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Diane Desierto, *Development as an International Right: Investment in the New Trade-Based IIAs*

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## DEVELOPMENT AS AN INTERNATIONAL RIGHT: INVESTMENT IN THE NEW TRADE-BASED IIAS

DIANE A. DESIERTO\*

*This article explores the international right of development, as expressed in the design of new trade-based international investment agreements (IIAs). The article shows that, hitherto, development has figured mostly in investment arbitration primarily through “jurisdictional gatekeeping” (what is designated to refer to issues involving access to dispute resolution procedures under the ICSID Convention). As this article shows in Parts I and II of this article, recent investment arbitrations in the past decade have turned on the issue of how to reconcile and interpret the meaning of “investment” within Article 25 of the ICSID Convention with the effect of the pro-development language in the Preamble to the ICSID Convention. While the Salini test will remain a much-debated approach in international investment interpretation, the main subjective difficulty in elevating development to a condition or criterion for investment treaty coverage is that the international right of development is itself a dynamic concept, with equally divergent methods for assessing “contributions to economic development”. The inherent fluidity of the concept of development, coupled with the absence of any language within Article 25 of the ICSID on the international right to development, further supports the view that the Convention did not intend to impose development contributions as a strict condition or mandatory criterion before gaining access to ICSID jurisdiction.*

*Rather than focus on the problematic uses of the international right of development in jurisdictional gatekeeping, this article draws attention to the actual nature of the international right to development and its implementation, which has less to do with*

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*justiciability (or adjudicated remedies) and more to do with the direct implementation and supervision of States. The practicable development-oriented innovations in new trade-based IIAs, such as the COMESA Common Investment Agreement, the ASEAN Comprehensive Investment Agreement, and the ASEAN-China Investment Agreement, appear to align more closely with the actual nature of the right to development. These particular types of IIAs, which often form part of a complete trade cooperation package, operationalize the international right of development through: (1) permissible differentiation or graduated implementation of host State obligations, taking the host State's stage of economic development into account; (2) transparency obligations and information exchanges between treaty partners; (3) joint investment promotion activities by treaty partners; and (4) coordinated institutional mechanisms that enable host State participation and access in monitoring treaty interpretation and any investment-related rulemaking. These phenomena demonstrate a marked paradigm shift towards a more effective deployment of the international right of development in international investment rule-making.*

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#### I. INTRODUCTION: DEVELOPMENT DEFINITIONS AND INVESTMENT PROTECTION

In his dissenting opinion to the ad hoc committee's annulment decision in *Malaysia Historical Salvors v. Malaysia* ("*Malaysia Historical Salvors*"), Judge Mohamed Shahabuddeen stressed that "[t]he outer limits of an ICSID investment comprise a requirement for contribution to the economic development of the host State...Contracting States did not agree that these burdens on them would apply to benefit transactions which did not promote the economic development of the host State. It is difficult to see how a purely commercial entity, intended only for the enrichment of its owners and not connected with the economic development of

the host State, is entitled to bring before ICSID a dispute concerning an investment in the host State”.<sup>1</sup> This interpretation of the meaning of “investment” under Article 25 of the International Centre for Settlement of Investment Disputes (“ICSID”) Convention<sup>2</sup> reflects the view that one of the aspects of the *Salini* test—contribution to the host State’s economic development – operates as a strict condition or criterion, and not merely as an indicator or descriptive characteristic of the existence of an investment.<sup>3</sup>

This particular use of the right of development focuses on its gatekeeping role, or how contributions to a host State’s development crucially determines the existence of an investment entitled to treaty protection and access to ICSID jurisdiction under Article 25 of the ICSID Convention. While reading in “development” as a criterion or condition in this manner might appear intuitive to properly upholding the “grand bargain” behind investment,<sup>4</sup> in practice, the ambiguity of the term itself has demonstrated that arbitral tribunals’ assessments of “contributions to a host State’s development” appear entirely subjective and incapable of precise definition.<sup>5</sup> As Part II shows, arbitral tribunals to this date continue to differ widely on their respective interpretive approaches to this question. The preponderance of arbitral decisions appears to favour treating “development” as a characteristic or aspect of investment (and thus not determinative of its existence); consistent with the clarification issued by Professor Christoph Schreuer and his co-authors in the second edition of his authoritative commentary to the ICSID Convention.<sup>6</sup> However, none of these tribunals have

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<sup>1</sup> Malaysia Historical Salvors Sdn Bhd v. Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, § B ¶ 21 (Apr. 16 2009) (Dissenting Opinion of Judge Mohamed Shahabuddeen).

<sup>2</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 U.N.T.S. 159 (1965), available at: <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp> (last visited Nov. 1, 2011).

<sup>3</sup> *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52: “...doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction (cf. commentary by E. Gaillard, cited above, p. 292). In reading the Convention’s preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.” (emphasis added).

<sup>4</sup> See Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain*, 46 HARV. INT’L L. J. 67 (2005); Kenneth J. Vandeveld, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT’L L. & POL’Y. 157 (2005-2006).

<sup>5</sup> For recent surveys on this subject, 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, 271-280 (2010).

<sup>6</sup> CHRISTOPH SCHREUER, LORETTA MALINTOPPI, AUGUST REINISCH, & ANTHONY

indicated a workable definition of the right of “development”, much less a method for empirically ascertaining the scope and extent of a contribution to the host State’s development. Rather, arbitral tribunals have been satisfied with recognizing demonstrable linkages of an investment to the improvement of the host State’s economy, without the need to precisely identify how a given investment specifically contributes to the host State’s economic development. As a result, in almost all cases where the development right has been considered (and whether as a strict condition or a mere descriptive characteristic of investment) for purposes of determining jurisdiction *ratione materiae* under Article 25 of the ICSID Convention, arbitral tribunals have had little difficulty in confirming that an investment has indeed contributed to the host State’s development.

Part III shows that while the concept of development is not static in international economic thought, it is nevertheless capable of normative description and empirical assessment. Development as an international right has been frequently recognized in international human rights instruments, particularly the 1986 United Nations General Assembly Declaration on the Right to Development.<sup>7</sup> While the justiciability of the right to development remains contested by governments and scholars, the binding quality of the right does not depend on its justiciability. Rather, the right to development, similar to other international human rights, must be seen to operate under a paradigm of State implementation and supervision, and less as a matter of direct adjudication (except when binding legal instruments so provide). The established use of the international right of development in the international legal canon, taken alongside the plurality of economists’ methods for empirically measuring or determining economic development, confirms this understanding of development. However, considering the inherent fluidity of the concept and right to development, coupled with the absence of any language in Article 25 of the ICSID Convention that specifically requires compliance with the right to development, it becomes even more difficult to impose the *Salini* test and demand that “contributions to the host State’s economic development” be treated as a jurisdictional criterion.

Part IV recognizes the limitations to the current analytical focus on the role of the international right of development for jurisdictional gatekeeping in international investment arbitration, and posits that the new trade-based International Investment Agreements (“IIA”) use the concept of development in ways more suited to its international implementation and States’ supervision. This article examines three examples of such treaties dealing extensively with

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SINCLAIR, THE ICSID CONVENTION: A COMMENTARY ¶¶ 171-174 (2d ed. 2009).

<sup>7</sup> Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/RES 41/128 (Dec. 4 1986), available at: <http://www.un.org/documents/ga/res/41/a41r128.htm> (last visited Nov. 1, 2011).

investment within developing country regions: the 2007 Investment Agreement for the COMESA (Common Market for Eastern and Southern Africa) Common Investment Area;<sup>8</sup> the 2009 ASEAN (Association of Southeast Asian Nations) Comprehensive Agreement;<sup>9</sup> and the 2009 ASEAN-China Investment Agreement.<sup>10</sup> These recent treaties form part of a broader trade cooperation package, and demonstrate the commitment of participating host States to affirm the right to development through innovations such as: (1) permissible differentiation or graduated implementation of host State obligations, taking the host State's stage of economic development into account; (2) transparency obligations and information exchanges between treaty partners; (3) joint investment promotion activities by treaty partners; and (4) coordinated institutional mechanisms that enable host State participation and access in monitoring treaty interpretation and any investment-related rulemaking. These developments demonstrate a marked paradigm shift towards a more effective deployment of the international right of development in international investment rule-making.

In the conclusion, this article maintains that the international right of development can be, and recently appears to be, a workable and vital aspect of contemporary investment treaty design. While the majority of arbitral tribunals rightly deny that "contribution to the host State's economic development" should be viewed as a strict condition for treaty coverage and access to ICSID jurisdiction (instead, treating the same as a descriptive characteristic or feature of investment), this article submits that the international right of development has been more effectively deployed in the emerging regimes created under the new trade-based IIAs referred to above. These new trade-based IIAs provide for other feasible gateways for the international right of development, which, (and perhaps more so than its current jurisdictional gatekeeping role) concretely support the inherent reciprocity of the host State's economic development and protection of investors in international investment law.

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<sup>8</sup> Investment Agreement for the COMESA Common Investment Area, adopted at the Twelfth Summit of COMESA Authority of Heads of State and Government, held in Nairobi, Kenya (May 22-23, 2007), *available at*: <http://vi.unctad.org/files/wksp/iawksp08/docs/wednesday/Exercise%20Materials/invagreecomesa.pdf> (last visited Nov. 1, 2011).

<sup>9</sup> ASEAN Comprehensive Investment Agreement (Feb. 26 2009), adopted in Cha-am, Thailand, *available at*: <http://www.asean.org/22244.htm> (last visited Nov. 1, 2011).

<sup>10</sup> Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the People's Republic of China, 2009, *available at*: <http://www.aseansec.org/22974.pdf> (last visited Nov. 1, 2011) (hereinafter ASEAN-China Investment Agreement).

