المعهد العالي للقضاء
HIGHER JUDICIAL INSTITUTE

مجلة الدراسات الفقهية والقانونية

مجلة علمية محكمة متخصصة (ربع سنوية)
يصدرها المعهد العالي للقضاء
سلطنة عُمان

في هذا العدد:

مجلة الدراسات الفقهية والقانونية

مجلة علمية محكمة متخصصة (ربع سنوية)
يصدرها المعهد العالي للقضاء – سلطنة عُمان

المراسـلات

ترسل البحوث إلى
رئيس هيئة التحرير
على البريد الإلكتروني للمجلة:
hji.journal@hji.edu.om

العنوان
المعهد العالي للقضاء
ص.ب : 330
الرمز البريدي : 611
نزوى - سلطنة عُمان

أرقام الهواتف
هاتف : 25432601 (00968)
فاكس : 25431127 (00968)

الموقع الإلكتروني للمعهد:
www.hji.edu.om

ISSN

Print: 2706-882X
Online: 2789-3294

قواعد النشر في مجلة الدراسات الفقهية والقانونية

أولاً- مواصفات البحوث المقدمة للنشر:

تقبل المجلة نشر البحوث التي تمتاز بالعمق والأصالة، والتي تقدم إسهاماً علمياً في مجال الشريعة أو القانون أو القضاء، سواء المكتوبة باللغة العربية أو الإنجليزية، وفي جميع الأحوال يجب مراعاة ما يأتي:

1. أن يرفق مع البحث ملخصين أحدهما باللغة العربية، والآخر باللغة الإنجليزية، بشرط ألا يزيد كل ملخص عن صفحة واحدة، وأن يُذيّل بعدد خمس كلمات مفتاحية.
2. أن تحتوي الصفحة الأولى من البحث على عنوان البحث، واسم الباحث أو (الباحثين)، وجهة عمل الباحث أو (الباحثين) باللغتين العربية والإنجليزية.
3. ألا يكون البحث المقدم للنشر قد نُشر أو قُدم للنشر في مجلة أخرى أو في مؤتمر علمي أو في أي جهة أخرى، وألا يكون مستلاً من كتاب منشور أو رسالة ماجستير أو دكتوراه، وعلى الباحث أن يقدم إقراراً خطياً بذلك مرفقاً ببحثه مع الطلب الخاص بنشر البحث.
4. أن يتحلى الباحث بالأمانة العلمية أثناء كتابة بحثه، والمجلة غير مسؤولة عن أي مخالفة لأصول الأمانة العلمية في أي بحث منشور بها.
5. أن يلتزم الباحث بالأصول العلمية المتعارف عليها في إعداد البحوث والدراسات العلمية، ومن ذلك التقديم للبحث، وتحديد أهدافه، ومنهجيته، والخطة المتبعة في كتابته، وتنسيق أقسامه، والتوثيق الكامل للمراجع، وإدراج خاتمة تتضمن خلاصة ما توصل إليه الباحث من نتائج، وأهم التوصيات التي انتهى إليها، ويُذيّل البحث بقائمة تشمل المصادر والمراجع التي استعان بها الباحث في إعداد البحث مرتبة أبجدياً.
6. أن يكون البحث مكتوباً بواسطة جهاز الحاسب الآلي بصيغة (Word Document)، وبصيغة (PDF).
7. ألا تقل عدد صفحات البحث عن 20 صفحة من حجم (A4)، وبحد أقصى 50 صفحة.
8. يشترط في البحوث المكتوبة باللغة العربية أن تكون بخط (Simplified (Arabic، بحجم (14) بالنسبة إلى المتن، وبالخط نفسه بحجم (12) بالنسبة إلى الإشارات المرجعية (الهوامش)، أما البحوث المكتوبة باللغة الإنجليزية فيشترط أن تكون بخط (Times New Roman)، بحجم (14) بالنسبة إلى المتن، وبالخط نفسه بحجم (12) بالنسبة إلى الإشارات المرجعية (الهوامش).
9. تثبت الإشارات المرجعية (الهوامش) في أسفل كل صفحة، وبتسلسل متصل.
10. لا تقبل البحوث غير المدققة لغوياً سواء المكتوبة باللغة العربية أو الإنجليزية.

