”⁴⁸ and

relevant time).

43. See generally Paolo Vargiu, *Beyond Hallmarks and Formal Requirements: A “Jurisprudence Constante” on the Notion of Investment in the ICSID Convention*, 10 J. WORLD INV. & TRADE 753, 754 (2009) (highlighting the “typical characteristics” and “jurisdictional” approaches of interpretation of Article 25(1) in ICSID arbitration).

44. See, e.g., *Československá Obchodní Banka, A.S. v. Slovakia*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, ¶ 61 (May 24, 1999), reprinted in 14 ICSID REV.—FILJ 251 (1999) (suggesting that investment disputes are not deprived of their “legal character” in the presence of political elements or governmental actions); *id.* ¶ 72 (finding satisfaction of the “directness” requirement even in a claim arising out of an indirect dispute, so long as the indirect dispute is “an integral part of an overall operation that qualifies as an investment”).

45. See ICSID Convention, *supra* note 2, art. 25(1) (allowing jurisdiction over “any legal dispute”); SCHREUER, *supra* note 40, at 102 (asserting that, while “[t]he matter must have been taken up with the other party[,]” other remedies need not have been exhausted).

46. See Report on the Convention, *supra* note 9, at 28 (disallowing matters involving “mere conflicts of interests”); see also SCHREUER, *supra* note 40, at 105 (noting legal disputes must invoke legal rights and seek legal remedies).

47. See SCHREUER, *supra* note 40, at 114 (adding that the directness requirement “is one of the objective criteria” and thus “independent of the parties’ consent”). Moreover, an investment need not be a “direct foreign investment.” See *Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, ¶ 24 (July 11, 1997), reprinted in 37 I.L.M. 1378 (1998) (stating that jurisdiction exists with respect to “indirect” investments “so long as the dispute arises directly from such transaction”).

48. See *Fedax*, ICSID Case No. ARB/96/3, ¶ 26 (quoting *Holiday Inns v. Morocco*, which found jurisdiction over loan contracts that had originated in agreements distinct from the investment (citation omitted)).

look for the existence of “distinctive features,” uncommon to all investment disputes, which link the dispute to the investment.⁴⁹

Because the ICSID Convention does not explicitly define the term “investment,” the third element of Article 25—qualification of the underlying transaction—has proven the most contentious.⁵⁰ Tribunals have established a variety of investment qualification frameworks, construing the term “investment” both narrowly and broadly.⁵¹ In a landmark decision, *Salini Costruttori S.p.A. v. Morocco*⁵² set forth an objective test for investment qualification.⁵³ The Salini tribunal suggests: “The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction.”⁵⁴ Most notably, though, it required that an investment contribute to the economic development of the host state.⁵⁵

49. See SCHREUER, *supra* note 43, at 121 (“[T]he fact that transactions that are ancillary but vital to the investment are made in separate form and even through separate entities does not deprive a dispute relating to them of its direct character.”).

50. See *Československá Obchodní Banka, A.S. v. Slovakia*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, ¶ 75 (May 24, 1999), reprinted in 14 ICSID REV.—FILJ 251 (1999) (discussing whether outlays in development of banking infrastructure are “investments”); *Biwater Gauff Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award, ¶ 307 (July 24, 2008) (considering whether city water shares satisfy “investment”); *Fedax*, ICSID Case No. ARB/96/3, ¶ 18 (raising the issue of whether a loan constituted an “investment”). This tension was also evident in the drafting of the Convention. See SCHREUER, *supra* note 43, at 122-23 (highlighting the various proposals for and against limiting the definition of investment in the First Draft).

51. See, e.g., *Fedax*, ICSID Case No. ARB/96/3, ¶ 22 (stating that “loans, suppliers’ credits, outstanding payments, ownership of shares, and construction contracts” have all qualified as “investments”).

52. ICSID Case No. ARN/00/4, Decision on Jurisdiction (July 23, 2001), reprinted in 42 I.L.M. 609 (2003).

53. See *id.* ¶ 52 (declaring that ICSID case law and legal authors suggest the investment requirement is an objective condition). *But see* Julian Davis Mortenson, *The Meaning of “Investment”: ICSID’s Travaux and the Domain of International Investment Law*, 51 HARV. INT’L L.J. 257, 273 (2010) (“not[ing] that Schreuer has subsequently criticized . . . tribunals for badly overruling his discussion of Article 25”).

54. *Salini Costruttori*, ICSID Case No. ARN/00/4, ¶ 52.

55. See *id.* (deducing an economic development factor from its reading of the ICSID Convention’s Preamble).

But since the ICSID Convention does not call for binding precedent, tribunals have used their discretion in applying and articulating the *Salini* test.⁵⁶ Building upon *Salini*'s "objective" reading of Article 25(1), the *Joy Mining Machinery, Ltd. v. Egypt*⁵⁷ tribunal articulated its own jurisdictional criteria, most notably adding the requirement that an "investment" constitute "a significant contribution to the host State's development."⁵⁸ Other tribunals have strictly applied the *Salini* test.⁵⁹ The tribunal in *Jan de Nul N.V. v. Egypt*⁶⁰ explicitly restated the *Salini* characteristics, only adding that they "may be closely interrelated, should be examined in their totality[,] and will normally depend on the circumstances of each case."⁶¹ While some ICSID tribunals have broadened the scope of the *Salini* test by dropping the "contribution to economic development" requirement,⁶² others have dispensed with it altogether.⁶³ In perhaps its most vehement repudiation to date, the tribunal in *Biwater Gauff Ltd. v. Tanzania*⁶⁴ asserted that "there is no basis for a rote, or overly strict, application of the five *Salini* criteria in every case."⁶⁵ It concluded that, because the Convention did not provide "a strict,

56. See ICSID Convention, *supra* note 2, art. 53(1) (declaring awards to be binding *only* on the parties); SCHILL, *supra* note 6, at 291 (claiming the *travaux préparatoires* of the Convention show binding precedent was never intended).

57. ICSID Case No. ARB/03/11, Award on Jurisdiction (Aug. 6, 2004), reprinted in 19 ICSID REV.—FILJ 486 (2004).

58. See *id.* ¶¶ 50-53 (emphasis added) (stating that to do otherwise would render Article 25 a "meaningless provision").

59. See, e.g., Malaysian Historical Salvors SDN BHD v. Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶ 55 (May 17, 2007) [hereinafter MHS Award] (treating the *Salini* elements as jurisdictional requirements).

60. ICSID Case No. ARB/04/13, Decision on Jurisdiction (June 16, 2006).

61. See *id.* ¶ 91 (harmonizing with the rationale of *Joy Mining Machinery*, ICSID Case No. ARB/03/11).

62. See, e.g., L.E.S.I.-Dipenta v. Algeria, ICSID Case No. ARB/03/08, Award, § 2, ¶ 13(iv) (Jan. 10, 2005) (asserting that consistency with the objective of the ICSID Convention demanded that an investment only fulfill the first three *Salini* criteria).

63. See, e.g., CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, ¶¶ 71-72 (Sept. 25, 2007) (applying the BIT definition of "investment").

64. ICSID Case No. ARB/05/22, Award (July 24, 2008).

65. See *id.* ¶ 312 (reasoning that the *Salini* criteria "are not fixed or mandatory as a matter of law" nor appear in the ICSID Convention).

objective, [sic] definition of ‘investment,’” ICSID tribunals should not impose one.⁶⁶

2. Personal Jurisdiction (*Jurisdiction Ratione Personae*)

Personal jurisdiction, the fourth element, derives from the second clause of Article 25(1) of the ICSID Convention—the diversity requirement.⁶⁷ It requires that the dispute be between a contracting state and an investor of another contracting state.⁶⁸ For the purposes of Article 25(1), natural persons must have “the nationality of a Contracting State other than the State party.”⁶⁹ Juridical persons, such as corporations or other business entities, must either have “the nationality of a Contracting State other than the State party” or be deemed foreign by contract.⁷⁰ Natural persons must possess foreign nationality on two dates—the date on which both parties consent to submit the dispute to arbitration and the date on which the request is registered by ICSID—whereas juridical persons must only possess foreign nationality on one date—the date of consent.⁷¹ Still, the nationality of natural persons is rarely at issue.⁷²

66. *See id.* ¶¶ 313, 316 (taking into account not only features identified in *Salini* but also the totality of the circumstances, including the BIT).

67. *See generally* Jan Schokkaert & Yvon Heckscher, *Protected Investors Nationality*, 10 J. WORLD INV. & TRADE 699 (2009) (detailing the condition *ratione personae*).

68. *See* ICSID Convention, *supra* note 2, art. 25(1) (extending jurisdiction to disputes “between a Contracting State . . . and a national of another Contracting State”) (emphasis added).

69. *See id.* art. 25(2)(a) (preventing individuals possessing double nationality, of which one is the State party, from utilizing ICSID arbitration).

70. *See id.* art. 25(2)(a)-(b) (allowing locally incorporated or seated juridical persons access to ICSID “because of foreign control”). Under Additional Facility Rules, even non-Contracting States or their nationals may become parties to proceedings provided one party is a Contracting State or a national of a Contracting State. *See* ICSID Additional Facility Rules, art. 2, Apr. 10, 2006, available at <http://icsid.worldbank.org/ICSID/ICSID/AdditionalFacilityRules.jsp> [hereinafter *Additional Facility*] (authorizing extrajudicial proceedings when one party is not a contracting state, a legal dispute does not arise directly out of an investment, or the purpose is fact-finding).

71. *See* ICSID Convention, *supra* note 2, art. 25(2)(a)-(b) (furnishing juridical persons with a more expansive notion of nationality).

72. *Cf.* Schokkaert & Heckscher, *supra* note 67, at 700 (emphasizing that the term “nationality” is infrequently used in “European conventional practice”).