## II. DEVELOPMENT IN INTERNATIONAL INVESTMENT JURISPRUDENCE

Since the *Salini* arbitral tribunal articulated its “contribution to a host State’s economic development” criterion in 2001, around thirty arbitral tribunals to date have extensively dealt with the *Salini* test.<sup>11</sup> Not all of these involve ICSID arbitrations – in three non-ICSID arbitrations, the *Salini* test had been considered either tacitly or expressly when the arbitral tribunal was interpreting the bilateral

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<sup>11</sup> See *Malaysia Historical Salvors Sdn Bhd v. Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction (May 10, 2007); *Bayindir Insaat Turizm Ticaret ve Sanayi A S v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (Nov. 14, 2005); *Helnan International Hotels A/S v. Egypt*, ICSID Case No. ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction (Oct. 15, 2006); *Saipem SpA v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on jurisdiction and recommendation on provisional measures (Mar. 21, 2007); *Jan de Nul NV and Dredging International NV v Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction (June 16, 2006); *Noble Energy Inc. and MachalaPower Cia Ltd v. Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction (Mar. 5 2008); *Joy Mining Machinery Ltd v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (July 30, 2004); *Mitchell v. The Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award (Oct. 27, 2006); *Inmaris Perestroika Sailing Maritime Services GmbH and ors v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction (Mar. 8, 2010); *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v. Paraguay*, ICSID Case No. ARB/07/9, Decision on Objection to Jurisdiction (May 29, 2009); *Pantehniki SA Contractors and Engineers v. Albania*, ICSID Case No. ARB/07/21, Award (July 28, 2009); *Fakes v. Turkey*, ICSID Case No. ARB/07/20, Award (July 12, 2010); *Abaclat and ors v. Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011); *Societe Generale v. Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction (Sept. 2008); *Romak SA v. Uzbekistan*, Award, PCA Case No. AA280 (Nov. 26, 2009); *Consortium RFCC v. Morocco*, ICSID Case No. ARB/00/6, Decision on Jurisdiction (July 16, 2001); *Ceskoslovenska Obchodni Banka As (CSOB) v. Slovakia*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction 2 (May 24, 1999); *Alpha Projektholding GMBH v. Ukraine*, ICSID Case No. ARB/07/16, Award (Oct. 20, 2010); *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (Apr. 9, 2009); *Malicorp Ltd. v. Egypt*, ICSID Case No. ARB/08/18, Award (Jan. 31, 2011); *Global Trading Resource Corp and Globex International Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award (Nov. 23, 2010); *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (Jan. 14, 2010); *F-W Oil Interests Inc. v. Trinidad and Tobago*, ICSID Case No. ARB/01/14, Award (Feb. 2006); *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Award (Mar. 11, 2009); *Consortio Groupement LESI and ASTALDI v. Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction (July 12, 2006); *Toto Costruzioni Generali SpA v. Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (Sept. 8, 2009); *Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on jurisdiction (July 6, 2007); *Alps Finance and Trade AG v. Slovakia*, Award (Ad hoc arbitration) (Mar. 5, 2011); *Mytilineos Holdings SA v. Serbia and Montenegro*, Partial Award on Jurisdiction, UNCITRAL (Sept. 8, 2006).

investment treaty (“BIT”) definition of an investment.<sup>12</sup> Less than a third of these tribunals held that an investment did not exist within the meaning of an investment treaty or Article 25 of the ICSID Convention (often, these tribunals followed the double-barrel method), because the development “criterion” had not been met.<sup>13</sup> Among the arbitral awards that found in favour of the existence of an investment, there is a greater preponderance of arbitral tribunals rejecting the *Salini* test, and instead treating “economic development” as a descriptive characteristic or feature of investment that should be considered with other interdependent characteristics or features. The differences in reasoning between tribunals that have accepted development as a “criterion” or “condition”, and those that saw it as a descriptive characteristic or feature of investment, can be seen below.

*A. Development as a Recognized “Criterion” or “Condition”*

Sole arbitrator Michael Hwang, S.C. in *Malaysia Historical Salvors* held that, a contribution to the host State’s development is a strict requirement for the transactions therein to qualify as an “investment” within the meaning of both the investment treaty and Article 25 of the ICSID Convention.<sup>14</sup> After surveying seven arbitral awards that dealt with the development aspect of the *Salini* test, he concluded:

The Tribunal considers that the weight of the authorities cited above swings in favour of requiring a significant contribution to be made to the host State’s economy. Were there not the requirement of significance, any contract which enhances the Gross Domestic Product of an economy by any amount, however small, would qualify as an “investment”.... The Tribunal therefore considers that, on the present facts, for it to constitute an “investment”

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<sup>12</sup> *Mytilineos Holdings SA v. Serbia and Montenegro*, Partial Award on Jurisdiction, UNCITRAL (Sept. 8, 2006); *Societe Generale v. Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction (Sept. 19, 2008); *Romak SA v. Uzbekistan*, Award, PCA Case No. AA280 (Nov. 26, 2009); *Romak SA v. Uzbekistan*, Award, PCA Case No. AA280 (Nov. 26, 2009).

<sup>13</sup> *Joy Mining Machinery Ltd v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (July 30, 2004); *Mitchell v. The Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award (Oct. 27, 2006); *Romak SA v. Uzbekistan*, Award, PCA Case No. AA280 (Nov. 26, 2009); *Global Trading Resource Corp and Globex International Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award (Nov. 23, 2010); *F-W Oil Interests Inc. v. Trinidad and Tobago*, ICSID Case No. ARB/01/14, Award (Feb. 20, 2006); *Alps Finance and Trade AG v. Slovakia*, Award (Ad hoc arbitration) (March 5, 2011).

<sup>14</sup> *Malaysia Historical Salvors Sdn Bhd v. Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction (May 17, 2007).

under the ICSID Convention, the Contract must have made a significant contribution to the economic development of the Respondent.<sup>15</sup>

The sole arbitrator found that the salvage operation, which was the subject of the contract in the above case, did not make any significant contribution to Malaysia's economic development. He further stressed the importance of an economic "impact" assessment when testing this criterion for purposes of determining the existence of an investment:

Not every contract entered into with a sovereign state will have a positive impact on the economic development of the host State in the sense envisaged under the ICSID Convention. Although the Contract was directly entered into by the Claimant with the Respondent, that does not *ipso facto* make the Contract an "investment" within the ICSID Convention. The economic impact of the benefits of the Contract must be assessed to determine whether there was an "investment." Accordingly, the Tribunal must reject any perceived political or cultural benefits arising from the Contract in assessing whether it constituted an "investment" except where such benefits would have had a significant impact on the Respondent's economic development. Stripped of all political and cultural benefits arising from the Contract, the Tribunal must assess whether the benefits arising from the Contract were simply a commercial benefit arising from the Contract or whether the Contract provided a significant contribution to the Respondent's economy.<sup>16</sup>

Applying the above test, the sole arbitrator concluded that the benefits flowing from the salvage contract "were no different from the benefits flowing to the place of the performance of any normal service contract. The benefit was not lasting, in the sense envisaged in the public infrastructure or banking infrastructure projects. The submission that historical marine salvage contracts could lead to a thriving tourism industry appears speculative."<sup>17</sup> The salvage contract was not like a "public infrastructure or banking infrastructure project...[that] could provide positive economic development to the host State".<sup>18</sup> However, the ad hoc committee later annulled these findings and rejected the sole arbitrator's conclusions, including his characterization of development as a

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<sup>15</sup> *Id.* ¶¶ 123-124.

<sup>16</sup> *Id.* ¶ 138.

<sup>17</sup> *Id.* ¶ 144.

<sup>18</sup> *Id.* ¶ 144.

criterion or condition to qualify as an investment under the BIT and Article 25 of the ICSID Convention.

While accepting development as a criterion or condition for determining the existence of an investment, other tribunals have not been as detailed or stringent in their application as the sole arbitrator demonstrated in *Malaysia Historical Salvors*. In most of these cases, the arbitral tribunals have generally recognized public infrastructure projects to meet the development criterion. For instance, the arbitral tribunal in *Consortium RFCC v. Morocco* did not dwell at length on this criterion even as it recognized that it was met: “as far as the market contribution to the economic development of the Moroccan State is concerned, this cannot be seriously discussed...the motorway in question will serve public interest...[and the] Consortium was also in a position to bring its know-how in connection with the work to be carried out to the State receiving the investment.”<sup>19</sup> A similar finding with respect to a highway construction contract was made by the arbitral tribunal in *Bayindir Insaat Turizm Ticaret ve Sanayi A S v. Pakistan*, where it noted that Pakistan’s own authorities had repeatedly declared that the project positively contributed to the country’s economic development.<sup>20</sup> The arbitral tribunal in *Toto Costruzioni Generali SpA v. Lebanon* also applied development as a criterion, and held that this criterion was met by the contract for the construction of a portion of the Arab Highway linking Beirut to Damascus, as it was a “major construction work that will facilitate land transportation between Lebanon, Syria and other Arab countries and thus increase Lebanon’s position as a transit country for goods from and to Middle East countries”.<sup>21</sup>

Other types of public projects, such as utilities and concessions, have also been found to readily satisfy the development criterion. For instance, a joint venture agreement involving interests in an oil and gas concession in Georgia was

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<sup>19</sup> *Consortium RFCC v. Morocco*, ICSID Case No. ARB/00/6, Decision on Jurisdiction ¶ 65 (July 16, 2001).

<sup>20</sup> *Bayindir Insaat Turizm Ticaret ve Sanayi A S v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction ¶ 137 (Nov. 14, 2005)

“...relying on the preamble of the ICSID Convention, ICSID tribunals generally consider that, to qualify as an investment, the project must represent a significant contribution to the host State’s development. In other words, investment should be significant to the State’s development. As stated by the tribunal in *L.E.S.I.*, often this condition is already included in the three classical conditions set out in the *Salini* test. In any event, in the present case, Pakistan did not challenge the numerous declarations of its own authorities emphasizing the importance of road infrastructure for the development of the country.”

<sup>21</sup> *Toto Costruzioni Generali SpA v. Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction ¶ 86 (Sept. 8, 2009).

found by the arbitral tribunal in *Kardassopoulos v. Georgia* to be “intended to contribute to Georgia’s economic development”.<sup>22</sup> The arbitral tribunal in *Helnan International Hotels A/S v. Egypt* held that the refurbishment of a hotel to transform it into a five-star luxury hotel in Egypt’s prime commercial and business district made an “obvious” contribution to the tourism of Egypt, by extension, the economic development of Egypt.<sup>23</sup> The arbitral tribunal in *Saipem SpA v. Bangladesh* found that a contract to construct a gas and condensate pipeline entailed a “significant contribution in terms of both technical and human resources...[Bangladesh did not] dispute that these resources contributed to its economic development”.<sup>24</sup> The arbitral tribunal in *Jan de Nul NV and Dredging International NV v. Egypt* had little trouble finding that a joint venture agreement for dredging operations in the Suez Canal was of “paramount significance for Egypt’s economy and development”,<sup>25</sup> as did the arbitral tribunal in *Noble Energy Inc. and Machala Power Cia Ltd. v. Ecuador and Consejo Nacional de Electricidad*, in relation to a 31-year concession contract authorizing the claimant investment company to generate and own the electricity it generated.<sup>26</sup> Even outlays for

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<sup>22</sup> *Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction ¶¶ 116-117 (July 6, 2007).