ثانياً- إجـــراءات النـــشـــر:

1. يتم إرسال البحث على عنوان البريد الإلكتروني الخاص بالمجلة: hji.journal@hji.edu.om
2. جميع المراسلات الموجهة من الباحث إلى المجلة تكون باسم رئيس التحرير.
3. يرفق الباحث نبذة تعريفية عنه مع الطلب الخاص بنشر البحث.
4. تخضع البحوث الواردة إلى المجلة لفحص نسبة الاقتباس العلمي فيها، والتي يجب ألا تتجاوز (15%)، بحيث لا يقبل البحث إذا تجاوز الاقتباس هذه النسبة.
5. يحيل رئيس التحرير البحوث الواردة للمجلة إلى لجنة النشر العلمي؛ لفحصها والتأكد من عدم تعارضها مع أهداف المجلة، واتخاذ قرار بشأن إحالتها إلى التحكيم من عدمه، فإذا ارتأت اللجنة صلاحية البحث للعرض على المحكمين، عينت محكّمين اثنين له، يكونان من ذوي الاختصاص بموضوع البحث.
6. تعامل البحوث الواردة إلى المجلة مع تقارير المحكّمين المتعلقة بها بسرية تامة.
7. يرسل مدير التحرير إلى الباحث صورة من تقريري المحكّمين مشفوعة بإشعار موجه إليه من رئيس التحرير بإجراء التعديلات المطلوبة على البحث إن وجد، وذلك طبقاً لما ورد في التقريرين، على أن يتضمن الإشعار تحديد مدة للباحث لتنفيذ هذه التعديلات لا تتجاوز شهراً من تاريخ استلامه للخطاب.
8. يرسل الباحث إلى رئيس التحرير نسخة من بحثه بعد إجراء التعديلات المطلوبة مشفوعة بتقرير منه، يبين فيه التعديلات التي أجراها على البحث، وذلك خلال المدة المحددة.
9. يحيل رئيس التحرير نسخة البحث بعد التعديلات التي أجراها الباحث إلى لجنة النشر العلمي، مشفوعة بصورة من تقرير الباحث، وصورة من تقريري المحكّمين؛ للتأكد من إجراء الباحث للتعديلات المطلوبة كاملة، فإذا تيقنت اللجنة من ذلك، أحالت البحث إلى رئيس التحرير تمهيداً للقيام بإجراءات الطباعة والإصدار.
10. يتولى مدير التحرير مراسلة الباحث بإشعار موجه إليه من رئيس التحرير يفيد قبول البحث للنشر أو عدم قبوله، وذلك بناء على قرار لجنة النشر العلمي.
11. إذا قُبل البحث للنشر، يحصل الباحث على إفادة معتمدة من المجلة بقبول البحث للنشر، ترسل له عبر البريد الإلكتروني.
12. يُزود الباحث بنسخة ورقية واحدة من عدد المجلة المنشور فيه بحثه، إضافة إلى مستلة من بحثه ترسل له عبر البريد الإلكتروني.
13. البحث المنشور في المجلة لا يجوز إعادة نشره في أي مجلة أخرى، أو في أي مؤتمر علمي.
14. إضافة إلى إصدار أعداد المجلة في مطبوعات ورقية، يجوز لهيئة التحرير نشر هذه الأعداد على الموقع الإلكتروني للمعهد عبر شبكة المعلومات الدولية (الإنترنت).

محتويات العدد

كلمة العدد

الحمد لله وكفى والصلاة والسلام على النبي المصطفى، وعلى آله ومن وفى

وبعد،،،،،

القراء الأعزة: هدفت مجلة الدراسات الفقهية والقانونية من أول عدد لها إلى تزويد قارئيها بالبحوث المعمقة مع مراعاة الأصالة والجدّة في الطرح مع مواضيع الساحة الفقهية والقانونية، مزينة بوشاح المنهجية البحثية المتبعة في المجالات الفقهية والقانونية وبما يتوافق مع رسالة المجلة وأهدافها.

ومن هذا المنطلق فإن المجلة تؤكد حرصها على الاختيار الأنسب والهادف للبحوث ذات الابتكار التي تخدم المجالات الفقهية والقانونية والقضائية من أجل نشر ثقافة قانونية مجتمعية؛ لتعميق دور البحث العلمي القانوني في المجتمع.