In determining the nationality of a juridical person, two criteria are decisive: the place of incorporation and the place of the administrative seat, or *siège social*.⁷³ But while either suffices to determine nationality for diplomatic protection, neither suffices to determine nationality for Article 25(2)(b).⁷⁴ The purpose of Article 25(1) is merely to designate the “outer limits” of ICSID’s jurisdiction.⁷⁵ Thus, any stipulation of entity nationality in national legislation or in treaties, provides ICSID’s jurisdiction and, if based on reasonable criteria, will likely be honored.⁷⁶

3. The Consent Requirement (*Jurisdiction Ratione Voluntatis*)

The fifth and final jurisdictional element relates to consent.⁷⁷ Consent of the parties is the “cornerstone” of ICSID’s jurisdiction.⁷⁸ Parties must agree in writing to both the classes of disputes acceptable for arbitration and the use of ICSID as the forum.⁷⁹ This endorsement is usually accomplished through BIT and FTA provisions.⁸⁰ Once consent to jurisdiction has been given, it cannot be withdrawn unilaterally.⁸¹

73. See SCHREUER, *supra* note 40, at 277 (announcing that “the most widely used test” is the place of incorporation, but that alternatively the effective seat may be used).

74. See Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 RECUEIL DES COURS 331, 360 (1972) (submitting that such a narrowly defined sense of nationality should be restricted to the context of diplomatic protection).

75. See *id.* at 360-61 (asserting that parties should have latitude to agree on the definition of nationality).

76. See *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶¶ 25-26 (Apr. 29, 2004), *reprinted in* 20 ICSID REV.—FILJ 205 (2005) (ascribing weight to the scholarship of Broches and Schreuer for its broad construction of nationality).

77. See generally Stern, *supra* note 1, at 249-50 (explaining that consent can be found in ICSID arbitration clauses and agreements and through the combination of documents, such as national legislation and investor requests).

78. Report on the Convention, *supra* note 9, at 28.

79. See ICSID Convention, *supra* note 2, art. 25(4) (welcoming party-initiated limitations of jurisdiction at any time).

80. Compare Israel-Czech Republic BIT, *supra* note 4, art. 7(2) (entitling investors to ICSID arbitration in addition to domestic forums), with U.K.-Malaysia BIT, *supra* note 5, art. 7(1) (exemplifying parties which opt only for ICSID arbitration).

81. ICSID Convention, *supra* note 2, art. 25(1).

4. Testing for Jurisdiction

While the ICSID Convention and trade agreements form the basis of ICSID's jurisdiction, they must be interpreted in light of international law, namely, the Vienna Convention on the Law of Treaties ("Vienna Convention").⁸²

a. The Vienna Convention

Article 31(1) of the Vienna Convention states: "A treaty shall be interpreted in *good faith* in accordance with the *ordinary meaning* to be given to the terms of the treaty in their *context* and in the light of its *object and purpose*."⁸³ Within this framework, there are three approaches to investment treaty interpretation.⁸⁴ The first approach is to focus on the "object and purpose" of the treaty by conducting a preamble-based interpretation.⁸⁵ The second approach emphasizes "the wording of the text without special regard to the object and purpose of the treaty."⁸⁶ The final approach is to interpret *in dubio mitius*; that is, to narrowly construe limitations on the sovereignty of the states concerned.⁸⁷ If such approaches of interpretation are unprofitable, courts may rely on supplementary means of analysis—for example, the preparatory work of the treaty and the conditions of its completion—under Article 32 of the Vienna Convention.⁸⁸

82. See generally Federico Ortino, *Treaty Interpretation and the WTO Appellate Body Report in US—Gambling: A Critique*, 9 J. INT'L ECON. L. 117 (2006) (embracing a holistic approach to treaty interpretation under the Vienna Convention).

83. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter Vienna Convention] (emphasis added).

84. See Rudolf Dolzer, *The Notion of Investment in Recent Practice*, in LAW IN THE SERVICE OF HUMAN DIGNITY: ESSAYS IN HONOUR OF FLORENTINO FELICIANO 261, 272 (Steve Charnovitz et al. eds., 2005) (proffering that, while Article 31 might not yield "hard and fast results" as in other areas of international law, there are, however, three lines of reasoning that are "conceivable" in the context of investment treaties).

85. See *id.* at 272-73 (highlighting ICSID decisions in *Tokios Tokelès v. Ukraine* and *SGS v. Philippines*, which relied on the "object and purpose" of the treaties (citations omitted)).

86. See *id.* at 273-74 (citing the ICSID tribunals' non-restrictive rulings in *Société Ouest Africaine des Bétons Industriels v. Senegal* and *Amco Asia Corp. v. Indonesia* (citations omitted)).

87. See *id.* at 274-75 (observing the ICSID tribunal's analysis in *SGS v. Pakistan* (citation omitted)).

88. See Vienna Convention, *supra* note 83, art. 32 (allowing for supplementary

b. Bipartite Test for Jurisdiction

ICSID tribunals have jurisdiction over disputes if: (1) the dispute arises out of an investment the ICSID Convention protects—that is, one covered by Article 25 of the Convention; and, if so, (2) the dispute involves an investment as defined by the BIT or FTA.⁸⁹ BIT and FTA definitions may narrow but not expand the scope of jurisdiction granted by the first prong.⁹⁰ Therefore, a BIT or an FTA alone cannot confer jurisdiction.⁹¹

C. RECENT CHALLENGES TO THE TERM “INVESTMENT”

Part I ends with a discussion of two recent judgments, *Phoenix* and *MHS*, that illustrate the underlying uncertainty in ICSID’s “investment” jurisprudence and sets up Part II’s analysis of what the term means under Article 25 of the Convention.⁹² First, Part I.C discusses the *Phoenix* tribunal’s reliance on objective criteria and supplementation to the *Salini* test.⁹³ It then moves to the *MHS* committee’s explicit rejection of the *Salini* characteristics as jurisdictional requirements.⁹⁴

I. Phoenix

Phoenix involved a dispute between Phoenix Action, Ltd. (“Phoenix”) and the Czech Republic over the treatment of its

means when interpretation, according to Article 31, “leaves the meaning ambiguous or obscure”).

89. See, e.g., *Československá Obchodní Banka, A.S. v. Slovakia*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, ¶ 68 (May 24, 1999), reprinted in 14 ICSID REV.—FILJ 251 (1999) (announcing that the parties’ agreement alone is inconclusive for resolving whether the dispute involves an investment protected by the Convention).

90. See *Biwater Gauff Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award, ¶ 308 (July 24, 2008) (explaining Tanzania’s stance that the scope of Article 25 cannot be expanded by agreement because it has an autonomous meaning).

91. See Report on the Convention, *supra* note 9, at 28 (declaring that consent is a necessary, but not a sufficient, condition for jurisdiction).

92. See Sean Kelsey, *ARB. WORLD*, May 2009, at 10, available at <http://www.klgates.com/newsstand/detail.aspx?publication=5670#ICSID> (last visited July 11, 2010) (opining that “[the two decisions] appear to have been reached in isolation from one another”). See generally Vargiu, *supra* note 43, at 754 (surveying tribunals’ objective and subjective formulations of “investment”).

93. See discussion *infra* Part I.C.1.

94. See discussion *infra* Part I.C.2.

investments in Benet Praha (“BP”) and Benet Group (“BG”).⁹⁵ BP and its subsidiary BG were Czech companies engaged in the trading of ferroalloys.⁹⁶ Phoenix was a closely held Israeli corporation, having Vladimir Beno, a Czech national, as its sole shareholder.⁹⁷

In April 2001, Czech authorities began to investigate Beno, BP’s Executive Officer, amidst allegations of tax and customs duty evasion and income tax fraud.⁹⁸ Pursuant to this criminal investigation, Czech police seized BP’s accounting and business records and froze its assets.⁹⁹ Meanwhile, BG was embroiled in its own dispute, one over an acquisitions agreement it had executed on November 26, 2000.¹⁰⁰ It was around this time that Beno fled to Israel and incorporated Phoenix.¹⁰¹

On December 26, 2002, Phoenix became the sole owner of BP and BG.¹⁰² Phoenix claimed that, with regards to BG, it was denied justice because the lengthy civil litigation was still ongoing in Czech courts, and that the freezing of BP’s funds, the document seizure, and the tax and customs assessments were illegal.¹⁰³ In response, the Czech Republic asserted that the tribunal did not have jurisdiction over the dispute because Phoenix was “an *ex post facto* creation of a sham Israeli entity.”¹⁰⁴

Building upon the articulation of *Salini* in *Jan de Nul*, the *Phoenix* tribunal held that six elements should be taken into account when determining if an investment is protected by ICSID:

- (1) a contribution in money or other assets;
- (2) a certain duration;
- (3) an element of risk;
- (4) an operation made in

95. *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, ¶¶ 2, 22 (Apr. 15, 2009).

96. *Id.* ¶ 25 (explaining that the businesses complemented each other: BP purchased ferroalloys internationally for sale on the Czech market and BG purchased and sold ferroalloy component materials internationally).

97. *Id.* ¶ 22.

98. *Id.* ¶ 32.

99. *Id.* ¶ 33.

100. *Id.* ¶ 30.

101. *Id.* ¶ 32. On October 14, 2001, Phoenix was incorporated in Israel; its permanent seat was in Tel Aviv. *Id.* ¶ 22.

102. *Id.* ¶ 22. At that time, both companies were already involved in legal disputes: BP with Czech fiscal authorities and BG with a private party. *Id.* ¶ 28.

103. *Id.* ¶ 44.

104. *Id.* ¶ 34.

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*.¹⁰⁵

Further refining its definition, the tribunal concluded that the BIT in no way narrowed the scope of investment.¹⁰⁶

This definition of investment contains two major modifications to the *Salini* test: the change of “contribution to economic development” to “development of economic activity”¹⁰⁷ and the addition of a *bona fide* requirement.¹⁰⁸ Four factors were critical to ascertaining the *bona fide* nature of the alleged investment: the timing of the investment, the timing of the claim, the substance of the transaction, and the true nature of the operation.¹⁰⁹ “[T]iming of the investment” looks to whether damages were sustained before or after the investment was made.¹¹⁰ “[T]iming of the claim” assesses whether a good faith effort was made to resolve the dispute before its submission to ICSID.¹¹¹ “[S]ubstance of the transaction” evaluates how the party conducted the transactions and whether there was a lack of transparency.¹¹² Finally, the “true nature of the operation” factor seeks indicia of ulterior motives.¹¹³

105. See *id.* ¶¶ 114-15 (adding that “extensive scrutiny” is not always necessary and “they have to be analyzed with due consideration of all circumstances”).