<sup>23</sup> *Helnan International Hotels A/S v. Egypt*, ICSID Case No. ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction ¶ 77 (Oct. 17, 2006):

The Arbitral Tribunal is satisfied that the dispute arises directly out of an investment. It disagrees with the Respondent’s view that the Contract can solely be ‘a standard commercial agreement featuring ordinary commercial terms, regulating the management of an unremarkable property of no particular consequence on the Host State’s development.’ The Arbitral Tribunal accepts the Respondent’s suggestion, based on ICSID precedents, as summarized in the unchallenged statement by Prof. Ch. Schreuer, that to be characterized as an investment a project ‘must show a certain duration, a regularity of profit and return, an element of risk, a substantial commitment, and a significant contribution to the host State’s development.’ But the Arbitral Tribunal also agrees with the Claimant that the Contract meets these requirements. Twenty six years is definitely a ‘certain duration’, the Claimant’s activity was supposed to provide it with a regular remuneration, refurbishing the Shepherd Hotel to transform it into a five-stars hotel implied the risk of no commercial success and the amount of money necessary to achieve that goal and keep such classification for years qualifies as a substantial commitment. As for the contribution to the development of Egypt, the importance of the tourism industry in the Egyptian economy makes it obvious.

<sup>24</sup> *Saipem SpA v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on jurisdiction and recommendation on provisional measures ¶ 101 (Mar. 21, 2007).

<sup>25</sup> *Jan de Nul NV and Dredging International NV v. Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction ¶ 92 (June 16, 2006).

<sup>26</sup> *Noble Energy Inc. and Machala Power Cia Ltd. v. Ecuador and Consejo Nacional*

improving the host State's banking infrastructure were deemed sufficient to satisfy the development criterion in *Ceskoslovenska Obchodni Banka As (CSOB) v. Slovakia*.<sup>27</sup>

Though other tribunals have not explicitly named the *Salini* test, they nevertheless appear to apply development as a criterion to the facts of the case before them. The arbitral tribunal in *Abaclat and ors v. Argentina* did precisely this in their August 2011 Decision on Jurisdiction: “[t]here is no doubt that funds generated through the bonds issuance process were ultimately made available to Argentina, and served to finance Argentina’s economic development. Whether the funds were actually used to repay pre-existing debts of Argentina or whether they were used in government spending is irrelevant. In both cases, it was used by Argentina to manage its finances, and as such must be considered to have contributed to Argentina’s economic development and thus to have been made in Argentina.”<sup>28</sup> Even the arbitral tribunal in a non-ICSID case, *Societe Generale v. Dominican Republic* (which dealt with a complex financial structure involving the claimant’s participation through various corporate vehicles as a general partner of Dominican Energy Holdings LP in the upstream segment of the investment, and the purchaser of shares in the downstream segment), appeared to recognize and apply economic development as a criterion of investment within the BIT definition:<sup>29</sup> “[t]he issue of the specific contribution made to the local economy by a transaction of this kind might not be as easy to identify as if a factory was built, but this of course does not disqualify financial investments from protection under the Treaty. The Claimant has convincingly identified as part of such contribution the continuing supply of electricity, the improvement of distribution and the contribution to employment within the country...”<sup>30</sup>

Some tribunals have also recognized development as a criterion, but subsequently concluded that certain transactions, activities, or operations failed to meet this criterion. In *Joy Mining Machinery Ltd. v. Egypt*, the arbitral tribunal found that letters of guarantee for contract performance, advance payment, and the remaining balance payment did not qualify as an investment under the *Salini* test, finding that while “the amount of the price and of the bank guarantees is relatively substantial, as is probably the contribution to the development of the mining operation...it is only a small fraction of the Project. Certainly, there is

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de Electricidad, ICSID Case No. ARB/05/12, Decision on Jurisdiction ¶ 132 (Mar. 5, 2008).

<sup>27</sup> *Ceskoslovenska Obchodni Banka As (CSOB) v. Slovakia*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction (May 24, 1999).

<sup>28</sup> *Abaclat and ors v. Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility ¶ 378 (Aug. 4, 2011).

<sup>29</sup> *Societe Generale v. Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction ¶¶ 16, 30, 25 (Sept. 19, 2008).

<sup>30</sup> *Id.* ¶ 35.

nothing here to be compared with the concept of ‘*contrats de développement économique*’ or even contracts entailing the concession of public services.”<sup>31</sup> The *ad hoc* committee’s annulment decision in *Mitchell v. The Democratic Republic of Congo* took a broad view of the development criterion, holding that “[i]t 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.”<sup>32</sup> However, the committee did not find anything in the award to show that this criterion was sufficiently satisfied: “[a]s a legal consulting firm is a somewhat uncommon operation from the standpoint of the concept of investment, in the opinion of the *ad hoc* Committee, it is necessary for the contribution to the economic development or at least the interests of the State, in this case the DRC, to be somehow present in the operation....the Award itself is actually mute on this issue.”<sup>33</sup>

#### B. *Development as a Descriptive Characteristic or Non-Binding Feature of Investment*

Where development is predominantly viewed as a descriptive characteristic or non-binding feature of investment, it has been suggested that the *Salini* test could have a narrow residual function for extreme cases involving goods, activities or services not traditionally associated with investment activities. The 2010 award in *Inmaris Perestroika Sailing Maritime Services GmbH and ors v. Ukraine* (“*Inmaris*”) significantly declared that “[t]he *Salini* test may be useful in the event that a tribunal were concerned that a BIT or contract definition was so broad that it might appear to capture a transaction that would not rightly be characterized as an investment under any reasonable definition. These elements could be useful in identifying such aberrations.”<sup>34</sup> The *Inmaris* arbitral tribunal deferred to the BIT definition of investment rather than the *Salini* test; but it also declared in obiter that “to the extent that showing a ‘contribution to the economic development of the host State’ were required in this case, the Tribunal is satisfied that the requirement is met by the alleged investments here. The *Inmaris* Companies’ renovation and operation of the *Kbersones* through the Bareboat Charter and related contracts provided benefits directly to the Ukrainian state that it could not otherwise afford – namely, a rehabilitated state asset (the *Kbersones*) – and provided valuable training for thousands of Ukrainian cadets.”<sup>35</sup> The arbitral tribunal in

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<sup>31</sup> Joy Mining Machinery Ltd. v. Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, ¶ 57 (July 30, 2004).

<sup>32</sup> *Mitchell v. The Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award ¶ 33 (Oct. 27, 2006).

<sup>33</sup> *Id.* ¶ 39.

<sup>34</sup> *Inmaris Perestroika Sailing Maritime Services GmbH and ors v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, ¶ 131 (Mar. 8, 2010).

<sup>35</sup> *Id.* ¶ 132. The same tribunal further noted that the state willingly participated in and

*Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v. Paraguay* likewise referred to the development contribution not as a strict condition but merely in the alternative sense, when it declared that a contract for the provision of technical services for pre-shipment inspect of imports into Paraguay constituted an “investment” within the meaning of the BIT.<sup>36</sup>

In another case, Jan Paulsson, as sole arbitrator in *Pantechniki SA Contractors and Engineers v. Albania*, recognized the inherent subjective difficulties when development is treated as a criterion, rather than as a descriptive characteristic or feature of investment:

36. What does ‘an investment’ mean here? [cf. Art. 25(1) of the ICSID Convention] Other ICSID tribunals have hesitated. A number of tribunals have struggled with what has become known as the *Salini* Test (by reference to the award in *Salini v. Morocco*). This appears to be a misnomer. It is not so much a test as a list of characteristics of investments. The *Salini* award identified five elements as ‘typical’ of investment but made clear that the absence of one could be compensated by a stronger presence of another. The resulting wide margin of appreciation is unfortunate for the reason articulated succinctly by Douglas: ‘If the fundamental objective of an investment treaty is to attract foreign capital, then the concept of an investment cannot be one in search of meaning in the pleadings submitted to an investment treaty tribunal that is established years, perhaps decades, after the decision to commit capital to the host state was made.’...

43. It comes down to this: does the word ‘investment’ in Article 25(1) carry some inherent meaning which is so clear that it must be deemed to invalidate more extensive definitions of the word ‘investment’ in other treaties? *Salini* made a respectable attempt to describe the characteristics of investments. Yet broadly acceptable descriptions cannot be elevated to jurisdictional requirements unless that is their explicit function. They may introduce elements of subjective judgment on the part of arbitral tribunals (such as ‘sufficient’ duration or magnitude or contribution to economic

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directly benefited from the bareboat charter arrangements and related contracts, leading to a cost of renovation and repair of the state asset amounting to approximately EUR 550,000 (¶ 133).

<sup>36</sup> Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v. Paraguay, ICSID Case No. ARB/07/9, Decision on Objection to Jurisdiction, ¶¶ 82, 83, 94, 96 (May 29, 2009).

development) which (a) transform arbitrators into policy-makers and above all (b) increase unpredictability about the availability of ICSID to settle given disputes.<sup>37</sup>

Accordingly, the sole arbitrator had no difficulty in finding that an investment existed, more so since Albania “does not dispute that the Claimant committed resources and equipment to carry out the works under the Contracts. Its own officials have accepted that material committed to infrastructural development was brought by the Claimant to Albania and lost there.”<sup>38</sup>

Other tribunals have also expressly rejected the use of the international right of development as a criterion determinative of the existence of an investment. The arbitral tribunal took the position in its 2010 award in *Fakes v. Turkey* that there were inherent textual problems arising from this interpretation:

111. The Tribunal is not convinced, on the other hand, that a contribution to the host State’s economic development constitutes a criterion of an investment within the framework of the ICSID Convention. Those tribunals that have considered this element as a separate requirement for the definition of an investment, such as the *Salini* Tribunal, have mainly relied on the preamble to the ICSID Convention to support their conclusions. The present Tribunal observes that while the preamble refers to the ‘need for international cooperation for economic development’, it would be excessive to attribute to this reference a meaning and function that is not obviously apparent from its wording. In the Tribunal’s opinion, while the economic development of a host State is one of the proclaimed objectives of the ICSID Convention, this objective is not in and of itself an independent criterion for the definition of an investment. The promotion and protection of investments in host States is expected to contribute to their economic development. Such development is an expected consequence, not a separate requirement, of the investment projects carried out by a number of investors in the aggregate. Taken in isolation, certain individual investments might be useful to the State and to the investor itself; certain might not. Certain investments expected to be fruitful may turn out to be economic disasters. They do not fall, for that reason alone, outside the ambit of the concept of investment.<sup>39</sup>

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<sup>37</sup> *Pantechniki SA Contractors and Engineers v. Albania*, ICSID Case No. ARB/07/21, Award, ¶¶ 36, 43 (July 28, 2009).

<sup>38</sup> *Id.* ¶ 48.

