DEFINING "INVESTMENT" – A DEVELOPMENTAL PERSPECTIVE

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I. Introduction

There is hardly any area of international law, as divided and disputed as investment treaty arbitration[1]. The deep divide is an outcome of serious implications that it has on the exercise of sovereign power by the States. Investment treaties severely curtail regulatory freedom of States.[2] There is obviously a serious concern for the States, since their exercise of sovereignty is amenable to review before a private international tribunal, operating on commercial arbitration principles which would be otherwise performed by domestic courts under the umbrella of public law.[3] On the other hand, investor oriented approaches insist that since a foreign investor is risking an investment – the transaction should be treated as a mere private and contractual dispute.[4] This leaves nearly every aspect of investment treaty arbitration prone to vulnerability of severe disagreement. One such contested area is the definition of "investment".

The jurisdiction of an arbitral tribunal constituted under an investment treaty - bilateral investment treaty ("BIT") or an investment chapter in a free trade agreement ("FTA"), is limited in its scope by *rationae materiae.* In other words, the tribunal should have jurisdiction over the subject matter of a dispute. A dispute must arise out of an investment. The investor has to first establish that the activity claimed falls within the definition of 'investment' in the investment treaty under which the proceedings are initiated. It is possible that the host State might have breached its substantive obligations under the

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[1] M SORNARAJAH, THE INTERNATIONAL LAW AND FOREIGN INVESTMENT 1 (3rd ed. 2012); Some even dispute whether international investment law belongs to international law and argue for a different approach by treating it as an autonomous regime. However, the purpose of this article is not to venture into that debate. See International Thunderbird Gaming Corporation v. The United Mexican States (Jan. 26, 2006)(dissenting opinion of Thomas Waldetb), STEPHEN W. SCHILL, INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW (2010).

[2] Prabhas Ranjan, *Definition of Investment in Bilateral Investment Treaties of South Asian Countries and Regulatory Discretion,* 26(2) J. INTN'L ARB. 217, 225-226 (2009).

[3] GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (2007); Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as Species of Global Administrative Law,* 17(1) EUR. J. INTN'L L. 121, 145-148 (2006).

[4] RUDOLPH DOLZER & CHRISTOPHER SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW, 19-20 (2nd ed. 2012).

treaty, but if the investor fails to establish that an investment was made, within the definition of the treaty, the tribunal cannot proceed. The question of determination of existence of an investment is therefore a jurisdictional question.[5] The crux is - whether an investor has made an "investment" as all consequential rights depend on it.

The definition of investment has serious implications for developing countries. If an investment is interpreted widely, it will grant a broad jurisdiction to the arbitral tribunal and allow it to review the actions of the host State. But if the tribunal adopts a strict approach, the investor cannot lay open the allegations of breach of substantive standards of treatment. There is a lot more to the definition of investment itself, *albeit* the ingredients of the definition of an investment specified in the investment treaty. For the first time, the ICSID[6] tribunal in *Salini*[7] held that investment has its own meaning and laid down four objective tests that are to be satisfied to determine the existence of an investment – namely, contribution of investor, duration, existence of operational risk and contribution to the host State's development.[8]

Ever since the objective elements are identified, controversy has sparked as to the appropriateness of an objective test, especially the rationale of the four-test approach. This article emphatically argues for an objective approach to define investment generally and particularly the last criteria of the *Salini* test that is "contribution to the economic development of the host State". Contribution to economic development is a topic dear to the heart of developing countries. After the ravage of colonial exploitation and under-explored potential of their economies, developing countries looked towards foreign capital as a route for growth and prosperity. It is not certain and is unproved yet, that the BITs result into greater inflows of capital. The claims that merely entering into investment treaties will bring investment are unsubstantiated and subject to doubt.[9] But one thing is clear, that if incoming

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[5] In practice, tribunals decide it at the jurisdictional stage itself or decide at the stage of rendering a final award; See Yv es GL Wolters, *The Meaning of "Investment" in Treaty Disputes: Substantive or Jurisdictional?: Lessons from Nagel v. Czech Republic and SD Myres v. Canada,* 8 JOURNAL OF WORLD INVESTMENT AND TRADE 175 (2007).

[6] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

[7] Salini Costruttori S.P.A. and ltalstrade S.P.A. v. Kingdom of Morocco, ICSID Case no.ARB/OO/4, Decision on Jurisdiction, (July 23, 2001)[hereinafter '*Salini v. Morocco*].

[8] CHRISROPH SCHREUER, LORETTA MALINTOPPI, AUGUST REINISCH & ANTONY SINCLAIR, THE ICSID CONVENTION: A COMMENTARY, 140 (2nd ed. 2009).

[9] Jeswald W Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries,* 24 INT'L LAW. 655, 673-675 (1990); MARY HALLWARD-DRIEMEIER, WORLD BANK, DO BILATERAL INVESTMENT

investments do not contribute to development then their utility for the developing world is in question. Thus, this article argues for a developmental approach for defining investment.

The structure of this article is as follows. Part II and III give a foundation, since they focus on the need to define these standards. An exposition of their contents would underscore the point that developing countries shall not be exposed to uncertainties and adoption of unnecessarily broad interpretations to severely restrict their regulatory discretion. Part II discusses the notion of investment. It argues for an objective determination of the meaning of an investment, in contrast to the adoption of a category-based approach. It presents arguments based on treaty interpretation and course adopted by tribunals in that direction and their justifications for defining the notion of investment. Part III starts by discussing the problems that would arise for developing countries, if the notion of investment is not taken into account. An argument based on hazards of portfolio investment is advanced to make a case for exclusion of transactions, which do not have a lasting relationship with the host State and therefore cannot claim to be an investment due to their nature. It then looks at the situation prior to the evolution of the *Salini* test. Part IV puts the position of *Salini* test in the ICSID context and discusses the ambivalence in its application. It then looks at awards that have applied the *Salini* test in a non-ICSID arbitration. Part V discusses the last strand of the *Salini* test – contribution to development of the host State. This aspect is highly relevant for developing countries and certain doubts are cast on its scope and application. This part will speak for retention of the test and reasons for doing so. This is followed by Part VI which contains policy arguments for taking a developmental perspective. The argument is based on the historic development of BITs and how they are different from the Friendship Commerce and Navigation ("FCN") treaties, latter aimed at liberalization. This article finally concludes by arguing for the need to accommodate developmental concerns in arbitral jurisprudence as well as treaty-making.