وفي هذا العدد الذي بين أيديكم تطالعنا ..... بحوث علمية قانونية قام عليها باحثون متخصصون فلهم منا وافر الشكر وفائق التقدير والاحترام على مشاركتهم، لتسهم هذه البحوث في البناء المعرفي القانوني، ولترفد المكتبة الفقهية والقانونية بالجديد.

والحمد لله رب العالمين

د. نبهان بن راشد المعولي

رئيس هيئة التحرير

عميد المعهد العالي للقضاء

20) International Centre for Settlement of Investment Disputes Case No. ARB/05/10, Malaysian Historical Salvors (note 100).
21) International Centre for Settlement of Investment Disputes Case No. ARB/10/7, Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay (Decision on Jurisdiction).
22) International Centre for Settlement of Investment Disputes Case No. ARB/98/2, Victor Pey Casado and President Allende Foundation v. Republic of Chile (Award of May 8 2002 in French) 41 §113.
23) International Centre for Settlement of Investment Disputes Case No. ARB/03/08, L.E.S.I. (note 96) §14.
24) International Centre for Settlement of Investment Disputes Case No. ARB/07/20, Saba Fakes v. Republic of Turkey (Award of July 14 2010) 36 §111.
25) International Centre for Settlement of Investment Disputes Case No. ARB/06/5, Phoenix Action, Ltd. v. The Czech Republic (Award of April 15 2009) 34 §85.
26) International Centre for Settlement of Investment Disputes Case No. ARB/06/5, Phoenix Action, Ltd. v. The Czech Republic (Award of April 15 2009).
27) International Centre for Settlement of Investment Disputes Case No. ARB/97/4, Ceskoslovenska Obchodni Banka, A.S.(CSOB) v. The Slovak Republic (Decision of the Tribunal on Objections to Jurisdiction of May 24 1999).
28) International Centre for Settlement of Investment Disputes Case No. ARB/03/11, Joy Mining (note 97).

11) International Centre for Settlement of Investment Disputes Case No. ARB/05/18, Ioannis Kardassopoulos v. The Republic of Georgia (Decision on Jurisdiction of July 6 2007) 32-33 §116,117.
12) International Centre for Settlement of Investment Disputes Case No. ARB/03/08, Consortium Groupement L.E.S.I.-DIPENTA v. République algérienne démocratique et populaire (Award of January 10 2005) §13,14 and 15.
13) International Centre for Settlement of Investment Disputes Case No. ARB/03/11, Joy Mining Machinery Limited v. The Arab Republic of Egypt, (Award of August 6 2004) (2004) 19 ICSID Review, 486.
14) International Centre for Settlement of Investment Disputes Case No. ARB/03/29, Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (Decision on Jurisdiction of November 14 2005) 35 §130 and 37 §138.
15) International Centre for Settlement of Investment Disputes Case No. ARB/05/10, Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia (Award on Jurisdiction of May 17 2007) 23 §73-74, 35 §107 and 49 §146.
16) International Centre for Settlement of Investment Disputes Case No. ARB/08/8, Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine (Decision on Jurisdiction of March 8 2010) 59 §129.
17) International Centre for Settlement of Investment Disputes Case No. ARB/07/16, Alpha Projektholding GmbH v. Ukraine (Award of November 8 2010).
18) International Centre for Settlement of Investment Disputes Case No. ARB/05/22, Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania (Award of July 24 2008).
19) International Centre for Settlement of Investment Disputes Case No. ARB/06/2, Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia (Decision on Jurisdiction of September 27 2012).