<sup>39</sup> *Fakes v. Turkey*, ICSID Case No. ARB/07/20, Award, ¶ 111 (July 12, 2010).

In its 2010 Award, the arbitral tribunal in *Alpha Projektholding GmbH v. Ukraine* expressed similar dissatisfactions with the development criterion in the *Salini* test, preferring instead to defer to the BIT definition of investment:

312. The Tribunal is particularly reluctant to apply a test that seeks to assess an investment's contribution to a country's economic development. Should a tribunal find it necessary to check whether a transaction falls outside any reasonable understanding of 'investment', the criteria of resources, duration, and risk would seem fully to serve that objective. The contribution-to-development criterion, on the other hand, would appear instead to reflect the consequences of the other criteria and brings little independent content to the inquiry. At the same time, the criterion invites a tribunal to engage in a post hoc evaluation of the business, economic, financial and/or policy assessments that prompted the claimant's activities. It would not be appropriate for such a form of second-guessing to drive a tribunal's jurisdictional analysis.

313. The Tribunal recognizes that elements discussed in the *Salini* test might be of some use if a tribunal were concerned that a BIT or contract definition of 'investment' was overreaching and captured transactions that manifestly were not investments under any acceptable definition. Indeed, a number of tribunals and ad hoc committees have treated the *Salini* elements as non-binding, non-exclusive means of identifying (rather than defining) investments that are consistent with the ICSID Convention. However, in most cases – including, in the Tribunal's view, this one – it will be appropriate to defer to the States' definition of investment in a BIT or a contract.<sup>40</sup>

Using the BIT's definition of investment, the arbitral tribunal then found that the reconstruction agreements for the renovation of a historic Ukrainian hotel fell well within the scope of the term "contribution" within the BIT definition of investment.<sup>41</sup> After noting that the improved hotel became the site of many important official functions, and higher tax revenues from increased sales by the improved hotel operations, Alpha's participation in the joint activities for rehabilitating the hotel were deemed to have "contributed to the development of Ukraine and its economy".<sup>42</sup>

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<sup>40</sup> *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, ¶¶ 312, 313 (Oct. 20, 2010).

<sup>41</sup> *Id.* ¶¶ 327-331.

<sup>42</sup> *Id.* ¶ 331.

Other tribunals have ceased to adopt the *Salini* test, or even consider the independent criterion or characteristic of development in any way, but have, instead, subsumed their discussion of development within the context of “contributions” to “economic activities” in the host State. In *Conorzio Groupement LESI and ASTALDI v. Algeria*, which involved the construction of a dam in Algeria’s Bouira district, the arbitral tribunal ultimately rejected development as a strict criterion and instead applied it within the tribunal’s assessment of “contributions”.<sup>43</sup> Out of the six elements of investment distilled by the arbitral tribunal in *Phoenix Action Ltd. v. Czech Republic* from various ICSID awards, only the fourth - “an operation made in order to develop an economic activity in the host State”, conceptually resembled development.<sup>44</sup> The tribunal stressed that “[t]he development of economic activities must have been foreseen or intended, but need not necessarily be successful...although there were no significant activities performed by the Czech companies owned by Phoenix since it acquired them, this alone would not be sufficient to disqualify the operation as an investment, provided that, and this caveat is fundamental, the Claimant had really the intention to engage in economic activities, and made good faith efforts to do so and that its failure to do so was a consequence of the State’s interference.”<sup>45</sup> The tribunal went on to hold that such good faith efforts were not met, and thus concluded that the initiation of the arbitration was “an abuse of the system of international ICSID and investment arbitration”.<sup>46</sup>

*Romak SA v. Uzbekistan* referred to investment as entailing “expenditure or

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<sup>43</sup> *Conorzio Groupement LESI and ASTALDI v. Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, ¶¶ 72-73 (July 12, 2006).

<sup>44</sup> *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, ¶¶ 114-115 (Apr. 9, 2009):

114. To summarize all the requirements for an investment to benefit from the international protection of ICSID, the Tribunal considers that the following six elements have to be taken into account:

1 – a contribution in money or other assets;

2 – a certain duration;

3- an element of risk;

4- an operation made in order to develop an economic activity in the host State;

5 – assets invested in accordance with the laws of the host State;

6 – assets invested bona fide

115. The Tribunal wants to emphasize that an extensive scrutiny of all these requirements is not always necessary, as they are most often fulfilled on their face, ‘overlapping’ or implicitly contained in others, and that they have to be analyzed with due consideration of all circumstances.” (emphasis added)

<sup>45</sup> *Id.* ¶ 133.

<sup>46</sup> *Id.* ¶ 144.

contribution, as well as the purpose of obtaining an economic benefit, the existence and extent of which is by definition, uncertain”, and found that an ordinary sale of goods contract did not satisfy the purpose of economic benefit and contribution.<sup>47</sup> Similar purposes of economic benefits and contributions were articulated and considered in the 2011 Award in *Malicorp Ltd. v. Egypt* (involving a build-operate-transfer contract for the building of the Ras Sudr) and the 2010 Award in *Global Trading Resource Corp and Globex International Inc. v. Ukraine* (involving purchase and sale contracts). The *Malicorp* tribunal referred to “major contributions” to the economy,<sup>48</sup> while the *Global Trading* arbitral tribunal emphasized that attenuated contributions to the host State economy would not qualify as an investment: “[t]he fact that the trade in these particular goods was seen to further the policy priorities of the purchasing State does not bring about a qualitative change in the economic benefit that all legitimate trade brings in its train.”<sup>49</sup>

*RSM Production Corporation v. Grenada* accepted that the exploration stage of an oil project, taken in its totality, could comprise an investment given its overall or collective contribution to the host State’s economy: “[a]s to the contribution to the economic and social development of the host State, in the unlikely situation where the exploration expenses themselves would not be sufficient to satisfy it, the condition must be assessed in consideration of a successful adventure...the project embodied in the Agreement was an ‘overall adventure’ from the execution of the instrument by the Parties.”<sup>50</sup>

Some arbitral tribunals have also used development to support the balance of interests between host States and investors, without being dispositive to the arbitral tribunal’s resolution of the dispute. In *Lemire v. Ukraine*, the arbitral tribunal took the opportunity to explain the concept of economic development, but without referring to the *Salini* test. The tribunal did not use the international right of development as a means to identify qualified investments pursuant to a BIT definition or Article 25 of the ICSID Convention, but rather recognized its policy function in the interpretation of investor and host State rights:

273. ...[E]conomic development is an objective which must benefit all, primarily national citizens and national companies, and secondarily foreign investors. Thus, the object and purpose of the

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<sup>47</sup> Romak SA v. Uzbekistan, PCA Case No. AA280, ¶¶ 206, 222 (Nov. 26, 2009).

<sup>48</sup> Malicorp Ltd. v. Egypt, ICSID Case No. ARB/08/18, Award, ¶ 113 (Jan. 31, 2011).

<sup>49</sup> Global Trading Resource Corp and Globex International Inc. v. Ukraine, ICSID Case No. ARB/09/11, Award (Nov. 23, 2010).

<sup>50</sup> RSM Production Corporation v. Grenada, ICSID Case No. ARB/05/14, Award, ¶¶ 244, 264 (Mar. 11, 2009).

Treaty is not to protect foreign investments per se, but as an aid to the development of the domestic economy. And local development requires that the preferential treatment of foreigners be balanced against the legitimate right of Ukraine to pass legislation and adopt measures for the protection of what as a sovereign it perceives to be its public interest.<sup>51</sup>

Clearly, outside of the sole arbitrator's findings in *Malaysia Historical Salvors*, no other arbitral tribunal has stringently regarded "contributions to the host State's economic development" as a rigid criterion. Neither has any other tribunal attempted to undertake any verifiable assessment of such contributions, other than to generally acknowledge direct or indirect linkages between the investment and improvements in the national economy through income growth, employment, tax revenues, and other similar economic benefits. Investment "aberrations" which, as the *Inmaris* tribunal suggested, are more proper subjects for the application of the *Salini* test – and development as a criterion have not yet been concretely demonstrated in investment arbitral jurisprudence.

The irony in debating the use of development as either a criterion or a mere descriptive characteristic is that, in actual arbitral practice, the majority of arbitral tribunals to date have had little difficulty finding that a given transaction, operation, or activity indeed contributes to a host State's economic development. If every such transaction, operation, or activity arguably redounds to the host State's economic development, the more relevant question should thus be the *magnitude* of the contribution to economic development as would be deemed sufficient to constitute such transaction, operation, or activity as a covered "investment" within the meaning of the BIT definition and Article 25 of the ICSID Convention. But as the experience of the sole arbitrator in *Malaysia Historical Salvors* shows us, the method for this assessment proved empirically unwieldy, if not quite unscientific; it may thus be futile for arbitral tribunals to address this question.

If arbitral tribunals could establish and identify the bare nexus of contributions to the host State's economy, albeit not having the wherewithal to precisely estimate the extent of such contributions, there would seem to be little, if any, value in perpetuating the *Salini* test's strict insistence on development as a jurisdictional criterion to comply with the double-barrelled test of the BIT definition of investment and Article 25 of the ICSID Convention. The rare cases or "aberrations" where activities not usually associated with investment (such as legal consulting services in *Mitchell v. The Democratic Republic of Congo*) are argued to

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<sup>51</sup> Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, ¶ 273 (Jan. 14, 2010).

be investments within the meaning of the BIT, IIA, or Article 25 of the ICSID Convention, would more likely form the outer margin of situations where the development criterion in the *Salini* test might prove salient. However, it is not too clear what these “aberrations” could be under the more evolved climate of contemporary investment activities.

As will be shown in Part III, new asset-based formulations or enumerations of investment now broadly encompass services, rights and choses in action, debt and equity participation. If the *Salini* test were to be applied by future arbitral tribunals to these new forms of investment, there should be a corresponding asset-based differentiation in how they assess the impact or “contributions to economic development” of these forms of investment. The inherent ambiguity of the international right of development, as well as the proliferation of different methods for its empirical assessment, further militates against inducing arbitral tribunals to use the development right as a criterion of jurisdictional gatekeeping in international investment arbitrations. Significantly, the United Nations Conference on Trade and Development (UNCTAD)’s own recommendations on enhancing development within the IIAs does *not* focus on imposing the development criterion on the meaning of investment, but on other more “proactive” means:

A final critical issue is how best to strengthen the development dimension of IIAs...to the extent that the development dimension is addressed in international investment rulemaking, *it is done in an indirect manner and in a primarily defensive mode, in order to shield contracting parties permanently or temporarily from assuming their full responsibilities under the agreement...*Incorporating a proactive development dimension would require adding new kinds of provisions not often seen in IIAs, including home country measures. Such means could include a broad range of issues: (a) transparency and exchange of investment-related information; (b) fostering linkages between foreign investors and domestic companies; (c) capacity-building and technical assistance; (d) granting of investment insurance; (e) encouragement of transfer of technology; (f) easing informal investment obstacles; (g) joint investment protection activities; (h) access to capital; (i) financial and fiscal incentives; and (j) the setting up of an institutional mechanism to coordinate the respective measures...<sup>52</sup>

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<sup>52</sup> United Nations Conference on Trade and Development (UNCTAD), Development implications of International Investment Agreements, IIA Monitor No. 2 (2007), p. 7.