II. Notion of Investment

The methodology employed in defining investment differs from treaty to treaty. Treaties normally follow a broad asset-based open-ended definition, making the task of defining investments a controversial topic.[10] The definition starts normally with the words, "investment means and includes every kind of asset" but "not exclusively" or "not limited to."[11] This is followed by an illustrative list

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TREATIES ATTRACT FDI? ONLY A BIT… AND THEY COULD BITE, (2003).

[10] M. Sornarajah, *Portfolio Investments and Definition of Investment*, 24 ICSID REV. FOREIGN INVESTMENT L.J. 516 (2009).

[11] UNCTAD, BILATERAL INVESTMENT TREATIES 1995-2006: TRENDS IN INVESTMENT RULE MAKING, 7-13 (2007); India Model BIT, Agreement Between the Government of

stipulating the categories of assets. Although specific description of the categories may differ, they typically contain the following:

- "Movable and immovable property and any other property rights such as mortgages, liens and pledges.
- Shares, stocks and debentures of companies or interests in the property of such companies.
- Claims to money or to any performance under contract having a financial value.
- Intellectual property rights and goodwill, and
- Business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources."[12]

The first contention is whether the categories of assets mentioned in the definition can be considered investment by themselves or is there a separate and additional requirement to constitute an investment. Whether "investment" has any meaning of its own – is referred to as the 'notion of investment'.

The notion of investment has become the most controversial issue in determining jurisdiction in investment arbitrations.[13]The investment claims adjudicated under ICSID shed illuminating light on the notion of investment. The ICSID is established with an objective of settlement of investment disputes.[14] The jurisdiction of an ICSID tribunal is limited to 'legal dispute arising directly out of an investment'.[15] The ICSID Convention through Article 25(1) does limit the operation of the Convention over an investment dispute but does not define an investment. During the drafting of the ICSID Convention there were irreconcilable differences of opinions in identifying the parameters of the definition.[16] Realizing this practical difficulty, the task of

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Republic of India and The Government of the United Kingdom or Great Britain and Northern Ireland for the Promotion and Protection of Investments, Article 1 (b), March 14, 1994; *Supra* note 2, at 226-230.

[12] UNCTAD, SCOPE AND DEFINITION: UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS, II 24 (2011).

[13] *Infra* note 21, p.193, citing E. Gaillard, *Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice, in International Investment Law for the 21st Century: Essays in Honour of Chrisoph Schreuer* 403-416 (Binder et al. eds., 2009); Y. Andreeva, *Salvaging or Sinking the Investment? MHS v. Malaysia Revisited*, 7(2) THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 161 (2009); *Infra* note 34; *Infra* note 41, at 283.

[14] ICSID Convention, *supra* note 6, Art. 1(2).

[15] *Id.* Art.25(1).

[16] CHRISTOPHER SCHREURER, LORETTA MALINTOPPI, AUGUST REINISCH & ANTONY SINCLAIR, THE ICSID CONVENTION: A COMMENTARY, 82 (2nd ed. 2009).

defining was deliberately left for the parties.[17] If the transaction is not an investment according to Article 25(1), then an ICSID tribunal will not have jurisdiction to adjudicate such a dispute. Therefore, the existence of an investment becomes an indispensible inquiry. To address this problem, the tribunal in *Salini* declared that there is duality in ICSID arbitrations. Investment has two definitions – as under the BIT and the other under Article 25 (1) of the Convention.[18] The latter is an objective satisfaction necessary for an ICSID tribunal to possess the mandate to decide a dispute under the Convention. The tribunal looked at the definition in the BIT and declared that the existence of one of the categories of an investment is sufficient for the purpose of the BIT,[19] But for the purpose of the ICSID Convention, the notion of investment must satisfy something more, which would be a four pronged objective test – "contributions, a certain duration of performance of the contract, participation in the risks of the transaction and most importantly, on "reading the Convention's preamble, contribution to the economic development of the host State of the investment as an additional condition."[20] The consequence of *Salini's* analysis is – definition of an investment applies only to ICSID Convention and not to BITs. The need of defining an investment is underscored but was then limited only to ICSID. The criticism for adopting a limited approach is addressed in detail in Part IV. The argument here is limited to the necessity of defining the notion of investment.

The possibility of investment having a meaning of its own was stressed in *Romak* v. *Tanzania*.[21] The tribunal found it necessary to define the attributes of the notion of investment. In the view of the tribunal, with which this article expresses complete agreement, the ordinary meaning of an investment has to be seen.[22] The need of an independent meaning for it was summarized as follows:

> "*Accordingly, there must be some benchmark against which to assess those non-listed assets or categories of assets in order to determine whether they constitute "investment" within the meaning of Article 1(2). The term "investment" has a meaning in itself that*

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[17] REPORT OF THE EXECUTIVE DIRECTORS ON THE CONVENTION ON THE SETTLEMENT ON INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES p.27 (International Bank for Reconstruction and Development,1965), *available at:* https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partB.htm; *Supra* note 8, at 115.

[18] *Supra* note 7, at 44.

[19] *Supra* note 7, at 45-49.

[20] *Id.* at p. 53.

[21] Romak SA v. Republic of Uzbekistan, PCA Case No. AA280, Award, (Nov. 29, 2009).

[22] *Id* at pp.176-177.

cannot be ignored when considering the list contained in Article 1(2) of the BIT."[23]

The tribunal further stressed that if the categories listed in the definition of investment are mechanically applied, it would produce a manifestly absurd or unreasonable result.[24] To avoid this consequence, which is disallowed by the Vienna Convention on the Law of Treaties[25], the tribunal must give an ordinary meaning to the term.[26]

Investment, like most of the terminologies in international trade law owes its origin to economic terminologies, like dumping, subsidies, capital transfers etc.[27] Therefore, just like dumping, subsidies, capital transfer etc. cannot be interpreted devoid of their inherent meaning; investment cannot be looked upon bereft of its natural meaning. Difference of specific wording of the category of an investment in different treaties can hardly be a justification to deprive investment of its natural meaning. The core notion of the terminology cannot be fluid; although its superimpositions may differ. While speaking of the notion of investment, the focus is not the superimpositions but the kernel being the meaning of investment. The enumerative list provided in the treaties is hardly a pointer. Defining the term would remove confusion.[28] It would be safe to state that the contents in the definition clause stipulate the kinds of assets that are entitled for protection under a BIT, but are not conclusive pointers for the definition of investment. Tribunals have from time to time suggested certain criteria, which would be helpful as well as appropriate to interpret the definition of 'investment'.[29] The starting point for the definition exercise shall be the term investment itself. The kind of investment enumerated in the definition clause of the treaty shall first satisfy that it is an investment *per se*, as any claim to money or performance under contract having a contractual value cannot by itself be protected. Such an interpretation would include any and every kind of claim irrespective of whether it is an investment.