106. See *id.* ¶ 116 (asserting that the BIT merely “expresses two necessary elements of the test”); see also Israel-Czech Republic BIT, *supra* note 4, art. 1(1) (stating “investments” shall be “any kind of assets”).

107. See *Phoenix Action, Ltd.*, ICSID Case No. ARB/06/5, ¶ 85 (claiming contribution to development is “impossible to ascertain”).

108. See *id.* ¶¶ 135-44 (rationalizing that only *bona fide* investments deserve protection).

109. See *id.* ¶¶ 136, 138-40 (examining closely a whole host of factors).

110. See *id.* ¶ 137 (noting that Phoenix’s initial motive for bringing the claim was, admittedly, to bring the “*pre-existing disputes*” involving BG and BP before the ICSID tribunal).

111. See *id.* ¶ 138 (dismissing the idea that a two-month delay in solving an investment problem is a violation of fair and equitable treatment or full protection and security standards).

112. See *id.* ¶ 139 (alleging that the investment was a “mere redistribution of assets within the Beno family”).

113. See *id.* ¶ 140 (finding no economic activity where there is “[n]o business plan, no program of re-financing, no economic objectives . . . [and] no real valuation of the economic transactions”).

Based on the aforementioned factors, the *Phoenix* tribunal ruled on both jurisdiction *ratione personae* and *ratione materiae*.¹¹⁴ The tribunal, deeming place of incorporation and permanent seat as determinative, found that Phoenix had Israeli nationality, and the condition *ratione personae* was met.¹¹⁵ It did, however, find a jurisdictional issue in regard to the condition *ratione materiae*.¹¹⁶ The *Phoenix* tribunal saw through Phoenix's ruse to bring its domestic dispute within ICSID's purview; found the alleged investment did not develop a "national economic activity" but instead engaged in an "international legal activity"; and thus, held it lacked jurisdiction because the investment was not *bona fide*.¹¹⁷

2. Malaysian Historical Salvors SDN BHD ("MHS")

MHS involved a dispute between Malaysian Historical Salvors SDN BHD ("MHS"), a British corporation, and Malaysia over the proceeds of a salvage contract.¹¹⁸ On August 3, 1991, MHS entered into a contract entitling it to seventy percent of the proceeds if the auction value of the recovered items was less than \$10 million.¹¹⁹ Additionally, the Malaysian government reserved the right to withhold items from auction, provided it paid MHS their "best attainable value."¹²⁰ MHS's efforts took nearly four years and resulted in the recovery of 24,000 items.¹²¹ The auctioned items fetched approximately \$2.98 million.¹²² When MHS brought its claim

114. *See id.* ¶¶ 65-73 (the the presence of jurisdiction *ratione personae* over Phoenix);

id. ¶¶ 74-116 (concluding that jurisdiction *ratione materiae* was lacking).

115. *See id.* ¶ 65 (noting the lack of discussion regarding Phoenix's nationality).

116. *See id.* ¶ 142 (holding that the "investment" was not protected under the ICSID system because it was not a valid economic activity).

117. *See id.* ¶ 143 (employing the *bona fide* test against an "abusive distortion of the requirements for jurisdiction").

118. MHS Award, *supra* note 59, ¶¶ 2-14. The contract called for the location and salvage of the cargo of the *Diana* vessel that sank off the coast of Malacca in 1817. *Id.* ¶ 7. *See generally* Valentina Sara Vadi, *Investing in Culture: Underwater Cultural Heritage and International Investment Law*, 42 VAND. J. TRANSNAT'L L. 853, 880 (2009) (claiming that the *Diana* was "laden with silks, tea, and blue-and-white porcelain").

119. MHS Award, *supra* note 59, ¶ 11.

120. *Id.*

121. *Id.* ¶ 13.

122. *Id.*

before ICSID, it alleged that it was paid only \$1.2 million (or 40% of the amount realized from auction) and was owed an additional \$400,000 for withheld items.¹²³ Malaysia argued the tribunal did not have jurisdiction over the dispute because it did not concern an “investment.”¹²⁴

In contrast with the *Phoenix* tribunal’s jurisdictional analysis, the *MHS* annulment committee found the *Salini* criteria inconsistent with its approach to defining “investment.”¹²⁵ Moreover, it restated the fact that the “criteria are not fixed or mandatory as a matter of law.”¹²⁶ Under its analysis of Article 25(1), the committee interpreted the requirement that an investment contribute to economic development differently and thus afforded an expansive definition under the Convention.¹²⁷

The committee then turned to the U.K.-Malaysia BIT to see whether any other limitations needed to be imposed.¹²⁸ Article 1(a) of the BIT prescribed the relevant definition: “[I]nvestment’ means every kind of asset”¹²⁹ But for transactions carried on in Malaysia, Article 1(1)(b)(ii) of the BIT only protected investments made in projects “classified” by the Malaysian government.¹³⁰ Nonetheless, the committee found the salvage contract a kind of asset, related to an approved project, and thus constituted an investment.¹³¹ Because the contract qualified as an investment under both the ICSID Convention and the U.K.-Malaysia BIT, the sole

123. *Id.* ¶ 14.

124. *Id.* ¶ 41.1.

125. *See* MHS Annulment, *supra* note 11, ¶ 78 (respecting the authors of *Salini*, but declaring its approach “consonant with the intentions of the Parties to the ICSID Convention”).

126. *See id.* ¶¶ 77-79 (quoting *Biwater Gauff Ltd. v. Tanzania* (citation omitted)) (criticizing the sole arbitrator for acting contrary to academic commentary and previous arbitral decisions and treating these characteristics as jurisdictional requirements).

127. *Id.* ¶¶ 75, 80.

128. *See id.* ¶¶ 58-62 (discovering “the intentions and specifications of the States” by analyzing the BIT).

129. *See id.* ¶ 59 (finding the BIT “defines ‘investment’ capaciously”); *see also* U.K.-Malaysia BIT, *supra* note 5, art. 1(a) (detailing the scope of protected assets).

130. U.K.-Malaysia BIT, *supra* note 5, art. 1(1)(b)(ii).

131. *See* MHS Annulment, *supra* note 11, ¶¶ 60-61, 80 (advancing that “there is no room for another conclusion”).

arbitrator's Award on Jurisdiction constituted a manifest excess of power.¹³²

II. ANALYSIS

The ICSID Convention was enacted to generate "international cooperation for economic development."¹³³ This goal led to the creation of an arbitration system charged with a poorly defined mandate, which has proven problematic.¹³⁴ Without a clear sense of purpose, the ICSID system frequently is forced to weigh the lofty goals for which it was created against the fundamental principle of consent found throughout the Convention.¹³⁵ The *Phoenix* and *MHS* rulings provide an acute illustration of tribunals' vacillation between two modes of analysis: an objective standard of "investment" to ensure the ICSID fulfills its unique role and a subjective standard which gives due deference to the expressed intent of freely contracting parties.¹³⁶ For that reason, Part II analyzes the rationale of both tribunals in their respective rulings on jurisdiction and explores where jurisdiction should ultimately lie. Part II.A discusses whether the tribunals properly determined their jurisdiction under Article 25

132. See *id.* ¶ 80 (detailing the manifest excesses of power to be: not applying the BIT definition, treating the *Salini* criteria as "jurisdictional conditions," and reaching conclusions "not consonant with the travaux").

133. See ICSID Convention, *supra* note 2, pmbl. (stating that this purpose is accomplished by protecting "private international investment").

134. See Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521, 1568-74, 1582 (2005) (concluding the *SGS v. Pakistan* and *SGS v. Philippines* awards demonstrate that "new waves of inconsistent decisions are alive and well" (citations omitted)).

135. See Broches, *supra* note 74, at 362 (seeing the drafters' failure "to devise a generally acceptable definition of the term 'investment'" as yielding to "the essential requirement of consent by the Parties") (internal quotation marks and citation omitted).

136. Compare *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, ¶ 140 (Apr. 15, 2009) (withholding jurisdiction *ratione materiae* because of a lack of purposeful national economic activity), with *MHS Annulment*, *supra* note 11, ¶¶ 60-61 (annulling the Award on Jurisdiction based on the parties' agreed-to definition of "investment"). See generally Mary E. Hiscock, *The Emerging Legal Concept of Investment*, 27 *PENN. ST. INT'L L. REV.* 765 (2009) (analyzing thoroughly the competing legal norms in ICSID's "investment" jurisprudence).

of the ICSID Convention and the relevant BITs.¹³⁷ Part II.B argues that, in order to achieve the Centre's mandate, ICSID tribunals should construe their jurisdiction as broadly as the Convention and relevant member states' BITs and FTAs allow.¹³⁸

A. THE ICSID CONVENTION AND THE RELEVANT MEMBER STATES' AGREEMENTS EMPOWER ICSID TO EXERCISE JURISDICTION OVER A BROAD RANGE OF "INVESTMENTS" PROVIDED ALL OTHER PROCEDURAL CONDITIONS ARE MET

Before an ICSID tribunal may exercise jurisdiction over a claim, a legal dispute pitting a Contracting State against a national of another Contracting State must have arisen out of an investment, and these parties must have expressly consented to ICSID's arbitration of the dispute.¹³⁹ Once these events have occurred, the tribunal is tasked with determining its own competence, or jurisdiction, over the dispute.¹⁴⁰ In order for the tribunal to exercise jurisdiction, the dispute must have arisen out of a protected investment—that is, one recognized by both the Convention and the relevant BIT or FTA.¹⁴¹

In *Phoenix*, the tribunal declined jurisdiction under Article 25(1) because the investment was not *bona fide* and therefore did not satisfy the condition *ratione materiae*.¹⁴² It feared protection of such investments would make "the jurisdiction of BIT and ICSID tribunals . . . virtually unlimited."¹⁴³ On the other hand, the

137. See discussion *infra* Part II.A (concluding that the *Phoenix* tribunal improperly withheld jurisdiction *ratione materiae* and the *MHS* committee validly annulled the earlier award).

138. See discussion *infra* Part II.B (concluding that the "outer limits" of jurisdiction should be derived from the consent of the parties).

139. See ICSID Convention, *supra* note 2, art. 25(1) (establishing that these three procedural conditions act as triggering conditions).