In the absence of a reliable method for estimating “contributions to the host State’s economic development”, applying the development criterion could be rightly criticized as a form of arbitrator-arbitrariness. Thus, because arbitrators would prefer to act prudently rather than superimpose an empirically-unsupported (and often tentative) assessment upon the parties to an investment dispute, it can be anticipated that most arbitrators confronted with the question of development in relation to the treaty definition of investment and Article 25 of the ICSID Convention, would more likely find that a transaction, operation, or activity contributes directly or indirectly to the host State’s economy, without requiring the contribution to be of any precise degree. In this sense, the international right of development appears to be of little practical value for arbitrators seeking to isolate the activities, operations, and transactions that should (rightly) be kept out of the protections of a BIT or IIA, including access to ICSID jurisdiction.

### III. DEVELOPMENT AS AN INTERNATIONAL RIGHT: THEORIES AND ASSESSMENTS

#### A. *The International Right of Development*

The sheer breadth of the concept of development, the mutability of its content, and the diversity in the methods and policies for achieving development, have not necessarily prevented its recognition as an international right. In 1986, the General Assembly of the United Nations issued the landmark *Declaration on the Right to Development* (“Declaration”).<sup>53</sup> In this Declaration, the right to development was defined as “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized”.<sup>54</sup> The same right has been expressly extended to the exercise of the “inalienable right to full sovereignty over all natural wealth and resources”.<sup>55</sup> Accordingly, the Declaration imposes primary duties on States to: (1) “formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom”;<sup>56</sup> (2) create “national and international conditions favourable to the realization of the

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<sup>53</sup> Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/RES/41/128 (Dec. 4 1986), available at: <http://www2.ohchr.org/english/law/rtd.htm> (last visited Aug. 15, 2011).

<sup>54</sup> *Id.* art. 1(1).

<sup>55</sup> *Id.* art. 1(2).

<sup>56</sup> *Id.* art. 2(3).

right to development”;<sup>57</sup> (3) “co-operate with each other in ensuring development and eliminating obstacles to development...promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States as well as to encourage the observance and realization of human rights”;<sup>58</sup> (4) “take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development”;<sup>59</sup> (5) “take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination”;<sup>60</sup> and (6) “undertake, at the national level, all necessary measures for the realization of the right to development”.<sup>61</sup> All of these aspects of the right to development are “indivisible and interdependent and each of them should be considered in the context of the whole”.<sup>62</sup>

### B. *Justiciability of the International Right of Development*

The exact content and justiciability of the international right to development, admittedly, remains much debated.<sup>63</sup> The late Arjun Sengupta, Independent Expert on the Right to Development to the Human Rights Commission, acknowledged the conceptual breadth of the right to development, and synthesized the right according to four main propositions of the Declaration:

“... (A) The right to development is a human right. (B) The human right to development is a right to a particular process of development in which all human rights and fundamental freedoms can be fully realized—which means that it combines all the rights enshrined in both the covenants and each of the rights has to be exercised with freedom. (C) The meaning of exercising these rights consistently with freedom implies *free, effective, and full participation* of all the individuals concerned in the decision-making and the

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<sup>57</sup> *Id.* art. 3(1).

<sup>58</sup> *Id.* art. 3(3). *See* Arts. 6-7.

<sup>59</sup> *Id.* art. 4(1).

<sup>60</sup> *Id.* art. 5.

<sup>61</sup> *Id.* art. 8.

<sup>62</sup> *Id.* art. 9.

<sup>63</sup> *See* Philip Alston, *Making Space for New Human Rights: The Case of the Right to Development*, 1 HARV. HUM. RTS. Y.B. 3, 20-24 & 33-38 (1988) (hereinafter Alston); Brigitte I. Hamm, *A Human Rights Approach to Development*, 23(4) HUM. RTS. Q. 1005, 1009 (2001).

implementation of the process. Therefore, the process must be transparent and accountable, individuals must have *equal opportunity* of access to the resources for development and receive *fair distribution* of the benefits of development (and income). (D) Finally, the right confers unequivocal obligation on duty-holders: individuals in the community, states at the national level, and states at the international level. National states have the responsibility to help realize the process of development through appropriate development policies. Other states and international agencies have the obligation to cooperate with the national states to facilitate the realization of the process of development.<sup>64</sup>

Notwithstanding the growth of the right to development in the international legal framework, the legal enforceability of the right to development has not gained much traction yet among international legal scholars. When anchored only in the Declaration, the right to development is regarded as “soft law”, but the right can be deemed part of “hard law” when read in conjunction with legally enforceable treaties such as the International Covenant on Civil and Political Rights<sup>65</sup> and the International Covenant on Economic, Social, and Cultural Rights<sup>66, 67</sup>

In 1988, international human rights expert Philip Alston clarified that the binding nature of international human rights such as the right to development did not depend on its justiciability or enforceability, as much of international human rights law adopts the “notions of ‘implementation’ and ‘supervision’ as its touchstones, rather than that of justiciability or enforceability.”<sup>68</sup> That is to say that rights once recognized, are to be implemented or given effect. Depending on the nature of the rights, the terms of the instrument and the factual circumstances,

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<sup>64</sup> Arjun Sengupta, *The Right to Development as a Human Right*, (unpublished paper) available at: [http://www.harvardfxbcenter.org/resources/working-papers/FXBC\\_WP7--Sengupta.pdf](http://www.harvardfxbcenter.org/resources/working-papers/FXBC_WP7--Sengupta.pdf) (last visited Aug. 15, 2011).

<sup>65</sup> International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 21 UN GAOR Supp. No. 16 U.N. Doc. A/6316, at 52 (1966); 999 U.N.T.S. 171; 6 I.L.M. 368 (1967).

<sup>66</sup> International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), 21 UN GAOR Supp. No. 16 U.N. Doc. A/6316, at 49 (1966); 993 U.N.T.S. 3; 6 I.L.M. 368 (1967).

<sup>67</sup> See Felix Kirchmeier, *The Right to Development – Where do we stand? State of the Debate on the Right to Development*, Friedrich-Ebert-Stiftung Dialogue on Globalization Occasional Papers No. 23, at 11-12 (July 2006), available at: <http://library.fes.de/pdf-files/iez/global/50288.pdf> (last visited Aug. 15, 2011).

<sup>68</sup> See Alston, *supra* note 63.

that requirement may or may not translate into the need for judicial remedies.”<sup>69</sup> Nevertheless, Alston also recognized that the Declaration “clearly represents a step towards satisfying the first of the relevant requirements in General Assembly resolution 41/20, but nevertheless falls short of doing so completely. Further precision as to the rights and obligations which are entailed is clearly required.”<sup>70</sup> Arjun Sengupta also accepts that the Declaration does not constitute “hard law”, but he nevertheless clarifies that the justiciability paradigm is, in the first place, conceptually inappropriate for determining the binding legal quality of the international right to development:

Another criticism of the right to development is related to its justiciability. There is a view, particularly among lawyers of the positivist school, that if certain rights are not legally enforceable, they cannot be regarded as human rights. At best, they can be regarded as social aspirations or statements of objectives. The skeptics, who doubt the appeal and effectiveness of ethical standards of rights-based arguments, would not consider a right to be taken seriously unless the entitlements of those rights are sanctioned by a legal authority, such as the state, based on appropriate legislation. As Sen puts it, these skeptics would say, “Human beings in nature are, in this view, no more born with human rights than they are born fully clothed; rights would have to be acquired through legislation, just as clothes are acquired through tailoring.” This view, however, confuses human rights with legal rights. Human rights precede law and are derived not from law but from the concept of human dignity. There is nothing in principle to prevent a right being an internationally recognized human right even if it is not individually justiciable.

Human rights can be fulfilled in many different ways depending on the acceptability of the ethical base of the claims. This should not, of course, obfuscate the importance or usefulness of such human rights translated into legislated legal rights. In fact, every attempt should be made to formulate and adopt appropriate legislative instruments to ensure the realization of the claims of a human right once it is accepted through consensus. These rights would then be backed by justiciable claims in courts and by authorities of enforcement. But to say that human rights cannot be invoked if they cannot be legally enforced would be most inappropriate. For many of the economic and social rights and the right to

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 37.

development, and even for some elements of civil and political rights, the positive actions that are necessary may often make it very difficult to identify precisely the obligations of particular duty-holders to make them legally liable to be prosecuted. Enacting appropriate legislative instruments for any of these rights would often be a monumental task, and it would be often useful and necessary to find alternative methods of enforcement of the obligations rather than through the courts of law.

....[A]lthough civil and political rights and economic, social, and cultural rights have been codified in international treaties or covenants and ratified by a large number of countries, the Declaration does not have that status, and therefore cannot be enforced in a legal system. That still does not detract from the responsibility of states, nationally or internationally, as well as of other individuals and agencies of the international community to realize the right to development. It may be necessary to suggest some mechanism to monitor or exercise surveillance over the states and the agencies of the international community to ensure that they are complying with their commitment to realize the right to development. That mechanism might not have the same legal status as a treaty body but may still be effective in ensuring the realization of this right through peer pressure, democratic persuasion and the commitment of civil society.<sup>71</sup>

Significantly, it has been argued that the right to development has policy implications for international economic law, specifically for vindicating key principles of respect for human rights, participation rights, equality of opportunity, the differential treatment of developing countries, and accountability in the course of interpretation and implementation of international economic obligations.<sup>72</sup> None of these proposals call for internationalized judicial remedies (or legal enforceability or justiciability) to adjudicate the international right to development. As with the views expressed by Alston and Sengupta, the implementation of the international right to development within international economic law thus appears to be primarily a task for State supervision and international monitoring.<sup>73</sup>

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<sup>71</sup> Arjun Sengupta, *On the Theory and Practice of the Right to Development*, 24(4) HUM. RTS. Q. 837, 846 & 859-861 (2002).

<sup>72</sup> Isabella Bunn, *The Right to Development: Implications for International Economic Law*, 15 AM. U. INT'L L. REV. 1425, 1442-1451 (1999-2000).