Even during the negotiations for the Multilateral Agreement on Investment

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[23] *Supra* note 21, at 180.
[24] *Supra* note 21, at 184.
[25] Vienna Convention on the Law of Treaties, Art. 31, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) [hereinafter VCLT].
[26] *Supra* note 21, at 181.The exact contents of this definition are discussed.
[27] Rudolph Dolzer, *The Notion of Investments in Recent Practice, in* LAW IN THE SERVICE OF HUMAN DIGNITY: ESSAYS IN HONOUR OF FLORENTINO FELECIANO-263 (Steve Charnovitz et al. eds., 2005).
[28] Sebastien Manciaux, *The Notion of Investment: New Controversies*, 9 J. WORLD INVESTMENT & TRADE 443, 448-449 (2008).
[29] *Id* at 449-450.

("MAI"),[30] need to provide definition of an investment was foreseen.[31] This shows the underlying presumption of negotiators that investment cannot be a term without a meaning. It cannot be motley of categories of assets without any meaning in the context.

The well-settled rule of *effective treaty interpretation* obliges the tribunal to give meaning to every term in the treaty. This principle is a part of the 'doctrine of good faith', in treaty interpretation.[32] The words in the treaty are presumed to have certain effect and they cannot be meaningless. This is reflected in the maxim *ut res magisvaleat quam pereat.*[33] One cannot simply ignore the existence of the word investment, in the treaties. It cannot be declared meaningless. The persuasion for the tribunal in *Romak* was its ordinary meaning; however it did not address the effective treaty interpretation principle to identify the meaning of investment. Nevertheless, the tribunal did arrive at a reasoned and a reasonable outcome by following a different route.

Efforts of defining investment are criticized on the ground that it is a conspiracy of academics and arbitrators[34]. The problem with adopting a *category based*[35] definition, rather than a *notion based* definition has blurred the distinction between ordinary commercial transactions and investments.[36] It is necessary that the distinction is retained[37], if not one is forced to remember the elementary point that these are investment treaties and not ordinary commercial transactions.[38]

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[30] MAI was intended to be a multilateral treaty dealing comprehensively with investment under the World Trade Organization (WTO), alongside other trade agreements. Developing countries through a spirited response succeeded in stalling the MAI and thus it failed.

[31] *Supra* note 27, at 265.

[32] IAN BROWNLIE, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 635 (James Crawford ed., 2012).

[33] LASA OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW 1280 (Robert Jennings and Arthur Watts eds., 1992).

[34] Devashish Krishnan, *A Notion of ICSID Investment, in* INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW 64-66 (TJ Grierson Weiler ed., 2008).

[35] By *category based* definition, this article means treating the categories of investment in the definition to as investments on their own.

[36] Joy Mining Machinery Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, p.58 (Aug. 6, 2004) [hereinafter *Joy Mining Case*]; *Infra* note 57, at 42; *Cited with approval in Supra* note 21, at 185.

[37] *Supra* note 21, at 185; *Ibid* (*Joy Mining Case*), at 58; *Infra* note 57, at 42.

[38] Secretary General of ICSID declined to register a case, since it arouse out of an ordinary sale of goods transaction. *See* I.F.I. Shihata & A. Parra, *The Experience of the International Centre for Settlement of Investment Disputes*, 14 ICSID K. FOREIGN INVESTMENT L.J 299, 308 (1999).

From the standpoint of developing countries, emphasis on definition of the notion of investment is important. If this exercise is disregarded by an investment tribunal, then any commercial transaction would become an investment. The description of these transactions as categories of investment in BITs is already broad. Contractual claims, decided otherwise by domestic courts or international commercial arbitral tribunals will be brought before investment tribunals. Investor can thus evade domestic courts completely and decide all its disputes before a tribunal of its own choice.[39] Though this does not fit anywhere in the scheme of investment treaty framework, unless investment is seen objectively, developmental concerns cannot be addressed.

III. Definition of Investment: an objective test

The definition of investment as per the International Monetary Fund ("IMF") reflects the objective of obtaining a lasting interest by the resident entity in one economy as compared to a resident in another economy in an enterprise[40]; where "lasting" implies a long term relationship. The economic debate on the definition of a direct investment involves - transfer of funds, long-term project, objective of regular income, participation of person transferring funds, although to a limited extent in management of project and business risk. They distinguish an investment from portfolio investment or ordinary transaction of sale or purchase, for a short term.[41]

There are strong arguments to exclude short term investments from the definition of investment, especially from the developing countries perspective.[42] During the Asian crises, the Asian economies have burnt their hands with fluid capital in share markets.[43] Portfolio investments do not contribute in any manner in the development of the host State's economy because the investor does not have any lasting interest in the host State's economy. The investor is not serious and does not intend to stay in the market for a long duration, rather the investment is temporary – until share value appreciates. Also the entry of an

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[39] Investors are already taking a "second bite at the cherry". If commercial arbitration awards are not enforced within the expected time and to the complete satisfaction of investors, investment treaty claims will be brought to get the awards enforced indirectly, especially against developing countries. *See* Patricia Nacimiento & Sven Lange, *Case Comment: White Industries Australia Limited v The Republic of India,* 27(2) ICSID REV. 274, 279-280 (2012).

[40] Joachim Karl, *The Competence for Foreign Direct Investment: New Powers for the European Union?,*5 J. WORLD INVESTMENT & TRADE 413, 420 (2004); OECD, OECD BENCHMARK DEFINITION OF FOREIGN DIRECT INVESTMENT 22 (2nd ed., 2008).

[41] *See* N Rubins, *The Notion of "Investment", in* ARBITRATING FOREIGN INVESTMENT DISPUTES (Norbert Horn & Stephan Kroll ed., 2004).