140. See *id.* art. 41 (empowering ICSID tribunals to determine jurisdiction "as a preliminary question or to join it to the merits of the dispute").

141. See discussion *supra* Part I.B.4.b (explaining the tribunal's bipartite test for jurisdiction in *Československá Obchodní Banka, A.S. v. Slovakia* (citation omitted)).

142. See *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, ¶¶ 145-46 (Apr. 15, 2009) (stating that this conclusion was derived from the object and purpose of both the Convention and the Israel-Czech Republic BIT).

143. See *id.* ¶ 144 (speculating that extending jurisdiction "would go against the basic objectives underlying the ICSID Convention" and thus would be an impermissible expansion of Article 25).

annulment committee in *MHS* stipulated no such requirement, ruling that the BIT's lack of conflict with Article 25(1) of the Convention allowed it to assign "investment" the definition contained in the BIT.¹⁴⁴ Thus, in defining "investment" for the arbitration of a dispute, ICSID tribunal must ensure that their definition neither impermissibly expands the scope of Article 25 by adding inconsistent definitions from the BIT or FTA, nor restricts the scope of the relevant BIT or FTA by imposing definitions not envisaged by the drafters of the Convention.¹⁴⁵

*1. Protected Investments Need Not Have a Readily Ascertainable
"Contribution to Economic Development" nor Be Bona Fide*

As discussed in the previous section on Article 25 jurisdiction, the condition *ratione materiae* requires the underlying transaction qualify as an "investment."¹⁴⁶ Because both the *MHS* and *Phoenix* tribunals' jurisdictional analyses centered on this element,¹⁴⁷ the forthcoming analysis will treat the other elements of the condition *ratione materiae* as met. Moreover, since the *Phoenix* tribunal found that Phoenix Action's investments satisfied the first five elements of its expanded *Salini* test,¹⁴⁸ the analysis of its failure to exercise jurisdiction *ratione materiae* will only examine whether an investment must be *bona fide* to qualify for protection.¹⁴⁹ The

144. See *MHS Annulment*, *supra* note 11 ¶ 80 (holding that the previous tribunal's failure to apply the U.K.-Malaysia BIT constituted a manifest excess of power).

145. See, e.g., *Biwater Gauff, Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award, ¶ 312 (July 24, 2008) (juggling the *travaux préparatoires* and the BIT to define "investment").

146. See discussion *supra* Part I.B (requiring also that (1) there be a legal dispute; and (2) the dispute arise directly out of an underlying transaction).

147. See *MHS Annulment*, *supra* note 11, ¶ 80 (annulling decision based on an improper definition of "investment"); *Phoenix Action*, ICSID Case No. ARB/06/5, ¶ 74 (postulating that "fail[ure] to satisfy the criterion of an 'investment' within the meaning of Article 25" would preclude its exercise of jurisdiction and foregoing analysis of the other two elements) (internal citation omitted).

148. See *Phoenix Action*, ICSID Case No. ARB/06/5, ¶¶ 118-34 (holding the acquisition of these local corporations—the investment—included a contribution in money, had a certain duration, contained an element of risk, developed an economic activity in the host state, and was made in accordance with Czech law).

149. It follows that if a *bona fide* requirement was incorrectly applied, under the *Phoenix* tribunal's own analysis, then it had jurisdiction *ratione materiae*.

following analyses use two approaches: preamble-based interpretation and text-based interpretation.¹⁵⁰

a. No Preamble Imposes a “Contribution to Economic Development” or a Bona Fide Requirement on “Investment”

Preamble-based interpretation seeks to define “investment” by ascertaining its meaning from the relevant treaty’s preamble.¹⁵¹ The “object and purpose” of the ICSID Convention is to promote economic development through international cooperation.¹⁵² Its Preamble stresses the role private international investment plays in development, and thus, it underscores that the Convention is meant to create a climate favorable for such investment.¹⁵³ The preambles of the Israel-Czech Republic BIT and the U.K.-Malaysia BIT take a similar tone: their “object and purpose” is to stimulate investment to the benefit of both parties.¹⁵⁴ Additionally, they recognize that

150. See Dolzer, *supra* note 84, at 274-75 (observing a third approach: interpretation *in dubio mitius*). The principle *in dubio mitius* (in doubt less) requires that ambiguous terms be resolved in favor of the one that is less onerous, less interferential with territorial and personal supremacy, or less restrictive. See Appellate Body Report, EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R; WT/DS48/AB/R, n.154 (Jan. 16, 1998) (summarizing this principle as giving “deference to the sovereignty of states”); see also SGS Société Générale de Surveillance S.A. v. Pakistan, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 171-72 (Aug. 6, 2003), reprinted in 18 ICSID REV.—FILJ 307 (2003) (using this principle to rule that a state must respect its undertakings with foreign investors).

151. See, e.g., Tokios Tokelès v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶¶ 27-52 (Apr. 29, 2004), reprinted in 20 ICSID REV.—FILJ 205 (2005) (defining “investor” using a preamble-based interpretation of the Convention and the Ukraine-Lithuania BIT). But this approach can prove problematic. See Mortenson, *supra* note 53, at 311 (claiming that an objective investment standard, which was constructed under the guise of “object and purpose,” actually “vitiates precisely the bargain which ICSID was designed to enable”).

152. SCHREUER, *supra* note 40, at 4 (interpreting the first line of the Preamble to be its purpose).

153. See ICSID Convention, *supra* note 2, pmbl. (“[c]onsidering the need for international cooperation for economic development, and the role of private international investment [has] therein”); SCHREUER, *supra* note 40, at 4 (stating that “[e]conomic development depends in large measure on private international investment”).

154. See Israel-Czech Republic BIT, *supra* note 4, pmbl. (aiming for the “intensification] of economic cooperation” between the two countries); U.K.-

“increas[ed] prosperity in both States” will only occur through the “reciprocal promotion and protection of investments.”¹⁵⁵ While these “object and purpose” statements are very broad, should there be any doubt if an investment is entitled to protection, the term “investment” must be construed in favor of investment protection and in favor of ICSID jurisdiction.¹⁵⁶

i. Neither BIT's Preamble nor the ICSID Preamble Imposes a “Development” Requirement

In light of the Preamble of the ICSID Convention and the preambles of the respective BITs, both the *Phoenix* tribunal and the *MHS* committee properly took an expansive view of *Salini's* “contribution to economic development” criterion.¹⁵⁷ Under the bipartite test, the term “investment” must be defined first with regard to the “object and purpose” of the ICSID Convention.¹⁵⁸ The promotion of economic development through international cooperation cannot be read, in an ordinary sense, to require a measurable “contribution to economic development.”¹⁵⁹ Economic development is a nebulous concept, one that is not readily

Malaysia BIT, *supra* note 5, pmb. (asserting “favourable conditions for greater investment” will bring about this goal).

155. U.K.-Malaysia BIT, *supra* note 5, pmb.; *see also* Israel-Czech Republic BIT, *supra* note 4, pmb. (hypothesizing that this “will . . . stimulat[e] . . . individual business initiative”).

156. *See, e.g.*, *Tradex Hellas S.A. v. Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction (Dec. 24, 1996), 14 ICSID REV.—FILJ 161, 194 (1999) (suggesting that if there is doubt regarding the meaning of a relevant Albanian law, the law should be interpreted “in favour of investor protection and in favour of ICSID jurisdiction in particular”).

157. *Cf. SGS Société Générale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, ¶¶ 116, 118 (Jan. 29, 2004) (resolving uncertainties in their “object and purpose” analysis of the Swiss-Pakistan BIT in favor of investment protection and stating limitations “could readily have been expressed”).

158. *See Československá Obchodní Banka, A.S. v. Slovakia*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 57, 68 (May 24, 1999), *reprinted in* 14 ICSID REV.—FILJ 251 (1999) (dictating “investment” be defined first under the Convention).

159. *But see Mitchell v. Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, ¶ 33 (Nov. 1, 2006) (holding that, while a contribution to economic development is a necessary criterion of investment, it need not “always be sizable or successful”).

quantifiable and, moreover, is subject to divergent viewpoints.¹⁶⁰ The MHS committee, recognizing it was not “fixed or mandatory as a matter of law,” wisely dispensed with the “contribution to economic development” criterion.¹⁶¹

Furthermore, given the unhelpful nature of an even broader criterion, “development of economic activity” presents an unworkable solution and should not be used as a criterion for “investment” under Article 25(1) of the ICSID Convention.¹⁶² An investment that meets the elements of contribution, duration, and risk inherently develops an “economic activity.”¹⁶³ Additionally, the *Phoenix* tribunal’s dilution of the fourth *Salini* criterion to a redundancy can serve only to further fracture “investment” jurisprudence and has little analytical merit.¹⁶⁴ No “development” requirement can be derived from a preambular analysis of the ICSID Convention.¹⁶⁵

The appropriate inclusion or exclusion of a “development” requirement of investment turns on whether it can be read from either BIT.¹⁶⁶ The Israel-Czech Republic BIT and the U.K.-Malaysia

160. See *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, ¶ 85 (Apr. 15, 2009) (highlighting the problematic nature of this *Salini* factor). It continued: “A less ambitious approach should therefore be adopted, centered on the *contribution* of an international investment *to the economy* of the host State . . .” *Id.* (emphasis added) (citing *Sedelmayer v. Russian Federation* for the proposition that investments are “made within the frame of a commercial activity” and “aim[ed] at creating a further economic value” (citation omitted)).

161. MHS Annulment, *supra* note 11, ¶¶ 78-79 (embracing the absence of a formal definition of “investment” from the Convention).

162. See, e.g., *L.E.S.I.-Dipenta v. Algeria*, ICSID Case No. ARB/03/08, Award, § II, ¶ 13(iv) (Jan. 10, 2005) (pronouncing that contribution to the host State’s development is “difficult to ascertain” and “implicitly covered by the other three [*Salini*] criteria”).

163. See *Phoenix Action*, ICSID Case No. ARB/06/5, ¶ 85 (rendering its expansion of “contribution to economic development” to “development of economic activity” a nullity by its own analysis).

164. *But see* SCHREUER, *supra* note 40, at 125 (allowing the argument “that there should be some positive impact on development”).

