What Constitutes an Investment and Who Decides?
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Like most complex legal instruments, BITs and multilateral treaties or chapters in Free Trade Agreements regulating investment usually include provisions setting out agreed definitions of key terms. Among those definitions, most BITs contain, in addition to an *ejusdem generis* formula, a descriptive list of the types of economic transactions the parties will consider “investments” which will come within the jurisdiction *ratione materiae* of the dispute-resolving modalities afforded to the investor and will, accordingly, benefit from the protections of the treaty. One of those dispute-resolving modalities, until now the most frequently invoked, is the International Centre for the Settlement of Investment Disputes (ICSID).

The ICSID Convention does not, itself, define investment. The relevant part of the opening sentence of its Article 25(1) says, simply, that “[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment.” For some time, scholars speculated about whether Article 25(1) contained its own inherent limits which the parties could not exceed by agreement, regardless of the putative breadth of their consent. In other words, whether, within Article 25(1), the word “investment” imposed a limit on the competence of every ICSID tribunal, such that certain economic transactions between a foreign entity and a host state, which the parties had made subject to their BIT, could, nonetheless, not qualify for protection under the ICSID Convention.

A number of related questions are actually bundled here: The first is whether there is a core meaning to investment or, put differently, whether there is an objective difference or a compelling general policy or, short of that, some institutional reason for distinguishing between “trade” and “investment,” such that only “investment” disputes are arbitrable in ICSID. This question will present itself when cases come directly to ICSID without reliance on a BIT. The second is whether the tribunals and arbitrators should be the gatekeepers for keeping “non-investment” claims out of ICSID or whether the signatories to BITs should be trusted to do this for themselves. A third, essentially constitutive question is whether ICSID, as a system, has any interest at all in restricting the types of claims which states have agreed are arbitrable under its auspices or whether ICSID may or should simply leave this to the parties.
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Until 1997, all of this remained largely academic. Earlier tribunals had considered the definition of “investment” on their own initiative but no respondent state objected to ICSID jurisdiction, in those terms, on the ground that that the underlying transaction did not meet the definition of an “investment” under Article 25(1). Since then, however, such objections have proliferated. The analysis in the Fedax award, as elaborated by the Salini tribunal, remains the most comprehensive response to this type of objection and purports to provide a general modus operandi for tribunals required to decide whether a transaction which may qualify as an investment under a relevant BIT meets the requirements of ICSID Article 25(1).

In Fedax, a corporation had acquired promissory notes from Venezuela indirectly, by way of endorsement; Venezuela contended that the absence of a direct relationship between the parties, the lack of actual investment in the territory of the host country and the lack of transfer of long-term capital meant that Fedax’s economic transaction did not constitute an investment within the meaning of Article 25(1). The tribunal rejected this argument, finding, instead, that promissory notes qualified as an investment. In the final paragraphs of Fedax, the tribunal, relying on an academic definition of “investment,” which had been offered by Professor Schreuer, concluded that the “basic features of an investment have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State’s development.” The tribunal concluded that these elements were easily satisfied in the case before it, for “the very existence of a dispute as to payment of the principle and interest” evidenced that the investor had taken a risk. The requirement that the loans should contribute to development was satisfied by the destination of the loans: they were for the public use of the Government of Venezuela.

To arrive at this conclusion, the tribunal first examined the BIT. The Netherlands—Venezuela BIT defined investment broadly and specifically included the transaction in question. But that apparently, was not dispositive, for rather than simply assuming that the BIT, as the lex specialis, resolved the matter, the tribunal proceeded to look for any guidance as to an “objective” definition of investment the ICSID Convention might provide.

1 Fedax v. Republic of Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, (July 11, 1997).
2 Id. para. 43.
3 Fedax, supra note 1, at para. 40.
4 Id. at para. 41.