[42] SORNARAJAH, *supra* note 10, at 518.

[43] JOSEPH STIGLITZ, GLOBALISATION AND ITS DISCONTENTS DISCONTENTS (2003).

investment is not through authorization of the government and cannot claim any protection. All treaties make mention to shares. If a *category based* approach is adopted, investments for the shortest possible time and losses arising thereof will give rise to investor-state arbitration claims. It will create havoc, unfathomable for developing countries. To maintain the health of an economy, it is necessary that short term transactions are not treated as investments.

Portfolio investment is of a purely financial character, passive and does not involve control. It is sold on appreciation with no intention to hold on to it. It does not result in technology transfer, training of local employees and other benefits associated with investment.[44]Adoption of a definition for an investment and inclusion of objective criteria would exclude portfolio investment and reduce uncertainties for developing countries.

By identifying objective tests and specially contribution to economic development; the *Salini* test excluded temporal engagements, which do not have any relevance for development and thus cannot be categorized as investment. The instances of assets covered under the definition of investment have gradually increased over time. There are perennial efforts by tribunals and authors to broaden the definition of investment. This covers various kinds of assets which otherwise would not have been covered.[45] The tribunals prior to *Salini*, in *Alcoa Minerals of Jamaica Inc*. v. *Jamaica*[46]*, Kaiser Bauxite* v. *Jamaica*[47], and *Letco* v. *Liberia*[48] never enunciated an objective test, but relied on investment to implicitly contain certain conditions without paying closer attention to the actual meaning of the term.[49] Those cases are mostly related to contracts for exploration of resources, wherein existence of investment was apparent. There was no dispute about whether the commitment and contribution was an investment. Therefore, absence of examples of adoption of objective criteria, prior to *Salini* can hardly discredit the relevance of the *Salini test*.

The *Salini* test has resonated strongly in the ICSID context and dithered in the BIT discourse. Its journey within ICSID has been turbulent, but imposing and convincing. Various tribunals have adopted this definition. A pragmatic approach would be to apply an objective test to investment because whether a

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[44] UNCTAD, *supra* note 12, at 29.
[45] SORNARAJAH, supra note 1, at pp.11-18.
[46] Alcoa Minerals of Jamaica Inc. v. Jamaica, ICSID Case No. ARB/74/2, Decision on Jurisdiction and Competence, (July 6, 1975).
[47] Kaiser Bauxite Company v. Government of Jamaica, ICSID Case No. ARB/74/3, Decision on Jurisdiction and Competence, (July 6, 1975).
[48] Liberian Eastern Timber Corporation v. Government of the Republic of Liberia, ICSID Case No. ARB/83/2, (Mar. 31, 1986).
[49] RUDOLPH DOLZER, *supra* note 27, at 267.

transaction would be an investment or not, will depend on the objectives of the treaty set out in the first sentence of the Preamble.[50]There is variation in the application of the objective criteria. Few tribunals have expressly or impliedly criticized the *Salini* test.[51] However, certain tribunals adopted the "conceptual" approach but refused to endorse all the constitutive elements in it.[52]In *Mahaley* v. *Sri Lanka,* the expenditure incurred by an investor in negotiations for investment at a per-investment stage was held not to be covered by the definition.[53] The tribunals in *Phonex Action*[54]*, Patrick Mitchell*[55], *CSOB*[56], *Fedax*[57] have relied on this definition. Their degree and approach would certainly differ.

IV. Salini Test and Beyond

The restrictive definition adopted in the ICSID arbitrations can ensure sustained

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[50] Ceskoslovenska Obchodni Bank, A.S. v The Slovak Republic, ICSID Case No. ARB/97/4, Decision on Jurisdiction, p.64-90 (May 24, 1999) [hereinafter *Ceskoslovenska Obchodni Case*].

[51] See MCI Power Group, LC and New Turbine, Inc v. Ecuador, ICSID Case No. ARB/03/6, Award, p.165 (July 31, 2007); CMS Gas Transmission Company v. Argentine, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment, p.71 (Sept. 25, 2007); Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, p.312-317 (July 24, 2008); Malaysian Historical Salvors SDN v. The Government of Malaysia, ICSID Case No. ARB/05/10, Decision of the ad hoc Committee on the Application for Annulment, p. 78-79 (Apr. 16, 2009) (citing *Biwater* v. *Tanzania*).

[52] See Consortium Groupement LESI-Dipenta v. People's Democratic Republic of Algeria, ICSID Case No. ARB/03/8, Award, p.13 (iv) (Jan. 10, 2005); LESI, SpA and Astaldi, SpA v. People's Democratic Republic of Algeria, ICSID Case No. ARB/05/3, Award on Jurisdiction, p.72 (iv) (July 12, 2006); Bayindir Insaat Turizm Ticaret VeSanayi AS v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award on Jurisdiction, p.130 (Nov. 14, 2005); Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt, ICSID Case No.ARB/04/13, Award on Jurisdiction, p.91 (June 16, 2006); Saipem SpA v. People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Award on Jurisdiction and Recommendation on Provisional Measures, p.99; Ioannis Kardass opoulos v. Georgia, ICSID Case No. ARB/05/18, Award on Jurisdiction, p.116 (July 6, 2007).

[53] Mihaley International Corporation v. Sri Lanka, ICSID Case NO. ARB/00/2, Award, (Mar. 15, 2002).

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

[55] Patrick H. Mitchell v. Democratic Republic of Congo, ICSID Case No. ARB/99/7, Award, (Feb. 9, 2004).

[56] *Ceskoslovenska Obchodini Case , supra* note 50.

[57] Fedax N.V. v. The Republic of Venezuela, ICSID Case No.ARB/96/3, Award, (Mar. 9, 1998).

contributions by an investor to the economic development of the host State.[58] This definition was applied outside the ICSID context, by the tribunal in *Romak*.[59] The factual controversy related to non-payment of dues towards importation of food grains into Uzbekistan by a public corporation. The claimant initiated arbitration proceedings under its contractual relationship[60] and succeeded in getting an award in its favour.[61] The claimant tried to enforce the award in Uzbek and French courts, but initially the efforts failed[62] but later on it succeeded partially by attaching the accounts of the government.[63] The arbitral proceedings under an investment treaty are aimed at recovering the amounts unpaid under the arbitral award.