165. See *id.* at 140 (noting that, while the “wording of the Preamble and the Executive Directors’ Report . . . suggest that development is part of the Convention’s object and purpose[,] [t]h[is] feature[] should not necessarily be understood as [a] jurisdictional requirement[]”).

166. See *Československá Obchodní Banka, A.S. v. Slovakia*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, ¶¶ 57, 68 (May 24, 1999), reprinted in 14 ICSID REV.—FILJ 251 (1999) (necessitating the second step: BIT

BIT each propose that they are meant to stimulate investment to the benefit of both countries.¹⁶⁷ Such “object and purpose” statements are more expansive than the “development” requirement.¹⁶⁸ Thus, since they do not act as a limitation on the scope of the Convention, such preambles do not affect the definition of “investment” under Article 25.¹⁶⁹

ii. Neither the Preamble of the ICSID Convention nor the Preamble of the Israel–Czech Republic BIT Institutes a Bona Fide Requirement on “Investment”

According to the *Phoenix* tribunal, the “object and purpose” of both the BIT and the Convention compel that an investment be *bona fide*.¹⁷⁰ Considering “the need for international cooperation for economic development”¹⁷¹ and the creation of “favorable conditions for [greater] investment[,]”¹⁷² the principle of effectiveness establishes that a *bona fide* requirement should be included only if it is “the interpretation that would most effectively fulfil the objectives of . . . [the] treaty.”¹⁷³ The Israel–Czech Republic BIT states an investment is “*any* kind of asset[] invested in connection with *economic activities* . . . in the territory of the other Contracting Party

analysis).

167. Israel-Czech Republic BIT, *supra* note 4, pmb.; U.K.-Malaysia BIT, *supra* note 5, pmb.

168. Economic development tends to embody a holistic notion of wealth, whereas prosperity is usually equated with financial wealth. *See generally* Ha-Joon Chang, *Hamlet without the Prince of Denmark: How Development Has Disappeared from Today’s “Development” Discourse*, in TOWARDS NEW DEVELOPMENTALISM: MARKET AS MEANS RATHER THAN MASTER (S. Khan & J. Christiansen eds., forthcoming 2010) (arguing for a “new developmentalism” that revives the “productionist” concern of old development economics and pays greater attention to issues of human development).

169. *See* Biwater Gauff Ltd. v. Tanzania, ICSID Case No. ARB/05/22, Award, ¶ 308 (July 24, 2008) (discussing the scope of jurisdiction).

170. *See* Phoenix Action, Ltd. v. Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 106 (Apr. 15, 2009) (offering access to ICSID arbitration only to investments made in good faith).

171. ICSID Convention, *supra* note 2, pmb.

172. Israel-Czech Republic BIT, *supra* note 4, art. 2(1)

173. *See* Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals—An Empirical Analysis*, 19 EUR. J. INT’L L. 301, 317 (2008) (arguing that a preamble should not be “interpreted in a way that makes other provisions superfluous or meaningless”).

in accordance with [its] laws and regulations . . .”¹⁷⁴ Under the good faith principle, a *bona fide* investment is any kind of asset invested with the *intent* to develop an economic activity in accordance with the other state’s laws and regulations.¹⁷⁵ Any investment meeting the typical characteristics of investment implicitly develops an economic activity.¹⁷⁶ Further, construing the reciprocal protection of investments less restrictively on the host state, the minimum body of legal rights it objectively intended to provide is that accorded by its laws and regulations.¹⁷⁷ Because the *bona fide* element is a superfluous criterion for investment, it should not be required.¹⁷⁸

b. No Text Imposes a “Contribution to Economic Development” or a Bona Fide Requirement on “Investment”

The ICSID Convention “is not to be construed restrictively, nor, as a matter of fact, broadly or liberally.”¹⁷⁹ Rather, “[i]t is to be construed in a way which leads to find[ing] out and [] respect[ing] the common will of the parties” and “in good faith, . . . by taking into account the consequences of the[] commitments the parties may . . . hav[e] reasonably and legitimately envisaged.”¹⁸⁰ To ascertain what

174. Israel-Czech Republic BIT, *supra* note 4, art. 1(1) (emphasis added).

175. *See Phoenix Action*, ICSID Case No. ARB/06/5, ¶¶ 135-44 (holding protection turned on Phoenix’s motives in making the investment).

176. *See id.* ¶ 85 (asserting that normally “national economic activity” is inherent in the mere presence of contribution, duration, and risk).

177. *But cf.* Tokios Tokelès v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 31 (Apr. 29, 2004), *reprinted in* 20 ICSID REV.—FILJ 205 (2005) (finding a similarly worded BIT preamble “should not be used to restrict the scope of ‘investors’” in favor of the Ukraine).

178. *See Phoenix Action*, ICSID Case No. ARB/06/5, ¶ 142 (conflating jurisdiction *ratione materiae* with jurisdiction *ratione temporis* in its assessment that the “pre-existing domestic dispute” did not make the transaction *bona fide*).

179. *Amco Asia Corp. v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, ¶ 14(i) (Sept. 25, 1983), *reprinted in* 1 ICSID Rep. 377 (1993).

180. *See id.* (opining that “such a method of interpretation is but the application of the fundamental principle of *pacta sunt servanda*”); *see also* Société Ouest Africaine des Bétons Industriels v. Senegal, ICSID Case No. ARB/82/1, Award, ¶ 4(10) (Feb. 25, 1988), *reprinted in* 2 ICSID Rep. 190 (1993) (“It is this principle of interpretation [the principle of good faith], rather than one of *a priori* strict, or, for that matter, broad and liberal construction, that the Tribunal has chosen to apply.”). *See generally* Jason Webb Yackee, *Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality*, 32

the parties reasonably contemplated, it is instructive to look at the language of the BITs. The Israel–Czech Republic BIT conceives of “investment” as “*any* kind of asset[,]” and it expressly considers the shareholders’ rights.¹⁸¹ The U.K.-Malaysia BIT envisages “investment” as “*every* kind of asset,”¹⁸² but limits investments U.K. nationals make to those which the Malaysian government has approved.¹⁸³

i. No Relevant Treaty Article Imposes a “Development” Requirement

Under the ICSID Convention, the “contribution to economic development” requirement is a preambular notion of “investment” not contained in Article 25 and thus inapposite to the following analysis.¹⁸⁴ To ascertain the common will of the parties, it is necessary to determine whether a “contribution to economic development” can be read from the U.K.-Malaysia BIT or a “development of economic activity” requirement can be gleaned from the Israel–Czech Republic BIT.¹⁸⁵ The Israel–Czech Republic BIT explicitly requires that assets be “invested in connection with *economic activities*.”¹⁸⁶ But, as the *Phoenix* tribunal made clear, such a connection is inherent in the other *Salini* criteria.¹⁸⁷ The U.K.-

FORDHAM INT’L L.J. 1550, 1605 (2009) (warning that, while BITs reaffirm *pacta sunt servanda* explicitly through “umbrella” clauses and indirectly through “adequate” compensation and “fair and equitable treatment” clauses, they can “complicate *pacta sunt servanda* principles by interfering with or overriding contract-based dispute settlement procedures”).

181. See Israel–Czech Republic BIT, *supra* note 4, art. 1(1)(b) (emphasis added) (recognizing “rights derived from shares, bonds and other kinds of interest in companies”).

182. U.K.-Malaysia BIT, *supra* note 5, art. 1(a) (emphasis added).

183. See *id.* art. 1(b)(ii) (“[Approved projects must be] classified by the appropriate Ministry of Malaysia in accordance with its legislation and administrative practice . . .”).

184. See discussion *supra* Part II.A.1.a.i (concluding that no applicable preamble imposes a “development” requirement on investment).

185. See *Amco Asia Corp. v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, ¶ 14(ii) (Sept. 25, 1983), *reprinted in* 1 ICSID Rep. 377 (1993) (analyzing the language of the parties’ contract and the Application to Establish PT Amco Indonesia to determine their will).

186. Israel–Czech Republic BIT, *supra* note 4, art. 1(1) (emphasis added).

187. *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, ¶¶ 84-85 (Apr. 15, 2009); *cf.* *Biwater Gauff Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award, ¶ 320 (July 24, 2008) (suggesting that any investment

Malaysia BIT mentions no such requirement.¹⁸⁸ As a result, under a text-based approach, the *MHS* committee properly annulled an award that elevated the “contribution to economic development” to a jurisdictional condition.¹⁸⁹ Based on the foregoing analysis, a text-based interpretation would not impose a “development” requirement in either case.

ii. Neither Article 25 of the Convention nor Article 1 of the Israel–Czech Republic BIT Institutes a Bona Fide Requirement on “Investment”

In analyzing contracts, the principle of good faith requires there be no deceit or artifice during the negotiation and execution of the investment instruments, nor any intention of nonperformance.¹⁹⁰ A failure to exercise one’s rights honestly and loyally constitutes an abuse of rights and violates this principle.¹⁹¹ Based on its BIT with Israel, the Czech Republic only contemplated having to protect investments made in accordance with its laws and regulations.¹⁹² But Phoenix did not misrepresent any of its actions, completed all of its obligations, and made all of its investments in accordance with Czech law.¹⁹³ Consequently, the *bona fide* requirement was a construct meant to circumvent the real jurisdictional issue at hand:

would constitute an economic activity).

188. See U.K.-Malaysia BIT, *supra* note 5, art. 1 (lacking any reference to development of any kind).

189. See *Bewater Gauff*, ICSID Case No. ARB/05/22, ¶ 312 (intimating that a “contribution to economic development” requirement should be excluded when it is absent from the BIT).

190. See *Inceysa Vallisoletana S.L. v. El Salvador*, ICSID Case No. ARB/03/26, Award, ¶¶ 231-36 (Aug. 2, 2006) (applying the principle of good faith to redress fraudulent acts and false information).

191. See Robert D. Sloane, *Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality*, 50 HARV. INT’L L.J. 1, 19 (2009) (claiming that the status and utility of the principle of abuse of rights is controversial).

192. See Israel-Czech Republic BIT, *supra* note 4, art. 1(1) (requiring that “investments” be made “in accordance with [its] laws and regulations”).