<sup>73</sup> See also James C.N. Paul, *The United Nations and the Creation of an International Law of Development*, 36 HARV. INT'L L.J. 307-328 (1995).

### C. *Measuring Economic Development*

Considering the evolving ideologies on the meaning and content of the right to development, it is unsurprising that the methods for measuring economic development are numerous and diverse. Barbara Ingham describes development “as a goal toward which countries strive, and also a process which involves causal relationships”.<sup>74</sup> Her analysis surveys the historical evolution of the meaning of economic development, examining the arguments of *institutional economics* (which “stresses the importance of institutions to economic growth and to the diffusion of growth throughout society”<sup>75</sup>); *mercantilist economics* (which “raises the question of the degree to which development can be identified with industrialization”<sup>76</sup>); *development economics* (“who argue that we should explore the possibilities of ‘decoupling’ growth from development and modernization”<sup>77</sup>); *political change theory* (which stresses “the importance of pressing for changes in international institutions so that they become more responsive to policies which aim to promote global development”<sup>78</sup>); *decentralization and participation theory* (which is seen “as a means of promoting democracy by enfranchising the economically weak”<sup>79</sup>); *redistribution and basic needs theory* (which mandates that income growth, structural change, industrialization and modernization should be augmented “by broader considerations of income distribution, poverty, and basic needs”<sup>80</sup>); *human development theory* (which looks to a “people-oriented view of development”<sup>81</sup>); *sustainable development theory* (which focuses on conservation of resources, or refers to “increases in per capita income which can be maintained without encountering inflation and balance of payments problems”<sup>82</sup>); and *capabilities-driven development theory* (which “builds on an agreed notion of a ‘just society’ and ‘basic needs’ for a minimum acceptable level of living”<sup>83</sup>).

Considering these ideological differences on the constitutive elements of economic development, there have also been numerous empirical methods for its measurement, focusing on gross national product (“GNP”) per capita, social and health indicators, income distributions, economic growth rates, among others.<sup>84</sup>

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<sup>74</sup> Barbara Ingham, *The Meaning of Development: Interactions Between ‘New’ and ‘Old’ Ideas*, 21(11) WORLD DEV. 1803, 1803 (1993).

<sup>75</sup> *Id.* at 1805.

<sup>76</sup> *Id.* at 1806.

<sup>77</sup> *Id.* at 1807.

<sup>78</sup> *Id.* at 1808.

<sup>79</sup> *Id.* at 1810.

<sup>80</sup> *Id.* at 1811.

<sup>81</sup> *Id.* at 1813.

<sup>82</sup> *Id.* at 1815.

<sup>83</sup> *Id.* at 1817.

<sup>84</sup> See Norman Hicks & Paul Streeten, *Indicators of Development: The Search for a Basic Needs*

In 1990, the United Nations Development Programme (“UNDP”) introduced the Human Development Index (“HDI”) in its first Human Development Report, which has since provided the benchmark empirical method for measuring human development, defined as “a process of enlarging people’s choices. The most critical ones are to lead a long and healthy life, to be educated, and to enjoy a decent standard of living. Additional choices include political freedom, guaranteed human rights and self-respect – what Adam Smith calls the ability to mix with others without ‘being ashamed to appear in public’”.<sup>85</sup> HDI measurement results in a single statistic for each country, which is a composite of three indicators – life expectancy rates (to measure longevity), literacy rates (to measure educational attainment), and per capita income (to measure access to resources):

This Report has chosen three types of deprivation as the focus of attention: people's deprivation in life expectancy, literacy and income for a decent living standard. Each measure could have been further refined, especially by making distributional adjustments if there had been adequate comparable data....

The first two indicators -life expectancy and adult literacy are commonly used concepts. But the third - the purchasing power to buy commodities for satisfying basic needs - is not as well understood. The GNP figures typically used for international comparisons do not adequately account for national differences in purchasing power or the distorting effect of official exchange rates. To overcome these inadequacies, we use here the purchasing-power-adjusted GDP estimates developed in the International Price Comparison Project, a collaborative effort of the UN Statistical Office, the World Bank, EUROSTAT, OECD, ECE and ESCAP, now being expanded by USAID. Since there are diminishing returns in the conversion of income into the fulfilment of human needs, the adjusted GDP per capita figures have been transformed into their logarithms.

To construct a composite index, a *minimum* value (the maximum deprivation set equal to one) and a *desirable* or *adequate* value (no deprivation set equal to zero) had to be specified for each of the three indicators.<sup>86</sup>

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*Yardstick*, 7 WORLD DEV. 567-580 (1979); JAMES M. CYPHER & JAMES L. DIETZ, THE PROCESS OF ECONOMIC DEVELOPMENT Ch. 2 (Routledge 2004).

<sup>85</sup> U.N.D.P. Rep., Human Development Report, 10 (1990), *available at*: [http://hdr.undp.org/en/media/hdr\\_1990\\_en\\_chap1.pdf](http://hdr.undp.org/en/media/hdr_1990_en_chap1.pdf) (last visited Aug. 15, 2011).

<sup>86</sup> *Id.* at 13.

These measurements of economic development are admittedly aggregated, and do not take into account all possible socio-economic variables which do not yet have reliable sources of empirical data. There are some methods for estimating the actual contributions of investment to economic development, although these are not uniform.<sup>87</sup> However, there is no global benchmark counterpart for investment contributions to economic development, comparable to that contained in the HDI. Thus, while the substantive content of the international right of development is well-established, it should be evident that the very nature and genesis of this right – as the “sum” of international human rights – does not lend itself easily to a formal paradigm of judicial enforceability.

Requiring arbitral tribunals to strictly assess the “contribution to a host State’s economic development” of a given transaction, operation, or activity through the *Salini* test would problematically impel arbitrators to take on the roles of empirical economists, who, even if they are better equipped with the methodological and scientific tools for estimating the precise degree of such contributions, would nevertheless differ among themselves as to the methods of assessment. More importantly, as explained by Alston and Sengupta, the validity of the international right of development was not intended in the first place to be co-dependent with access to formal justiciability or legal enforceability before courts. Much like the corpus of international human rights law, States’ compliance with the international right to development is a matter of monitoring and implementation, and not *ex post* judicialization.<sup>88</sup>

#### IV. INTEGRATING DEVELOPMENT IN TRADE-BASED INVESTMENT PROTECTION

Within the framework of international trade rules, investment protection and regulation, and its linkages with international trade have had only some limited recognition to date within the framework of the World Trade Organization (“WTO”) Agreements. The Agreement on Trade-Related Investment Measures (“TRIMs”) regulates potential distortions in the trade in goods arising from certain investment measures that host States may apply. Accordingly, WTO Member States are prohibited from applying investment measures that violate

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<sup>87</sup> See, *inter alia*, Mohsin S. Khan & Carmen M. Reinhart, *Private Investment and Economic Growth in Developing Countries*, 18(1) WORLD DEV. 19-27 (Jan. 1990); E. Borensztein, J. De Gregorio & J.W. Lee, *How does Foreign Direct Investment affect Economic Growth?*, 45 J. INT’L ECON. 115-135 (1998); Niels Hermes & Robert Lensink, *Foreign Direct Investment, Financial Development, and Economic Growth*, 40(1) J. DEV. STUD. 142-163 (2003).

<sup>88</sup> On theories of compliance with international agreements and strategies for measuring State compliance, see Beth Simmons, *Compliance with International Agreements*, 1 ANN. REV. POL. SCI. 75-93 (1998).

obligations on national treatment (GATT Article III) and quantitative restrictions (GATT Article XI).<sup>89</sup> The General Agreement on Trade in Services (“GATS”) regulates obligations in relation to service suppliers who establish a commercial presence in other WTO Member States.<sup>90</sup> The Government Procurement Agreement regulates WTO Member States’ domestic laws, regulations, practices and procedures applicable to government procurement contracts.<sup>91</sup> While these Agreements prescribe standards of treatment commonly used in international trade law such as MFN clauses, national treatment clauses, among others, they do not, however, specifically provide for investment protection. There is no consolidated multilateral agreement yet that deals with international investment.

In recent years, however, investment issues have featured prominently in the negotiation of regional trade cooperation agreements by developing countries. This is a nascent phenomenon worth observing, particularly as the mechanisms and innovations within these new investment chapters in trade agreements respond to development concerns in the context of investment protection, outside the traditional threshold of the *Salini* test. These treaties operationalise the right to development outside the contested jurisdictional gatekeeping role of an investment’s “contributions to the host State’s economic development”, through mechanisms such as: (1) permissible differentiation or graduated implementation of host State obligations, taking the host State’s stage of economic development into account; (2) transparency obligations and information exchanges between treaty partners; (3) joint investment promotion activities by treaty partners; and (4) coordinated institutional mechanisms that enable host State participation and access in monitoring treaty interpretation and any investment-related rulemaking. These mechanisms bring to mind the marked emphasis on transparency, consultation, and review long prescribed in the 1976 OECD Declaration on International Investment and Multinational Enterprises.<sup>92</sup> Unlike the *Colonia*

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<sup>89</sup> Arts. 1 & 2 of Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results Of The Uruguay Round Of Multilateral Trade Negotiations 143 (1999), 1868 U.N.T.S. 186, available at: [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm#trims](http://www.wto.org/english/docs_e/legal_e/legal_e.htm#trims) (last visited Nov. 1 2011) (hereinafter TRIMS Agreement).

<sup>90</sup> Art. I(2)(c) of General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, The Legal Texts: The Results Of The Uruguay Round Of Multilateral Trade Negotiations 284 (1999), 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994), available at: [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm#services](http://www.wto.org/english/docs_e/legal_e/legal_e.htm#services) (last visited Nov. 1, 2011).

<sup>91</sup> Agreement on Government Procurement, Arts. I(1) & I(2), official text available at: [http://www.wto.org/english/docs\\_e/legal\\_e/gpr-94\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf) (last visited Nov. 1, 2011).

<sup>92</sup> Arts. II, IV-VI of OECD Declaration on International Investment and Multinational Enterprises, reprinted in 15 I.L.M. 967 (1976), available at:

Protocol of the Common Southern Market (“MERCOSUR”) countries or Chapter 11 of the NAFTA (North American Free Trade Agreement),<sup>93</sup> which apply to developing countries but only contain (mostly) standard BIT provisions, recent developing country investment agreements now purposely include more treaty provisions to operationalize the international right to development.

Development-oriented innovations in the 2007 Investment Agreement on the COMESA (Common Market for Eastern and Southern Africa) Common Investment Area, the 2009 ASEAN (Association of Southeast Asian Nations) Comprehensive Investment Agreement, and the 2009 ASEAN-China Investment Agreement are briefly examined and discussed below.