The tribunal decided that, investments shall be given an ordinary meaning and be tested against some benchmark; otherwise every commercial transaction will become an investment.[64] A mechanical approach to treat the categories of investment as investment would create, *de facto,* a new instance of review of State court decisions concerning the enforcement of arbitral awards."[65] Finally, such an approach would mean every award or judgment in favour of a national of one party to the BIT will be treated as an investment. This would imply that States have renounced the applicable domestic law – chosen as the governing law by the parties; and consequentially surrender the jurisdiction of domestic courts.[66] Investment must be given its proper meaning.[67] The tribunal adhered to ICSID jurisprudence since the Convention "incidentally, does not contain a definition of the term "investment".[68] Since it is an admitted fact that ICSID does not contain a separate definition of investment and drafters deliberately did not offer the definition, it is improper to suggest that the term has a different definition in ICSID context than in BIT's.[69] Although there is ambivalence in application of the *Salini* test as the tribunal found no reason to reject it and apply to the facts in question[70] to conclude that a one off sale transaction cannot be an investment.[71] The path

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[58] Anna Turinov, *"Investment" and "Investor" in Energy Charter Treaty Arbitration: Uncertain Jurisdiction*, 26(1) J. INT'L ARB. 1-20 (2009).
[59] Romak SA v. Republic of Uzbekistan, *supra* note 21.
[60] Romak SA v. Republic of Uzbekistan, *supra* note 21, p.41-52.
[61] *Id.* at 58.
[62] *Id.* at 64-66.
[63] *Id.* at 68-69.
[64] *Id.* at 177, 180-181, 184-185.
[65] *Id.* at 186.
[66] *Id.* at 187.
[67] *Id.* at 160.
[68] *Id.* at 192.
[69] *Id.* at 194.
[70] *Id.* at 207-208.
[71] *Id.* at 242.

chartered in *Romak* is followed in *Alps Finance and Trade* v. *Slovak Republic*[72] and *Compagine International de Maintenance (CIM)* v. *Ethiopia*[73].

The only instance outside the ICSID Convention where requirement of objective criteria is rejected is *White and Industries* v. *India*[74]. The claimant was seeking to enforce an arbitral award against the Government of India. India resisted, *inter alia*, on the ground that the *Salini* test was not satisfied. The tribunal rejected the argument on the ground that the *Salini* test was limited to ICSID arbitrations.[75] However, it did not dwell much on the reasoning for arriving at such a finding It was introduced in Part II that investment was never defined in the ICSID Convention and the effort in that direction was specifically abandoned. Initially, the drafting committee of the World Bank proposed a definition of investment for the purposes of Article 25 because it was a definite objective that non-investment disputes shall not be raised before ICSID. During negotiations, no consensus could emerge on an acceptable definition of investment. Realizing this problem, the Secretary General Broches suggested that the task of defining investment be left to the states.[76] The tests developed by *Salini* were specifically rejected during the negotiations.[77] It was left for the States to define investment with a broad autonomy.[78] The parties to ICSID never intended to define investment in a manner limited to ICSID cases. The definition was integrated with that of the BIT. Thereby, effort of any ICSID tribunal at defining investment would automatically get added to the notion of investment generally, and not limited to ICSID. The word cannot be a surplusage in non-ICSID cases and the word of reference in ICSID cases it would be improper to limit the application of definition of an investment only to ICSID cases. *Salini* therefore made a mistake by stating that its jurisprudence is limited to the meaning of investment under Article 25(1) and did not apply to the notion of investment. The tribunal in *Salini* did limit itself to the meaning of investment under Article 25(1) of ICSID[79] but the tribunal was addressing the term on its autonomous meaning.

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[72] Alps Finance and Trade v. Slovak Republic, Award (Preliminary Redacted Version), p. 241. (Mar. 5, 2011).

[73] Compagine International de Maintenance (CIM) v. Ethiopia, Award, is unpublished but for discussion. *See* Jarrod Hepburn & Luke Eric Peterson, *Ethiopia Prevailed in Face of Foreign Investor's Attempt to Use Investment Treaty to Sue Over ICC Arbitration Award*, INVESTMENT ARB. REP. (2012).

[74] White Industries Australia Ltd. v. The Republic of India, (UNCITRAL), Final Award, (Nov. 30, 2011).

[75] *Id.* at 7.4.8, 7.4.9.

[76] DOLZER*, supra* note 27, at 266.

[77] Julian Davis Mortenson, *The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law,* 51(1) HARV. INT'L L.J. 257, 280-281 (2010).

[78] *Id.* at 301.

[79] *Id.*

It would equally result into unreasonable consequences by arguing that the meaning of investment would depend on the forum before which the claims are raised.[80] Institutions cannot award jurisdictions. This will run counter to the rule of construction developed by the International Court of Justice ("ICJ"), that if the same term is employed in the same or similar context by a State party to two or more treaties; the terms shall be given same or a compatible meaning.[81] It is in the interest of developing countries, whether they are a Contracting Party to the ICSID Convention or not, in order to support the *Salini* test and its extension beyond ICSID. Apart from the arguments on merits, for extending these principles, there is a special relevance of the last ingredient of the facets of investment that is "*the contribution to development.*"

V. Contribution to Development

The four criteria test of investment has been applied with variations by tribunals. It is not entirely clear if the tribunals have applied these criteria as "essential requirement for the existence of investment" or "typical character or indicator", but their repeated application strengthens the perception that these are not merely features indicative of investment, but mandatory standards.[82] The criteria are not that rigid but nevertheless their existence is necessary.[83]

While defining investment in *Salini*, the tribunal made a specific and special reference to the need of contribution to development. Other ingredients of definition such as substantial contribution have not been a problem,[84] but contribution to development is most controversial.[85] Contribution to economic development of the host economy was introduced with reference to the Preamble of the ICSID Convention.[86] The intention behind creation of the ICSID Convention was to protect the interest of investors as well as those of host States[87] by stimulating large flow of capital[88]. ICSID is not merely a dispute resolution mechanism but also "an instrument of international policy for the promotion of economic development".[89]