193. *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, ¶ 134 (Apr. 15, 2009). More importantly, it found that even the principle of good faith in Czech law was not violated. See *id.* (contending that the investment was not made “with dissimulation or otherwise contestable methods”).

the absence of jurisdiction *ratione personae*. Therefore, it should not be a criterion for the term “investment.”¹⁹⁴

2. *The Phoenix Tribunal Was Empowered to Dismiss on Two Other Grounds*

a. *The Phoenix Tribunal Could Have “Pierced the Corporate Veil” and Found No Jurisdiction Ratione Personae*

An ICSID tribunal may exercise its authority to arbitrate only over disputes for which it has jurisdiction *ratione materiae* and *ratione personae*.¹⁹⁵ While *Phoenix* represents an egregious abuse of the ICSID system by the claimant, a natural and ordinary reading of Article 25 of the ICSID Convention and the Israel–Czech Republic BIT would have granted jurisdiction *ratione materiae* over the dispute.¹⁹⁶ But using the equitable principle of “veil piercing,” the *Phoenix* tribunal could have found insufficient diversity for jurisdiction *ratione personae* and achieved the same desired and just outcome.¹⁹⁷

In reaching its award, the *Phoenix* tribunal failed to spot the real issue at hand: the lack of mixed parties. The corporation was merely an “alter ego” of the claimant, a Czech national, registered solely to gain access to ICSID arbitration in an outrageous display of treaty shopping.¹⁹⁸ The equitable principle of “veil piercing” allows for removal of the legal fiction of corporate identity in cases of basic

194. See discussion *infra* Part II.A.2 (arguing that the real issue was the claimant’s nationality).

195. See *Phoenix Action*, ICSID Case No. ARB/06/5, ¶ 54 (deriving the conditions *ratione materiae* and *ratione personae* from Article 25 of the Convention). Of course, jurisdiction *ratione temporis* and *ratione voluntatis* must also exist. See *id.* (deriving the condition *ratione temporis* from general principles of international law).

196. See discussion *supra* Parts III.A.1.a.ii, III.A.1.b.ii (concluding that the *bona fide* requirement is an impermissible restriction on “investment”); see also *Phoenix Action, Ltd.*, ICSID Case No. ARB/06/5, ¶¶ 22, 32-34 (pointing out that *Phoenix* was a sham entity incorporated by a Czech national).

197. See *Phoenix Action*, ICSID Case No. ARB/06/5, ¶ 144 (refusing jurisdiction to prevent “an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs”).

198. The Czech Republic raised this issue, but the *Phoenix* tribunal chose not to address it. See *id.* ¶ 146 (finding “no protected investment,” and thus, electing not to address the Czech government’s other objections).

injustice or fundamental unfairness.¹⁹⁹ In municipal law, the corporate veil has been lifted to prevent misuse of legal personality, to protect third persons, and to prevent evasion of legal requirements or obligations.²⁰⁰ The tribunal's reluctance to employ "veil piercing" is likely attributable to the International Court of Justice's holding in *Barcelona Traction*²⁰¹ that, in the scheme of diplomatic protection, the doctrine is inappropriate.²⁰² But BITs and the ICSID Convention preclude recourse to diplomatic protection and, furthermore, contain their own definitions of corporate nationality, making diplomatic protection principles inapposite.²⁰³

Contrary to the holding in *Barcelona Traction* and unlike the situation in *Tokios Tokelès v. Ukraine*,²⁰⁴ piercing the corporate veil was required.²⁰⁵ The *Phoenix* tribunal found Phoenix's actions were

199. See generally STEPHEN M. BAINBRIDGE, CORPORATE LAW 52-71 (2d ed., 2009) (surveying "veil piercing" and other related doctrines). Admittedly, courts have shown themselves far more willing to pierce the corporate veil in tort cases than in contract cases. See *id.* at 56-58 (submitting that the nature of the claim and the nature of the defendant are critical factors in any "veil piercing" case).

200. See *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 54 (Apr. 29, 2004), reprinted in 20 ICSID REV.—FILJ 205 (2005) (suggesting that "veil piercing" is especially appropriate in cases of fraud or malfeasance and to protect creditors or purchasers) (citation omitted).

201. *Barcelona Traction, Lights and Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 42 (Feb. 5) (ruling that a corporation is a national of the state in which it is incorporated for purposes of diplomatic protection).

202. See *id.* (stating, for corporations, no test of "genuine connection" has found widespread acceptance).

203. See Broches, *supra* note 74, at 360-61 (maintaining that *Barcelona Traction* "is without relevance to the meaning of the term 'nationality' in Article 25(2)(b)" of the Convention and advancing that a broader approach would "give effect to economic realities such as ownership and control"). See generally Lawrence J. Lee, *Barcelona Traction in the 21st Century: Revisiting Its Customary and Policy Underpinnings 35 Years Later*, 42 STAN. J. INT'L L. 237, 270 (2006) (detailing the use of the equitable principle of "veil piercing" in modern international law).

204. See ICSID Case No. ARB/02/18, ¶¶ 1-4 (involving a Ukrainian-controlled corporation based in Lithuania that had substantial and long-standing business ties to its corporate seat). See generally Andriy Alexeyev & Sergiy Voitovich, *Tokios Tokelès Vector: Jurisdictional Issues in ICSID Case Tokios Tokelès v. Ukraine*, 9 J. WORLD INV. & TRADE 519, 520 (2008) (presenting the conceptual issues surrounding jurisdiction *ratione personae*).

205. See *Tokios Tokelès*, ICSID Case No. ARB/02/18, ¶ 56 (refusing to "pierce the veil" because the claimant did not create his corporation "for the purpose of gaining access to ICSID arbitration under the BIT against the Ukraine").

meant to “bring . . . *pre-existing disputes* involving Benet Group and Benet Praha before th[e] Tribunal,” and thus, it can reasonably be inferred that this was also the motivation for the incorporation of Phoenix Action, Ltd. in Israel.²⁰⁶ Differentiating *Phoenix* from *Tokios Tokelès*, the claimant created his corporation “for the purpose of gaining access to ICSID arbitration under the BIT” against the Czech Republic.²⁰⁷ The tribunal should have concluded that the corporation was a natural person of Czech nationality, and thus it did not have jurisdiction *ratione personae*.²⁰⁸

b. Alternatively, It Could Have Dismissed the Claim as an Abuse of Process

While the ICSID Convention does not explicitly confer the power to dismiss a claim on grounds of abuse of process, “if such a power exists, it would only be for the purpose of protecting the integrity of the Tribunal’s process or dealing with genuinely vexatious claims.”²⁰⁹ Nonetheless, “[i]t is almost tautological to say a tribunal

206. See *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, ¶ 137 (Apr. 15, 2009) (underscoring Beno’s flight from criminal prosecution). Additionally, Phoenix notified the Czech Republic of an investment dispute before it had even registered its purchases. See *id.* ¶ 138 (questioning further Phoenix’s claims of injustice under fair and equitable treatment given it had only allowed the government two months to resolve the issues).

207. See *Tokios Tokelès*, ICSID Case No. ARB/02/18, ¶ 56 (accepting that Tokios Tokelès was not established for the purpose of gaining access to ICSID arbitration as it had been established six years before the BIT came into effect); see also *Phoenix Action, Ltd.*, ARB/06/5, ¶ 35(d) (highlighting the Czech Republic’s argument that “[t]he Benet Companies, rather than Phoenix, [we]re the real parties in interest, and the diversity of nationality requirement and the exclusive remedies principle[s] [we]re therefore not satisfied”).

208. See *Phoenix Action, Ltd.*, ICSID Case No. ARB/06/5, ¶ 40 (“Phoenix’s claims should still be dismissed because the presentation of an ICSID claim under the circumstances is abusive Where there is . . . an abuse of a corporate structure, the Tribunal should look beyond the apparent facts and lift the corporate veil.”); see also *Tokios Tokelès*, ICSID Case No. ARB/02/18, ¶ 56 (allowing “veil piercing” for abuses of corporate personality).

209. See *Waste Mgmt., Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Mexico’s Preliminary Objection Concerning the Previous Proceedings, ¶ 49 (June 26, 2002) (contrasting the Convention with the explicit power provided in Article 294(1) of the United Nations Convention on the Law of the Sea); see also *Libananco Holdings Co. v. Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, ¶ 78 (June 23, 2008) (adding that this inherent power exists “even if the remedies open to [ICSID tribunals] are necessarily

has the power to dismiss an application which is an abuse of its process.”²¹⁰ Although jurisdiction technically exists, the tribunal may dismiss a claim pursuant to procedural or substantive defects.²¹¹ Both claims based on fraud and illegality, as well as those brought in bad faith, provide occasion for a tribunal to disqualify or terminate proceedings.²¹²

The *Phoenix* tribunal found “that the initiation and pursuit of th[e] [claim] [wa]s an abuse of the international investment protection regime under the BIT and, consequently, of the ICSID Convention.”²¹³ In the absence of an investment made contrary to the laws of the Czech Republic and thus the BIT, dismissal for an abuse of process would have been more appropriate.²¹⁴ In fact, such a decision would have accorded with the tribunal’s award of all costs to the Czech Republic.²¹⁵

different from those that might be available to . . . domestic court[s] of law”).

210. See *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2008 I.C.J. Pleadings 15, ¶¶ 15, 19-20 (June 19, 2008) (finding two bases for this power: the court’s overall responsibility to safeguard the integrity of its procedure and “the general duty of loyalty between the parties”).

211. See *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Award, ¶¶ 141-43 (Aug. 27, 2008) (reasoning that granting the protections provided by the Energy Charter Treaty would run contrary to the principle *nemo auditur propriam turpitudinem allegans*—no one is heard when alleging his own wrong—and international public policy).

212. See *Eur. Cement Inv. & Trade S.A. v. Turkey*, ICSID Case No. ARB(AF)/07/2, Award, ¶ 175 (Aug. 13, 2009) (analogizing *Phoenix* to find “a claim based on false assertion of ownership of an investment” an abuse of process); *Waste Mgmt.*, ICSID Case No. ARB/00/3, ¶ 50 (refusing to end the proceedings as an abuse of process in the absence of such acts). Conduct prejudicial to procedural fairness provides the other occasion. See, e.g., *Methanex Corp. (Canada) v. United States*, Final Award of the Tribunal on Jurisdiction and Merits, UNCITRAL Arbitration, ¶ 54 (Aug. 3, 2005) (NAFTA) (finding a duty to participate in good faith during arbitration proceedings under both general legal principles and the UNCITRAL Rules).