#### *A. 2007 COMESA Investment Agreement*

The 2007 Investment Agreement of the Common Market for Eastern and Southern Africa (“COMESA”) States (“COMESA Agreement”) provides the framework for the COMESA Common Investment Area (“CCIA”).<sup>94</sup> The COMESA Common Investment Area includes nearly twenty States in Eastern and Southern Africa, namely: Burundi, Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe. Under the 2007 COMESA Agreement, the CCIA is intended to be an area for “coordinated COMESA investment co-operation programme that will generate increased investments from COMESA and non-COMESA sources”; where there is “freer flow of capital, skilled labour and professionals, and technology among Member States”; where Member States will “extend national treatment to COMESA investors by 2010” and “ensure all economic activities are opened for investment to COMESA investors by 2010”; and where “the private sector is a partner and fully participates in investment and related activities of the Common Market as provided for under Article 151 of the COMESA Treaty”.<sup>95</sup>

The Preamble to the COMESA Agreement recognizes that “particular pressures on the balance of payments of a Member State in the process of

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[http://www.oecd.org/document/53/0,3746,en\\_2649\\_34887\\_1933109\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/53/0,3746,en_2649_34887_1933109_1_1_1_1,00.html)  
(last visited Nov. 1, 2011).

<sup>93</sup> See 1994 Protocol of Colonia for the Promotion and Reciprocal Protection of Investments in Mercosur; Chapter 11 (Investment) of the North American Free Trade Area (NAFTA) Agreement.

<sup>94</sup> See Peter Muchlinski, *The COMESA Common Investment Area: Substantive Standards and Procedural Problems in Dispute Settlement*, SOAS School of Law Research Paper No. 11/2010, available at: <http://ssrn.com/abstract=1698209> (last visited Aug. 15, 2011).

<sup>95</sup> Investment Agreement for the COMESA Common Investment Area, 2007 (hereinafter 2007 COMESA Investment Agreement), art. 3.

economic development or economic transition may necessitate the use of restrictions to ensure, *inter alia*, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition”.<sup>96</sup> Thus, the Agreement permits COMESA Member States to submit a Temporary Exclusion List and/or Sensitive List to the CCIA Committee, the body tasked with the supervision and monitoring of Member States’ measures to implement the Agreement.<sup>97</sup> These Lists enable COMESA Member States to partially or wholly, temporarily or permanently, exclude forms of investment, subject to a periodic review by the CCIA every two years. Member States also have detailed transparency obligations, such as to report to the CCIA Committee and publish “all relevant measures which pertain to, or affect, the operation of this Agreement”.<sup>98</sup> It is a fundamental general obligation of the COMESA Member States to “undertake appropriate actions to promote transparency and consistency in the application and interpretation of their investment laws, regulations and administrative procedures”.<sup>99</sup>

COMESA Member States may modify or withdraw their respective commitments under Schedules I to III of the Agreement, as well as their corresponding Action Plans, subject to the consideration of the CCIA Committee. They may also amend their respective Sensitive Lists and Temporary Exclusion Lists “subject to the preservation of rights for a COMESA investor who has commenced the process of establishing an investment or who has established an investment” pursuant to the Agreement.<sup>100</sup> Noticeably, these obligations of transparency are purposely excluded from the coverage of investors’ recourse to dispute settlement under Part Two (Rights and Obligations) of the Agreement.<sup>101</sup>

It is also observable that the substantive rights and obligations involving investor protection in the COMESA Agreement frequently contain language that recognizes differentiation for COMESA Member States according to their levels of development, when appropriate. For example, COMESA Member States are obligated to accord “fair and equitable treatment to COMESA investors and their investments, in accordance with customary international law. Fair and equitable treatment includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due

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<sup>96</sup> *Id.* at Preamble, ¶ 6.

<sup>97</sup> *Id.* arts. 1(13), 1(14), and 18, in relation to arts. 7(1) to 7(7).

<sup>98</sup> *Id.* arts. 4(1) to 4(4).

<sup>99</sup> *Id.* art. 5(a).

<sup>100</sup> *Id.* arts. 9(1) to 9(3).

<sup>101</sup> *Id.* art. 10.

process embodied in the principal legal systems of the world.”<sup>102</sup> However, the Agreement also provides that, “[f]or greater certainty, Member States understand that different Member States have different forms of administrative, legislative and judicial systems and that Member States at different levels of development may not achieve the same standards at the same time”.<sup>103</sup> With respect to employment decisions, though the Agreement recognizes the right of investors to hire “technically qualified persons from any country”, it also obligates investors to “accord a priority to workers who possess the same qualifications and are available in the Member State or any other Member State”.<sup>104</sup> The obligation to observe national treatment “in like circumstances” is clarified in the COMESA Agreement as requiring “an overall examination on a case by case basis of all the circumstances of an investment, including, *inter alia*:

- (a) its effects on third persons and the local community;
- (b) its effects on the local, regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment;
- (c) the sector the investor is in;
- (d) the aim of the measure concerned;
- (e) the regulatory process generally applied in relation to the measure concerned;
- (f) other factors directly relating to the investment or investor in relation to the measure concerned”.<sup>105</sup>

Payment of compensation awarded in case of expropriation, when “significantly burdensome on a host State”, may be “paid yearly over a period agreed by the Parties, subject to interest at the rate established by agreement of the disputants or by a tribunal”.<sup>106</sup> Bona fide regulatory measures that are designed and applied to protect or enhance “legitimate public welfare objectives, such as public health, safety and the environment”, shall not constitute an indirect expropriation under the COMESA Agreement.<sup>107</sup>

Noticeably, the COMESA Agreement broadly provides for “emergency safeguard measures”, which a COMESA Member State may provisionally and non-discriminatorily take “to the extent and for such period as may be necessary to prevent or to remedy such injury”, when the Member State “suffers or is

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<sup>102</sup> *Id.* art. 14(1).

<sup>103</sup> *Id.* art. 14(3).

<sup>104</sup> *Id.* art. 16.

<sup>105</sup> *Id.* art. 17.

<sup>106</sup> *Id.* art. 20(5).

<sup>107</sup> *Id.* art. 20(8).

threatened with any serious injury”, “as a result of opening up of economic activities in accordance with the Agreement”.<sup>108</sup> The Member State must notify the CCIA Committee within 14 days from taking the emergency safeguard measure, including a “justification of such action supported by evidence gathered from an investigation”.<sup>109</sup> The CCIA Committee shall “determine what constitutes serious injury and threat of serious injury and the procedures of instituting emergency safeguard measures pursuant to this Article”.<sup>110</sup> Similarly, a COMESA Member State’s measure to safeguard its balance of payments, “in the event of serious balance of payment and external financial difficulties or threat thereof”, should likewise be notified to the CCIA Committee, who will review such measures according to its applicable rules and procedures.<sup>111</sup>

### B. 2009 ASEAN Comprehensive Investment Agreement

The 2009 Association of Southeast Asian Nations (“ASEAN”) Comprehensive Investment Agreement (“ACIA”) was signed by the ASEAN Economic Ministers on 26 February 2009, and has been ratified by seven of the ten ASEAN States, till date.<sup>112</sup> The ACIA will only enter into force “after all Member States have notified, or, where necessary, deposited instruments of ratification with the Secretary-General of ASEAN, which shall not take more than 180 days after the signing of [the] Agreement”.<sup>113</sup> The ACIA is designed to govern intra-ASEAN investments in manufacturing, agriculture, fishery, forestry, mining and quarrying, services incidental to such activities, and any other sectors that may be agreed upon by all ten ASEAN Member States.<sup>114</sup> During the August 2011 Plenary Meeting of the ASEAN Economic Ministers, the ASEAN Investment Area Council declared that it would aim to complete the remaining Member States’ ratifications of the ACIA before the next ASEAN Summit

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<sup>108</sup> *Id.* art. 24(1).

<sup>109</sup> *Id.* art. 24(2).

<sup>110</sup> *Id.* art. 24(3).

<sup>111</sup> *Id.* arts. 25(1) to 25(5).

<sup>112</sup> As of this writing, the ASEAN Secretariat reports that Member States such as Brunei Darussalam (Sept. 9, 2009), Cambodia (Oct. 17, 2009), Laos (Nov. 27, 2009), Malaysia (Aug. 5, 2009), through an Instrument of Notification, Myanmar (Aug. 6, 2009), through a Notification Letter), Philippines (Apr. 2, 2009), and Singapore (Aug. 12, 2009), through a Notification Letter), have ratified the ACIA. See status of ratifications of all ASEAN treaties, including the ACIA, in <http://www.asean.org/Ratification.pdf> (last visited June 15, 2011).

<sup>113</sup> ASEAN Comprehensive Investment Agreement 2009, art. 48(1), *available at*: <http://www.aseansec.org/documents/FINAL-SIGNED-ACIA.pdf> (last visited June 15, 2011) (hereinafter ACIA).

<sup>114</sup> ACIA arts. 3(1) to 3(4).

Meeting in November 2011.<sup>115</sup>

The ACIA is designed to “create a free and open investment regime in ASEAN in order to achieve the end goal of economic integration under the AEC (ASEAN Economic Community)”.<sup>116</sup> The ACIA recognizes “the different levels of development within ASEAN especially the least developed Member States which require some flexibility including special and differential treatment as ASEAN moves toward a more integrated and interdependent future”.<sup>117</sup> Such special and differential treatment to the newer ASEAN Member States, namely, Cambodia, Laos, Myanmar, and Vietnam, refer to technical assistance in investment policies and promotion, commitments in areas of interest to these States, and the recognition that “commitments by each newer ASEAN Member State may be made in accordance with its individual stage of development”.<sup>118</sup> Implementation of the ACIA falls under the responsibility of the ASEAN Investment Area Council, which provides policy guidance, oversight, coordination, review of ACIA implementation, and reports to and informs the ASEAN Economic Ministers (AEM) on the implementation and operation of the ACIA.<sup>119</sup>

Similar to the COMESA Agreement, the ACIA also permits ASEAN Member States to submit their respective Reservations Lists to the ASEAN Secretariat, “for the endorsement of the AIA Council within 6 months after the date of signing of [the] Agreement”.<sup>120</sup> These Reservations Lists refer to existing measures maintained by a Member State, either at the central, regional, or local level of government, to which the obligations under Article 5 (National Treatment) and Article 8 (Senior Management and Board of Directors) will not apply.<sup>121</sup> Within 12 months from the submission of the Reservation List, the ASEAN Member State concerned may “adopt any measures or modify any of its reservations made...for prospective applications to investors of any other Member States and their investments, provided that such measures or modification shall not adversely affect any existing investors and investments”.<sup>122</sup>

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<sup>115</sup> ASEAN Aims to Complete Investment Agreement before November, Xinhua News, Aug. 11, 2011, *available at*: <http://english.cri.cn/6966/2011/08/11/2743s653055.htm> (last visited Aug. 15, 2011).