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[80] Romak SA v. Republic of Uzbekistan, *supra* note 21, at 195.
[81] Agean Sea Continental Shelf (Greece v Turkey), 1978 I.C.J. 3 (Dec. 19),
[82] SCHREUER, MALINTOPPI, REINISCH & SINCLAIR, *supra* note 8, at 129-130.
[83] *Id.* at 133
[84] *Joy Mining Case, supra* note 36, p.57; Jan de Nul v. Egypt, ICSID Case No. ARB/04/13, Jurisdiction, p.92 (June 16, 2006); Helnan International Hotels A/S v. Arab Republic of Egypt, ICSID Case No. ARB/05/19, Jurisdiction, p.77 (Oct. 17, 2007).
[85] SCHREUER, MALINTOPPI, REINISCH & SINCLAIR, *supra* note 8, at 137.
[86] Salini v. Morocco*, supra* note 7, at 44.
[87] INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, *s*upra note 17, at 13.
[88] *Id.* at 12.
[89] SCHREUER, MALINTOPPI, REINISCH & SINCLAIR, *supra* note 8, at 4-5; UNCTAD, *supra*

A general study of various BITs shows that they frequently make reference to "economic development" in one form or the other. In some cases, there is a reference to technical co- operation,[90] technology transfer[91] or simply through mutual development. The reference is normally made in the Preamble. The fact of reference to a specific objective of development makes contribution to development an indispensible "context" for treaty interpretation under Article 31 of the VCLT. The tribunal in *Patrick Mitchell* looked at the Preamble of the US Model BIT, to confirm that contribution to development is necessary.[92] The phraseology may differ but the underlying object remains– development. The tribunal in *LESI*[93] declined to apply the criteria of contribution to the development of host State independently, because the criteria in its view is difficult to establish and is *implicitly* covered by the first three.[94] There is however, no outright rejection of the criteria.

However the principle was elucidated in *Patrick Mitchell* v. *Democratic Republic of Congo*[95]. The military court of Congo, the Respondent State, had passed an order directing the premises of law firm of Mr. Mitchell to be seized, and the employees were forced to leave the premises.[96] A jurisdictional objection was raised on behalf of the Respondent, whether providing legal services can be termed as an investment. The tribunal had declined to find the existence of contribution to development, because it was presumed that the objective elements are frequently present in investment projects, and there is no formal requirement for finding if they are actually present.[97] The ad hoc Annulment Committee viewed the four criteria test to be interdependent and stated the need to treat them comprehensively.[98] Contribution to economic development of the host State has always been taken into account, either expressly or impliedly by the ICSID tribunals.[99] Therefore, even in cases where it has not been specifically mentioned, the tribunal has always been conscious that contribution to the development of host State exists.[100] The legal consulting services provided

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note 12, at 52.

[90] Agreement on the Promotion and Protection of Investments, Austl-Egypt, 2001, IC-BT 1451 (2001); Free Trade Agreement, Colom-Venez-Mex, June 13, 1994 (entered into force Jan. 1, 1995).

[91] Agreement Concerning the Encouragement and Reciprocal Protection of Investments, S. Kor.-Brunei, Nov. 14, 2000 (entered into force Oct. 30, 2003).

[92] Patrick H. Mitchell v. Democratic Republic of Congo, *supra* note 55, at 32.

[93] *Supra* text accompanying note 52.

[94] *Id.*

[95] Patrick H. Mitchell v. Democratic Republic of Congo, *supra* note 55.

[96] *Id.* at 1.

[97] Patrick H. Mitchell v. Democratic Republic of Congo*, supra* note 55, at 56-57.

[98] *Id.* at 27.

[99] *Id.* at 29.

[100] *Ibid* at 30; citing Alcoa Minerals of Jamaica Inc. v. Jamaica, ICSID Case No.

would fall within the category of investment under a BIT but that does not satisfy the definition of investment.[101] The claimant had failed to establish that the legal consulting services contributed to the economic development of the host State for which no protection could be claimed under the investment treaty.[102]

It is argued that development of the host State criterion is not relevant because it does not distinguish between transactions that are investments and those that are not. All foreign investments do not participate in the development of a host State, and all transactions that participate in the development of the host State are not necessarily investments.[103] This argument fails to understand the reason for inclusion of contribution to the host State economy as a criterion. These criteria are applied to "investments". The argument works the other way round, merely because some transaction contributes to development, it does not become an investment. Moreover, even if there is an investment - in the literal sense of the term, but it does not contribute to the economic growth it will not fall within the definition of investment. The Ad hoc Committee in *Patrick Mitchell* has stated that 'contribution to economic development of the host State is not sufficient by itself to constitute an investment'. It is one of the criteria to identify the existence of an investment and set out the extent of contribution to economic development that shall be made in the following words:

> "*The ad hoc Committee wishes nevertheless to specify that, in its view, the existence of contribution to the economic development of the host State as an essential – although not sufficient – characteristic or unquestionable criterion of the investment, does not mean that this contribution must always be sizable or successful; and, of course, ICSID tribunals do not have to evaluate the real contribution of the operation in question. It suffices for the operation to contribute in one way or another to the economic development of the host State, and this concept of economic development is, in any event, extremely broad but also variable depending on the case."*[104]

ARB/74/2, Decision on Jurisdiction and Competence, (July 6, 1975); Tradex Hellas S.A. v. Republic of Albania, ICSID Case No. ARB/94/2, Award, (Apr. 29, 1999); *SGS* Societe Generale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No.ARB/01/13, Decision on Objections to Jurisdiction, (Aug. 6, 2003); SGS Societe Generale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Jurisdiction, (Jan. 29, 2004).

[101] Patrick H. Mitchell v. Democratic Republic of Congo, *supra* note 55, at 7-38.

[102] *Id.* at 39.

[103] SEBASTIEN MANCIAUX, *supra* note 28, at 459.

[104] Patrick H. Mitchell v. Democratic Republic of Congo, *supra* note 55, at 33.

The quality of 'contribution' to the state would include any significant financial resource or transfer of knowhow, equipment and personnel.[105] An approach to "significant contribution to the economy" is that investment may also result into certain social and political benefits; therefore there is no need of separate contribution. A social and political contribution cannot be sufficient. The development contemplated by FDI is not a social or cultural development but economic development.[106]The entire exercise of BITs is aimed at economic development. The fact that there is some other form of development achieved is only tertiary and peripheral. Additionally, uncertainty of the notion cannot be a reason to disregard its application. By that standard, every treaty standard is uncertain and non- specific. Even customary international law falls in the same category.