213. *Phoenix Action*, ICSID Case No. ARB/06/5, ¶ 151.

214. Because the claim was predicated upon Beno’s own wrongful acts, such dismissal was available and would not have necessitated the creation of another needless criterion for “investment,” thereby promoting a more coherent Article 25 jurisprudence. See, e.g., Posting of John Gaffney to Kluwer Arbitration Blog, <http://kluwerarbitrationblog.com/blog/2009/08/04> (Aug. 4, 2009) (proclaiming that the same outcome “would have been better achieved through the exercise of [this] inherent power”).

215. See *Eur. Cement Inv. & Trade S.A.*, ICSID Case No. ARB(AF)/07/2, ¶ 175 (awarding full costs to Respondent Turkey so as to “discourage others from

B. PROMOTION OF PRIVATE INTERNATIONAL INVESTMENT WILL ONLY OCCUR WHEN THE EXPRESSED INTENT OF CONTRACTING PARTIES IS GIVEN ITS DUE WEIGHT, AND THUS, ICSID'S JURISDICTION MUST LIE IN THE INTERSECTION OF ITS MEMBER STATES' BITS AND FTAS AND ITS OWN CONVENTION

Investor reluctance is attributable to risk.²¹⁶ While it is true that with risk comes reward, developing economies are especially susceptible to certain risks.²¹⁷ The risk that foreign investors' rights will not be respected greatly hinders the promotion of private international investment.²¹⁸ ICSID seeks to assuage fear of this risk by enabling contracting parties to elect for impartial arbitration through its tribunals.²¹⁹ But when ICSID tribunals fail to exercise jurisdiction over contracts with reasonable definitions of investment, uncertainty is reintroduced into the international system.²²⁰ Thus, to continue to promote private international investment, contracting parties' expressed intentions should be given considerable weight.

pursuing such unmeritorious claims"); *Plama Consortium*, ICSID Case No. ARB/03/24, ¶¶ 321-22 (making the claimant bear all costs as it was guilty of fraudulent misrepresentation). Nonetheless, awarding all costs is divergent from normal practice. See generally *EDF (Servs.) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, ¶ 322 (Oct. 8, 2009) (explaining that, in investment arbitration, parties historically have split costs evenly, regardless of outcome).

216. See Mary Hallward-Driemeier, DO BILATERAL INVESTMENT TREATIES ATTRACT FOREIGN DIRECT INVESTMENT? ONLY A BIT . . . AND THEY COULD BITE 3 (World Bank, Working Paper No. 3121, Aug. 2003), available at <http://go.worldbank.org/38XTI9OZ30> (emphasizing investors' concerns about their ability "to earn - and control - a return on their investment").

217. See BAKER, *supra* note 30, at 5-6 (citing as common problems: controls on ownership, "bureaucratic snafus" in project approval, quotas on employment of nationals, performance requirements, local political conditions, and financial restraints, such as financial regulations, insufficient foreign exchange, and heavy taxation).

218. See, e.g., *Israel-Czech Republic BIT*, *supra* note 4, pmbl. (acknowledging that a greater investment will not come without a reciprocal protection of the investment).

219. See BAKER, *supra* note 30, at 43 (pointing to the Centre's advocates and their belief that such work would increase private foreign investment in less developed countries).

220. See, e.g., *U.K.-Malaysia BIT*, *supra* note 5, art. 7 (leaving the impacted party without remedy after the Decision on Jurisdiction, as ICSID was the only acceptable arbitration forum). See generally Mortenson, *supra* note 53, at 259 (espousing that not exercising "jurisdiction over [certain] categories of enterprise . . . compromises the credibility of states' promises to protect them).

1. Foreign Nationals Will Not Engage in Private Investment Unless Their Contractual Relationships Are Enforced with Predictability

Arbitration outcomes are less predictable because tribunals give varying degrees of weight to the definitions of jurisdictional terms to which the parties have assented in their trade agreements.²²¹ Without a clear sense of the investment disputes over which ICSID tribunals will likely exercise jurisdiction, foreign investors must account for the added risk that their investments may not be protected should a dispute regarding a jurisdictional “defect” arise; this risk is reflected as an additional cost.²²² Moreover, when investments have negative net present values (“NPVs”) because of excessive legal risk, parties, assuming they are rational actors, do not invest.²²³ Accordingly, eliminating or reducing legal risk to investment through predictable

221. *Compare* Salini Costruttori S.p.A. v. Morocco, ICSID Case No. ARN/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001), *reprinted in* 42 I.L.M. 609 (2003) (defining “investment” based on its hallmarks), *with* MHS Annulment, *supra* note 11, ¶ 59 (defining “investment” through the definition established in the BIT).

222. *See* Peter Egger & Michael Pfaffermayr, *The Impact of Bilateral Investment Treaties on Foreign Direct Investment*, 32 J. COMP. ECON. 788, 790 (2004) (touting that “reliable and transparent conditions” provided by BITs “reduce the costs of investing abroad, including risk premia”).

223. *See* Jiang Wang, *Chapter 14: Capital Budgeting*, in 15.407 FINANCE THEORY 14–1, 14–3 (2003), *available at* <http://web.mit.edu/15.407/file/Ch14.pdf> (posing three investment criteria: for a single project, invest if NPV is positive; for many independent projects, invest in all projects with positive NPVs; and for mutually exclusive projects, invest in the project with the highest positive NPV). This situation can be illustrated using a simple example at $t=0$:

There is a known oil reserve in Washingtonia that its government has agreed to let A, a juridical person of Alandia, explore. Alandia and Washingtonia have a BIT expressly calling for ICSID arbitration. The Government of Washingtonia is notorious for confiscating oil after it has been extracted (this occurs with probability 1). Additionally, A incurs expenses of \$7 to extract the oil.

Situation 1 (80% Chance of Enforcement): with probability 4/5, ICSID exercises jurisdiction, A’s rights are enforced, and A receives an award of \$10; with probability 1/5, ICSID fails to exercise jurisdiction because oil extraction does not constitute an “investment.” *NPV of Situation 1*: $(4/5)(\$10) - \$7 = \$1 > 0$; provided there are no better alternatives, the investment is made.

Situation 2 (60% Chance of Enforcement): same as Situation 1, but with probability 3/5, ICSID exercises jurisdiction. *NPV of Situation 2*: $(3/5)(\$10) - \$7 = -\$1 < 0$; no investment is made.

See id. at 14-19 (providing a similar example over a two-period investment horizon).

contract enforcement increases projects' NPVs, and thus promotes investment.²²⁴

2. Extending ICSID's Jurisdiction to the Intersection of Its Convention and the Relevant Member States' BITs and FTAs Will Ensure Consistent Definition of Jurisdictional Terms

ICSID tribunals should extend jurisdiction to the "outer limits" of the Convention; that is, they should exercise jurisdiction over all investment disputes that are not clearly inconsistent with the Convention.²²⁵ Moreover, since the relevant BIT or FTA is the clearest manifestation of the parties' intent, it should serve as the limiting factor, narrowing the scope of jurisdiction to disputes consistent with its purposes.²²⁶ The exercise of jurisdiction in this manner accords with the *travaux preparatoires* and, more importantly, gives appropriate deference to the parties as required by the fundamental element of consent.²²⁷

224. Cf. Egger & Pfaffermayr, *supra* note 222, at 790, 801 (concluding that BIT ratifications result in real outward foreign direct investment (FDI) increases of 15-20%). See generally Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. J. INT'L L. 67, 104 (2005) (concluding that BITs should be used in conjunction with strong domestic legal institutions).

225. See Broches, *supra* note 74, at 362 (affording parties discretion when their actions are consistent with the Convention). See generally Mortenson, *supra* note 53, at 261 (arguing that acceptable definitions should include all those that "are [not] so disconnected from meaningfully economic activity so as to be absurd").

226. See, e.g., U.K.-Malaysia BIT, *supra* note 5, art. 1(1)(b)(ii) (restricting U.K. "investments" to those which the Malaysian government has approved). More importantly, most BITs and FTAs postdate the Convention and thus must be integrated into it for complete interpretation. See Vienna Convention, *supra* note 83, art. 31(2) (merging all parties' subsequent agreements and practices that are involved in the interpretation of the treaty).

227. See *Biwater Gauff Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award, ¶¶ 312, 314, 316 (July 24, 2008) (expressing the drawbacks of formalistic requirements and electing to use a "more flexible and pragmatic approach"). The *Biwater* tribunal was also troubled by the lack of a historical basis for such a test:

They do not appear in the ICSID Convention. On the contrary, it is clear from the *travaux preparatoires* of the Convention that several attempts to incorporate a definition of 'investment' were made, but ultimately did not succeed. In the end, the term was left intentionally undefined, with the expectation (inter alia) that a definition could be the subject of agreement as between Contracting States.

Id. ¶ 312. For a historical analysis rejecting the restrictive, or objective, approach, see Mortenson, *supra* note 52, at 260 (concluding that the three core *Salini* criteria

Also, because most BITs and FTAs contain similar language, a body of *jurisprudence constante* would likely emerge.²²⁸ Once the “outer limits” of the Convention and the restrictions of common BIT and FTA provisions had been delineated, parties would know with far greater certainty what qualified as a protected investment and could then construct their contracts accordingly.²²⁹ Additionally, states would not feel constrained in their ability to regulate domestic matters for fear of future disputes.²³⁰ Such efficiency and social ordering is the very purpose of the rule of law.²³¹ Thus, stable jurisprudence would enable contracting parties to get exactly what they bargained for and, as a result, would induce greater investment.²³²

III. RECOMMENDATIONS

In order to rectify the current state of affairs in ICSID jurisprudence, concrete changes must be made to the process by

“were explicitly considered and rejected during the drafting process”).

228. See *AES Corp. v. Argentina*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, ¶¶ 17-33 (Apr. 26, 2005) (concluding that fact-specific, BIT-limited decisions often rule out the use of binding precedent); Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN. ST. L. REV. 1269, 1294 (2008) (charging that well-reasoned opinions carry weight within the ICSID system because they are considered to have “practical precedential value”). See generally Vargiu, *supra* note 43, at 767-68 (explaining the workings of a *jurisprudence constante*—which is similar to the French civil-law tradition—and how it might apply to ICSID).