<sup>116</sup> ACIA, *supra* note 113, art. 1.

<sup>117</sup> *Id.* at Preamble, ¶ 2 in relation to art. 2(f) (“grant special and differential treatment and other flexibilities to Member States depending on their level of development and sectoral sensitivities”).

<sup>118</sup> *Id.* art. 23.

<sup>119</sup> *Id.* art. 42(3).

<sup>120</sup> *Id.* art. 9(2).

<sup>121</sup> *Id.* art. 9(1).

<sup>122</sup> *Id.* art. 10(1).

Also fairly similar to the COMESA Investment Agreement are the transparency obligations of the ASEAN Member States under the ACIA, which require them to: (1) “promptly and at least annually inform the ASEAN Investment Area (“AIA”) Council of any investment-related agreements or arrangements which it has entered into and where preferential treatment was granted”; (2) “promptly and at least annually inform the AIA Council of the introduction of any new law or of any changes to existing laws, regulations or administrative guidelines, which significantly affect investments or commitments of a Member State under [the] Agreement”; (3) “make publicly available, all relevant laws, regulations and administrative guidelines of general application that pertain to, or affect investments in the territory of the Member State”; and (4) “establish or designate an enquiry point where, upon request of any natural person, juridical person or any other Member State, all information relating to the measures required to be published...may be promptly obtained”.<sup>123</sup>

Perhaps somewhat unpredictably, the ACIA contains more detailed provisions than the COMESA Agreement; it permits ASEAN Member States to alter their mode and degree of compliance with substantive obligations, presumably for reasons of ensuring host State control over public policies most directly involved in economic development. Member States may prevent or delay transfers “through the equitable, non-discriminatory, and good faith application of its laws and regulations” in various matters, such as “bankruptcy, insolvency, or the protection of the rights of creditors”, “issuing, trading, or dealing in securities, futures, options, or derivatives”, “financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities”, among others.<sup>124</sup> It is also recognized that Member States can impose restrictions on capital transactions “where, in exceptional circumstances, movements of capital cause, or threaten to cause, serious economic or financial disturbance in the Member State concerned.”<sup>125</sup> These restrictions must be: (1) “consistent with the Articles of Agreement of the International Monetary Fund”; (2) “not exceed those necessary to deal with the circumstances”; (3) “temporary and shall be eliminated as soon as conditions no longer justify their institution or maintenance”; (4) “promptly be notified to the other Member States”; (5) “applied such that any one of the other Member States is treated no less favourably than any other Member State or non-Member State”; (6) “applied on a national treatment basis”; and (7) “avoid unnecessary damage to investors and covered investments, and the commercial, economic, and financial interests of the other Member States”.<sup>126</sup> The ACIA also contains an extensive and detailed

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<sup>123</sup> *Id.* art. 21 (1).

<sup>124</sup> *Id.* art. 13(3).

<sup>125</sup> *Id.* art. 13(4)(c).

<sup>126</sup> *Id.* art. 13(5).

provision permitting ASEAN Member States to “adopt or maintain restrictions on payments or transfers related to investments”, in the event of “serious balance-of-payments and external financial difficulties or threats thereof”.<sup>127</sup> The ACIA explicitly recognizes “that particular pressures on the balance-of-payments of a Member State in the process of economic development may necessitate the use of restrictions to ensure, inter alia, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development”.<sup>128</sup> The ACIA also appears to permit States to exempt conservation or sustainable development measures from the coverage of the ACIA, since “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures... relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”.<sup>129</sup>

### C. 2009 ASEAN-China Investment Agreement

The 2009 ASEAN-China Investment Agreement (“ASEAN-China Agreement”) entered into force on 1<sup>st</sup> January 2010.<sup>130</sup> Barely a year after its coming into force, China’s direct investment into ASEAN countries has grown to US\$ 2.57 billion, while direct investment from ASEAN countries to China reached US\$ 6.32 billion, accounting for a 37.5% increase in trade volume between China and ASEAN countries, making ASEAN countries “a major source of investment for China”.<sup>131</sup> The ASEAN-China Agreement seeks to “promote investment flows and to create a liberal, facilitative, transparent and competitive investment regime in ASEAN and China”.<sup>132</sup> It builds on the 2002 Framework Agreement on Comprehensive Economic Cooperation between ASEAN and China, which recognized “the different stages and pace of development among the Parties and the need for special and differential treatment and flexibility for the newer ASEAN Member States of Cambodia, Lao PDR, Myanmar and Viet Nam”.<sup>133</sup>

The 2009 ASEAN-China Agreement does not apply national treatment

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<sup>127</sup> *Id.* art. 16(1).

<sup>128</sup> *Id.* art. 16(1).

<sup>129</sup> *Id.* art. 17(1)(f).

<sup>130</sup> ASEAN–China Investment Agreement, *supra* note 10.

<sup>131</sup> China’s direct investment to ASEAN countries reaches \$2.57b, Xinhua News, China, Mar. 2, 2011, *available at*: [http://www.chinadaily.com.cn/business/2011-03/02/content\\_12104984.htm](http://www.chinadaily.com.cn/business/2011-03/02/content_12104984.htm) (last visited Aug. 15, 2011).

<sup>132</sup> ASEAN–China Investment Agreement, *supra* note 10, art. 2.

<sup>133</sup> *Id.* Preamble, ¶ 3. See also Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the People’s Republic of China, November 2002, *available at*: <http://www.asean.org/13196.htm> (last visited Aug. 15, 2011).

(Article 4) and most-favoured-nation treatment (Article 5) to “existing or new non-conforming measures maintained or adopted”, as well as the “continuation or amendment” of such measures.<sup>134</sup> Similar to the ACIA, the ASEAN-China Investment Agreement also permits a host State to “prevent or delay a transfer through the equitable, non-discriminatory and good faith application of its laws and regulations”, such as those involving “bankruptcy, loss of ability or capacity to make payments, or protection of the right of creditors”; “non-fulfilment of the host Party’s transfer requirements in respect of trading or dealing in securities, futures, options or derivatives”; and “financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities”, among others.<sup>135</sup> The Agreement also permits Parties to impose restrictions on capital transactions “in exceptional circumstances”, when “movements of capital cause, or threaten to cause, serious economic or financial disturbance in the Party concerned, provided such restrictions do not affect the rights and obligations of the Parties as members of the WTO”.<sup>136</sup>

Parties are also permitted to “adopt or maintain restrictions on investments, including payments or transfers related to such investments”, where there is a “serious balance of payments and external financial difficulties or threat thereof”, borne out of the recognition that “particular pressures on the balance of payments of a Party in the process of economic development may necessitate the use of restrictions to ensure, inter alia, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development”.<sup>137</sup> The Agreement also contains conditions nearly identical to the ACIA in relation to measures safeguarding balance of payments, general exceptions for public policy concerns, and security exceptions.<sup>138</sup> The detailed transparency provisions in the ASEAN-China Agreement are likewise similar to those in the ACIA.<sup>139</sup>

As may be seen from the foregoing, these recent trade-based IIAs incorporate development concerns through measures other than the gatekeeping function of the *Salini* test. The international right to development is arguably operationalized in more concrete ways than the *Salini* test, to the extent that the innovations in these treaties enable developing countries to obtain access to transparent information on investment regulation and protection; retain vital policy discretion for areas crucial to development and sensitive areas of regulation vital to the

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<sup>134</sup> *Id.* art. 6(1).

<sup>135</sup> *Id.* art. 6(3).

<sup>136</sup> *Id.* art. 10(5).

<sup>137</sup> *Id.* art. 11(1).

<sup>138</sup> *Id.* arts. 11(2), 16 and 17.

<sup>139</sup> *Id.* art. 19.

process of economic development; and permit developing countries to exclude, differentiate, or qualify their mode and degree of compliance with treaty obligations in areas of administrative and statutory regulation deemed vital to economic development.

#### V. THE INTERNATIONAL RIGHT TO DEVELOPMENT AS AN IIA REALITY

Transposing the international right of development into the reality of functioning international investment treaties is admittedly, quite a difficult conceptual merger between a well-established “third-generation” international human rights norm, and the specialized treaty norms governing international investment. The experience of international investment adjudication illustrates one such concrete difficulty in attempting to use development as a norm to determine the meaning of covered “investments” within investment treaties and Article 25 of the ICSID Convention. As shown in this article, the *Salini* standard does not provide a coherent definition of economic development, and reduces arbitral tribunals to little more than armchair economists hazarding estimates of a given investment’s contribution to a host State’s economic development. The practical effect of the *Salini* test, judging from the outcomes of arbitrations where the test has been asserted, is for arbitrators to adopt an expansive view of “contributions to a host State’s economic development”, to the point that virtually no economic activity, transaction, or operation can be ruled out or excluded by the *Salini* test. The nullified findings of the sole arbitrator in *Malaysia Historical Salvors* remains somewhat of a cautionary tale for future arbitral tribunals seeking to define and delimit the parameters of what truly consists a “contribution to a host State’s economic development”. While the aim of preserving the balance of investment protection and host State development is laudable, it is more than likely that the inherent imprecision and subjectivities of the *Salini* test would not be the most advisable way of achieving this balance.

As seen from the nature, history, and scope of the international right of development alongside the practice of development formulations and innovations in recent trade-based IIAs, it is argued that the international right of development can instead be a workable and vital aspect of contemporary investment treaty design. While the viability of these innovations remains to be tested in the future, when ripe controversies arise in relation to the State’s use of such development-driven innovations and mechanisms, they may be tentatively assessed and scrutinized, especially in relation to how they are monitored and reviewed by the trade-based institutions and bodies that are responsible for the coordinated implementation of these new IIAs. While the majority of arbitral tribunals rightly deny “contribution to the host State’s economic development” as a strict condition for treaty coverage and jurisdiction – instead treating the same as a

descriptive characteristic or feature of investment – the international right of development arguably appears to be more specifically deployed for the emerging regimes created under the new trade-based IIAs, in a manner more aligned with the nature of implementation envisaged for the international right of development. These new trade-based IIAs provide for other feasible gateways for the international right of development, which, (and perhaps more so than its current jurisdictional gatekeeping role) concretely support the inherent reciprocity of the host State's economic development and protection of investors in international investment law.