The contribution cannot always be sizable and successful- this is understandable. One cannot insist on certain amount of success of investment, unless so stipulated in the treaty. A tribunal may not evaluate the "real contribution" of operation in question. It is sufficient that the contribution is made one way or the other to the economic development of the host State and the investor has discharged the burden. The concept of contribution to development is extremely broad and variable, depending on the case.[107]The debate at the moment is still stuck on the presence of contribution to economic development of host State. It shall now mature and shift to the extent of economic cooperation and parameters for measurement.

VI. Developmental Perspective

There are certain sound policy reasons for adoption of a development oriented approach. Most of the BITs in the first generation were concluded between a capital exporting developed country and a capital importing developing country. This happened at the time when the newly independent third world gave birth to the New International Economic Order ("NIEO"). Developing countries with their numerical majority in the General Assembly of the United Nations declared sovereignty over natural resources[108] and States were declared to possess the authority to remove aliens from their territory at their wish by payment of "appropriate compensation".[109] The idea behind BITs was to make the developing world give up its harsh stand and allow foreign investment to enter

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[105] Bayinder Insaat Turizm Ticaret VeSanayi AS v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Jurisdiction, p.131 (Nov. 14, 2005); Saipem S A v. Peoples Republic of Bangladesh, ICSID Case No. ARB/05/7, Jurisdiction, p.100 (Mar. 21, 2007).

[106] *Supra* note 28.

[107] *Supra* note 21, at 33.

[108] G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No.17, U.N. Doc.A/5217 (1962).

[109] G.A. Res. 3281 (XXIX), UN Doc.A/RES/29/3281 Article 2.2(c) (emphasis added).

their jurisdiction for promoting development. It was only once the BIT program arrived, developing countries joined the BIT bandwagon by abandoning the NIEO.[110] Developing countries would not have joined the BIT program without expecting infusion of foreign capital and technology transfer. The developing world entered the sphere by subjecting its sovereign authority to control, expecting development in return. Although the BIT says that the treaty is between two equals, one is inevitably the recipient of capital and the other is an exporter.[111]Although normally a BIT is an agreement between equals, in practice it is different. It is not a quid pro quo bargain but a fiction where one is an exporter of capital and the other is importer.[112]

Most of the BITs contain a Preamble aimed at satisfying developmental needs of recipient states. It is difficult to imagine, why a developing country would otherwise allow an investor. The investment treaties are not entered into with liberalization objectives. If it was so, multilateral efforts at an investment treaty would have never failed. To this extent, as well as BITs are different from Friendship Commerce and Navigation ("FCN") treaties. FCN treaties were treaties aimed at liberalization and entered into between developed countries. They provided greater access to markets.[113]A cleavage of liberalization and development would shed light. Most of the BITs are entered with the objective of attracting capital for development, rarely for market access. The ASEAN Framework agreement is a mixture of both these objectives. The preamble says so in following words:

> "*Reaffirming the importance of sustenance of economic growth and development in all Member States through joint efforts in liberalizing trade and promoting inter-ASEAN trade and investment flows…"*[114]

There is an increasing move towards entering BITs for liberalization and market access[115]; especially amongst European states there is a move from the developmental objective to the market access objective.[116] It is understood from these cases, that the investment treaties are entered for obtainingaccess to markets rather than achieving the developmental goal. Investment treaties aimed

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[110] STEPHEN SCHILL, MULTILATERALISATION OF INTERNATIONAL INVESTMENT LAW 91 (2009).
[111] Adeoye Akinsanya, *International Protection of Direct Foreign Investments in the Third World,* 36 INT'L & COMP. L.Q. 58 (1987).
[112] *Supra* note 1, at 177.
[113] RUDOLPH DOLZER & MARGARETE STEVENS BILATERAL INVESTMENT TREATIES (1995), pp. 10-13.
[114] ASEAN Framework Agreement on the Facilitation of Goods in Transit, Preamble, Signed 16th December 1998.
[115] *Supra* note 12, at 1.
[116] *Supra* note 40.

at liberalization are not yet prevalent amongst developing countries.[117] But, until the treaty specifically provides that its aim is market access, its primary aim would be development.

An important necessity is that the investments are made in accordance with the laws of the host State.[118] Investment is exposed to domestic regulation mostly at the entry point.[119] A treaty would normally declare that domestic regulations will apply. In any case, an investment cannot operate contrary to the domestic legal framework. The requirement is implied,[120]also referred to as, the doctrine of legality.[121] If the investment is not made in accordance with the domestic law of the host State, the tribunal will decline to exercise jurisdiction, consequentially rejecting the claim of protection under a treaty.[122] By retaining the power to screen investments at entry state, host States, especially developing courtiers can exercise greater control over the entry of investments. The need of compliance with entry requirements, getting licenses, certificates and registration is not merely procedural but a necessary pre-requisite for a qualified investment.[123]The developing countries can exercise this power to grant permission for those investments, which its domestic economy needs for development. It can choose labor intensive as well as high technology oriented investments, which can eventually lead to employment generation as well as enrichment of domestic technical knowhow. The most famous entry route has been joint venture corporations, since they ensure greater engagement.[124] Chinese policy towards foreign investment was driven by the condition that the investments shall aim at establishing export oriented and technologically advanced enterprises.[125] China has adopted a liberal approach for entry; however, it exercised heavy control in the initial phases. The entry was limited to contractual or equity joint ventures

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[117] *Supra* note 12, 33 & 36.

[118] Most of the treaties entered into by India contain this clause.

[119] M. Sornarajah, *India China and Foreign Investment, in* CHINA, INDIA & THE INTERNATIONAL ECONOMIC ORDER 145 (M Sornarajah et al. eds., 2011).

[120] *Supra* note 12.

[121] Gabriel Bottini, '*Legality of Investments under ICSID Jurisprudence*', *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION 298 (Michael Waibel et al. eds., 2010); Investments that are not made in accordance with the domestic legal framework will be illegal investments. See InceysaVallisoletana S.L v. El Slavador, ICSID Case No. ARB/03/06, Award, (Aug. 2, 2006); Fraport AG Frankfurt Airport Services Worldwide v. Philippines, ICSID Case No. ARB/03/25, Award, (Aug. 16, 2007).