229. But see Bjorklund, *supra* note 228, at 1295 (maintaining that the sheer number of different BITs and provisions precludes anything but BIT-specific analysis).

230. See KONRAD VON MOLTKE & HOWARD MANN, TOWARDS A SOUTHERN AGENDA ON INTERNATIONAL INVESTMENT: DISCUSSION PAPER ON THE ROLE OF INTERNATIONAL INVESTMENT AGREEMENTS 30 (International Institute for Sustainable Development, Discussion Paper May 2004), available at http://www.iisd.org/pdf/2004/investment_sai.pdf (detailing the phenomenon known as “regulatory chill”). Regulatory chill results in necessary regulatory measures being delayed or not implemented at all for fear of potential disputes. *Id.*

231. See Gabrielle Kaufmann-Kohler, *Is Consistency a Myth?*, in PRECEDENT IN INTERNATIONAL ARBITRATION 137, 144-45 (Emmanuel Gaillard & Yas Banifatemi eds., 2008) (contending that, according to legal theory, one cannot have the rule of law without rules, which come through precedent).

232. See Report on the Convention, *supra* note 9, at 28 (returning inevitably to the notion of consent).

which tribunals resolve claims.²³³ Part III.A presents the idea that, in keeping with the consent requirement and legislative history, parties should be allowed great leeway to define “investment” in their trade agreements.²³⁴ Part III.B calls for the establishment of precedent, at minimum a *jurisprudence constante*, which would result in modifications to and restraints on existing powers, while also affording greater predictability and, thereby, promoting private international investment.²³⁵

A. CONTRACTING PARTIES OUGHT TO HAVE INCREASED
DISCRETION IN DEFINING WHAT CONSTITUTES “INVESTMENT”
FOR THE PURPOSES OF THEIR AGREEMENTS

Because the drafters of the Convention could not come to a consensus, the term “investment” was never defined.²³⁶ Given the essential requirement of consent in the ICSID Convention framework, the drafters believed that contracting parties themselves could draft *acceptable* definitions.²³⁷ The tension inherent in ICSID’s jurisprudence on “investment” now is merely reflective of the tension inherent at the time of the Convention’s drafting.²³⁸

This tension could be relieved entirely if parties were given more discretion to define the terms of their agreements.²³⁹ Like the Israel–Czech Republic BIT rightly notes, stimulation of individual business initiative is central to the promotion of greater investment.²⁴⁰ In the

233. See generally Franck, *supra* note 134, at 1521-23 (arguing that present efforts are insufficient and thus preventative and corrective measures must be made).

234. See discussion *infra* Part III.A (focusing on the wishes of the parties and their role in stimulating international development).

235. See discussion *infra* Part III.B (proposing precedent is necessary to ensure regularity).

236. See Broches, *supra* note 74, at 362 (“[T]he effort to devise a generally acceptable definition of the term ‘investment’ was abandoned ‘given the essential requirement of consent by the Parties.’”) (citation omitted).

237. Report on the Convention, *supra* note 9, at 28.

238. See SCHREUER, *supra* note 40, at 121-25 (detailing the extent of the discussions had over the term “investment” and the drafters’ inability to come to an agreement on its definition).

239. Provided that these were arms-length transactions, the contracting parties would get the benefit of their bargain.

240. See Israel-Czech Republic BIT, *supra* note 4, at pmbl. (claiming that it will not only “stimulat[e] . . . individual business initiative,” but “will increase

absence of specific evidence to the contrary, treaty texts are the only safe guide to the common intent of the parties.²⁴¹ Respect for their intentions will only engender the feeling that their “individual business initiative” is worth effecting.²⁴² Moreover, given the fact that member states support ICSID’s operation financially and that ICSID arbitration is quite expensive, it seems unlikely that rampant abuse would ensue.²⁴³ Therefore, two contracting parties should be given reasonable discretion to define “investment” for the purposes of their contract, and thus ICSID.²⁴⁴

B. ICSID MUST ESTABLISH SOME FORM OF PRECEDENT

Together, *Phoenix* and *MHS* stand for the proposition that ICSID jurisprudence is inconsistent.²⁴⁵ But on top of the problem of inconsistency, tribunal awards are not “subject to any appeal or to any other remedy except those provided for in th[e] Convention.”²⁴⁶ The current ICSID Convention provides only for rectification,

prosperity in both States”).

241. See *Rompertol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent’s Preliminary Objections on Jurisdiction and Admissibility, ¶ 107 (Apr. 18, 2008) (failing to be persuaded that any rule of treaty interpretation gives the ICSID Convention interpretative supremacy).

242. See Dr. Edward Younkings, *Freedom to Contract*, LIBERTY FREE PRESS, June 15, 2000, <http://www.quebecoislibre.org/younkins25.html> (arguing that a free contract system, unrestricted from undue judicial interference, encourages “dynamic processes and technological achievements by permitting entrepreneurs to quickly and flexibly experiment with new ways of satisfying wants”).

243. See ICSID, Schedule of Fees, ¶¶ 1, 4 (2008), available at <http://icsid.worldbank.org> (charging \$20,000 for the mere constitution of an arbitration tribunal); Bjorklund, *supra* note 231, at 1275 (stating that *PSEG v. Turkey* cost \$20,851,636.62 and arbitration for *UPS v. Canada* lasted seven years (citations omitted)).

244. *But see* Report on the Convention, *supra* note 9, at 28 (asserting that consent alone is insufficient to bring a dispute within ICSID’s jurisdiction); *MHS Annulment*, *supra* note 11, ¶ 63 (Shahabuddeen, J., dissenting) (charging that a “subjectivist view” may make ICSID “just another arbitration institution, competing with a range of others”).

245. *But see* POSSIBLE IMPROVEMENTS OF THE FRAMEWORK FOR ICSID ARBITRATION 15 (ICSID Secretariat, Discussion Paper Oct. 2004), available at <http://icsid.worldbank.org> (last visited Nov. 9, 2009) [hereinafter IMPROVEMENTS] (asserting boldly that “significant inconsistencies have not . . . been a general feature of the jurisprudence of ICSID”).

246. ICSID Convention, *supra* note 2, art. 53(1).

interpretation, revision, and annulment.²⁴⁷ In addition, it limits the grounds for annulment to five cases: (1) the original “[t]ribunal was not properly constituted”; (2) the tribunal “manifestly” exceeded its powers; (3) a member was corrupt; (4) there was a major procedural error; or (5) the award does not state its rationale.²⁴⁸ Notably, mistake of law or fact is not grounds for annulment.²⁴⁹ An annulment proceeding is the last opportunity to challenge an ICSID award before it becomes enforceable as a matter of law.²⁵⁰

In the absence of a broader review structure, the most plausible solution is precedent.²⁵¹ While binding precedent could quell the inconsistencies in ICSID jurisprudence, it would require an amendment to the Convention.²⁵² Moreover, certain treaties, such as the North American Free Trade Agreement, preclude its use.²⁵³ For these reasons, a *jurisprudence constante* presents an attractive alternative.²⁵⁴

Given the infeasibility of broader structural reform, establishment of a *jurisprudence constante* currently presents the best option.²⁵⁵ A *jurisprudence constante* is appealing because it focuses on the text—the correct starting point for analysis.²⁵⁶ Tribunals could then review

247. See generally Christian J. Tams, *An Appealing Option? The Debate About an ICSID Appellate Structure*, in *ESSAYS IN TRANSNATIONAL ECONOMIC LAW* 5-8 (No. 57, June 2006) (detailing the remedies presently available under the Convention).

248. ICSID Convention, *supra* note 2, art. 52(1).

249. Franck, *supra* note 134, at 1547.

250. ICSID Convention, *supra* note 2, art. 54(1).

251. See Kaufmann-Kohler, *supra* note 231, at 147 (advocating for precedent as “the main tool to promote efficiency”).

252. See *IMPROVEMENTS*, *supra* note 245, at 14-16 (expressing concern that an appeals process might lead to further fragmentation—in addition to the Convention and the existing Additional Facility Rules).

253. See Bjorklund, *supra* note 228, at 1295 (questioning whether there is any “system” of international arbitration and concluding international arbitration is too young to establish precedent).

254. See Vargiu, *supra* note 43, at 768 (proclaiming a *jurisprudence constante* to be the only solution).

255. Other commentators have suggested that an “investment arbitration court” oversee appellate litigation from various arbitration tribunals throughout the world. See, e.g., Franck, *supra* note 134, at 1617-21 (suggesting a court created through a pooling of procedures from the New York, Panama, and ICSID Conventions).

256. See Bjorklund, *supra* note 228, at 1295 (suggesting that analysis would occur much like interpretation of the civil code).

previous decisions interpreting the same text.²⁵⁷ Inconsistent decisions would be ignored or annulled.²⁵⁸ Over time, a consistent line of cases would emerge.²⁵⁹ Such practice could develop into customary international law.²⁶⁰

CONCLUSION

Ultimately, ICSID tribunals are in the same position that the drafters of the Convention were in; they are unable to agree on the definition of “investment.” But the drafters also realized the solution lay in giving deference to the parties involved. In construing “investment” for ICSID arbitration, tribunals must ensure that their definitions comport with the expressed will of the parties. Moreover, consistently ruling in favor of investment protection and in favor of jurisdiction signals to investors that their rights are, in fact, protected. Private international investment cannot flourish in the absence of such security.

257. *See id.* (assuming well-reasoned decisions would be persuasive).

258. *See* Vargiu, *supra* note 43, at 768 (designating the process of annulment as a consequence of going against the *jurisprudence constante*); Bjorklund, *supra* note 228, at 1297 (contending that “unfit [decisions] will perish”).

259. *See* Kaufmann-Kohler, *supra* note 231, at 146-47 (reasoning that precedents foster consistency when tribunals “systematically rely on a consistent line of cases and depart from it only for compelling reasons”).

260. *See id.* at 147 (citing Thomas Walde for the proposition that customary international law “impl[ies] a well-established practice and an *opinio juris*”).