[122] Yuang Chi OoPtd Ltd. v. Myanmar, ASEAN ID Case No. ARB/01/1, Award, (Mar. 31, 2003).

[123] *Id.* at 34.

[124] M SORNARAJAH, SETTLEMENT OF FOREIGN INVESTMENT DISPUTES, INTERNATIONAL LAW ON FOREIGN INVESTMENT, (2000).

[125] *Supra* note 119, at 143.

but it has now moved on to allow wholly owned enterprises.[126] Developing countries in the capacity of a host Sate can have a greater say and participation in the working of the industry set-up as a part of the investment.

Exercising control at entry point is seen as a strong tool for achieving developmental goals for developing countries. Comparatively, India follows a conservative approach allowing only sector specific entry which is subjected to caps.[127]The Indian approach allows sector-wise assessment and development. This can avoid swamp in a swathe of investments, either warranted or unwarranted.[128]

VII. Conclusion

If notion of investment is appropriately defined it will bring certainty to the investors as well as States. The investor would know if his claim would ever be covered under the BIT, and the States would know which investments would operate as a limitation on its authority. There is a tendency to treat every kind of asset as an investment because it carries economic value. The number of assets has drastically increased over time – from equity stocks in companies to intellectual property rights.[129] There is a need to set clear benchmarks as to what is an investment, so that other commercial transactions can be excluded.[130] It is important for developing countries to keep purely commercial transactions out of the definition. At the same time, those investments, which do not possess any value for the economy and are purely a short-term enterprise, shall be excluded. China has established the benefits that can be reaped by channelizing investments for development.

An exercise of imposing performance conditions on an investor is non-prevalent. It may or may not turn out to be a vigorous proposition but need to contribute to host economy can always be specifically added into the treaty. The Singapore-US FTA has achieved in adding elements to the definition of investment, through a footnote, which reads as under:

> *"Where an asset lacks the characteristics of an investment, that asset is not an investment regardless of the form it may take. The characteristics of an investment include the commitment of capital, the expectation of gain or profit, or the assumption of risk."*

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[126] *Supra* note 119, at 142-143.
[127] Government of India, FDI Policy, 2012, *available at:* http://dipp.nic.in/English/Policies/FDI_Circular_01_2012.pdf.
[128] *Supra* note 19, at 143.
[129] *Supra* note 12, at 8.
[130] *Supra* note 12, at 9.

This explanation of investment would leave out commercial transactions as it cannot serve as a template for all the developing countries. Additional features may be added depending on the need of respective countries. Adding contribution to development will be one such feature. A contemporary threat that still remains is adoption of open-ended definitions of investment. New treaties are adopting techniques to narrow down the open ended asset-based definition of investment. This trend is in response to the expansive interpretations of open-ended terminologies adopted by tribunals.[131] There is a tightly defined closed-list approach emerging but the league is lead by developed countries.[132] Developing countries are still to make strides on this front. An enterprise based definition of investment – insisting establishment of an enterprise in the host State is a tested mechanism in treaty practice.[133] This ensures that employment is generated in the host State along with contribution to economic growth. Such a definition gives greater control at entry level.[134] Likewise, the EU's economic agreements have the need of "commercial presence".[135] To retain health of developing economies, short term and commercial transactions – portfolio investments, commercial contracts, certain loans, duration, debt securities etc shall be excluded.[136] For example, the Peru-US FTA, 2006, Article 10.28 excludes bonds, debentures, other debt instruments and loans that do not have a character of investment.

Investments also bring lot of costs along with them. Developing countries have to achieve an increased flow of investment and maximize benefits while minimizing costs.[137]One investor-state arbitration claim can replenish the benefits that the entire regime may bring for a developing state. The investment tribunals have been awarding heavy damages. Some states, especially Argentina have become a regular target of investors.[138] The costs shall not outweigh the benefits. It is in the interest of developing states to narrow down the width of

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[131] *Supra* note 12, Executive Summary, (xi).

[132] Canada 2004 Model BIT, Agreement between Canada and …for the Promotion and Protection of Investments, *available at:* http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf.

[133] Canada-US FTA of 1992 adopted this model. Later NAFTA continued it along with other traditional open-ended definitions.

[134] *Supra* note 12, at 22.

[135] *Supra* note 12, at 23.

[136] *Supra* note 12, at 29.

[137] J W Salacuse, *Foreign Direct Investment and the Law in Developing Countries,* 15 ICSID REV. 382 (2000).

[138] *See* José E. Alvarez & Gustavo Topalian, *The Paradoxical Argentina Cases*, Wilmer Cutler Pickering Hale and Dorr Scholar-in- Residence Seminar, Dec. 17, 2012, *available at:* http://www.law.qmul.ac.uk/events/items/87203.html.

definition of investments. There are various advisories which emphasize this approach[139] – especially of sustainable development.[140]

The developing countries do not seem to yet tone their treaties down. There is a paradox in their approach, when compared with trade law. In trade law, it is development all over the place. An important reason for deadlock in the Doha Negotiations is the "developmental issues", which are "related to addressing the trade-related development challenges faced by the least-developed countries ("LDC"), and the so-called 'small, weak and vulnerable developing countries'[141]same is yet to be reflected in investment-treaty making. One reason could be that the negotiations at the Doha Round are multilateral and developing countries can consolidate themselves and resist any proposal that does not satisfy their developmental needs. On the other hand, they are alone fighter in an investment- treaty negotiation. If they intend to stay afloat in the swamp of investor clams, there is a need of serious rethinking on the drafting of treaties and for arbitrators to take note of the reasons why developing states enter into investment treaties.

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[139] J ANTHONY VANDUZER, PENELOPE SIMONS & GRAHAM MAYEDA, INTEGRATING SUSTAINABLE DEVELOPMENT INTO INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE FOR DEVELOPING COUNTRIES, (2012).

[140] MARIE-CLAIRE CORDONIERSEGGAR, MARKUS W GEHRING AND ANDREW NEWCOMBE, SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW, (2011).

[141] See Faizel Ismail, *One year Since the Hong Kong Ministerial Conference: Developing countries reclaim the development content of the WTO Doha Round*, *in* ECONOMIC DEVELOPMENT THROUGH WORLD TRADE: A DEVELOPING WORLD PERSPECTIVE 122 (Yong-Shik Lee ed., 2008).