- **Cases:**

1) International Centre for Settlement of Investment Disputes Case No. ARB/96/3, Fedax N.V. v. The Republic of Venezuela (Decision on Objection to Jurisdiction of July 11 1997) (1998) 37 International Legal Materials, 1378.
2) International Centre for Settlement of Investment Disputes Case No. ARB/00/4, Salini Costruttori S.p.A., and Italstrade S.p.A. v. Kingdom of Morocco (Decision on Jurisdiction of July 23 2001) (2003) 42 International Legal Materials, 609.
3) International Centre for Settlement of Investment Disputes Case No. ARB/99/7, Mr. Patrick Mitchell v. Democratic Republic of Congo (Decision on the Application for Annulment of the Award of November 1st 2006).
4) International Centre for Settlement of Investment Disputes Case No. ARB/00/4, Salini (note 32).
5) International Centre for Settlement of Investment Disputes Case No. ARB/96/3, Fedax (note 31).
6) International Centre for Settlement of Investment Disputes Case No. ARB/97/4, Ceskoslovenska Obchodni Bank, A.S. (CSOB) v. The Slovak Republic, (Decision of Objection to Jurisdiction of May 24 1999) (1999) ICSID Review, 251.
7) International Centre for Settlement of Investment Disputes Case No. ARB/00/06, Consortium RFCC v. Kingdom of Morocco (Award of December 22 2003) (2003) ICISD Review, 391.
8) International Centre for Settlement of Investment Disputes Case No. ARB/03/11, Joy Mining Machinery Limited v. The Arab Republic of Egypt, (Award of August 6 2004) (2004) 19 ICSID Review, 486.
9) International Centre for Settlement of Investment Disputes Case No. ARB/00/4, Salini (note 32).
10) International Centre for Settlement of Investment Disputes Case No. ARB/04/13, Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt (Decision on Jurisdiction of June 16 2006) 29-29 §91,92.

21) Mavluda Sattorova, ‘From Expropriation to Non-Expropriatory Standards of Treatment: Toward a Unified Concept of an Investment Treaty Breach’ (Dphil thesis, University of Birmingham 2010) 13.
22) Muthucumaraswamy Sornarajah, The International Law on Foreign Investment (Cambridge: Cambridge University Press 2010).
23) Noah Rubbins, "The Notion of Investment in International Investment Arbitration", in ed. Arbitration Foreign Investment Disputes: Procedural and Substantive Legal Aspect, (Kluwer Law International, 2004).
24) Obianuju Chioma Ezejiofor, ‘Domestic courts and international investment arbitral tribunals: nurturing a profitable and symbiotic relationship’ (Dphil thesis, Queen Mary University of London 2014).
25) Omar E. Garcia-Bolivar, ‘Defining an ICSID Investment : Why Economic Development Should be the Core Element’ (Investment Treaty News, 13 April 2012).
26) Peter Muchlinski, Multinational Enterprises and the Law (2nd Ed, Oxford University Press 2007).
27) Rudolph Dolzer and Christoph Schreuer, Principles of international investment law (Oxford: Oxford University Press, 2012) 13.
28) Shokouh Hossein Abadi, ‘Power in Investor-State Arbitration’ (Dphil thesis, King’s College London, University of London 2014).
29) UNCTAD, World Investment Report 2016 (United Nations 2016) xii.
30) Velimir Zivkovic, ‘Contractual Rights As Protected Investments In International Investment Law’ SSRN Electronic Journal, 25.
31) World Bank, ICSID Convention, Regulations and Rules (Washington: ICSID 2006) 43 §22.

10) Fenghua Li, 'The Divergence and Convergence of ICSID and Non-ICSID Abitration' (Dphil thesis, University of Glasgow 2014).
11) Jacob Viner, International Economic: Studies (Glencoe, Illinois: Free Press 1951).
12) Jean Ho,'The Meaning Of 'Investment' In ICSID Arbitrations' (2010) 26 Arbitration International, 634.
13) Jean-Pierre Harb, 'Definition Of Investments Protected by International Treaties : An On-Going Hot Debate' (2011) 26 Mealey's International Arbitration Report, 3.
14) Jonathan Law (ed) A dictionary of Law, 8th edition (Oxford: Oxford University Press, 2013) 348.
15) Joseph M. Boddicker, 'Whose Dictionary Controls?: Recent Challenges to the Term "Investment" in ICSID Arbitration' (2010) 25 (5) American University International Law Review, 1033.
16) Julian Davis Mortenson, 'The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law' (2010) 51 Harvard International Law Journal, 259.
17) Julien Fouret and Dany Khayat, 'International Centre For Settlement Of Investment Disputes (ICSID) Case Law Review' (2013) 12 The Law & Practice of International Courts and Tribunals, 113-161 cited in den Outer (note 20) 11.
18) Krista Nadakavukaren Schefer, International investment law: text, cases and materials (Cheltenham: Edward Elgar Publishing, 2016).
19) Lise Johnson, 'International Investment Agreements: Are their policy aims served by their broad definitions of covered "investors" and "investments"?' [2014] European International Business Academy, 13.
20) Lorenzo Cotula, 'Property rights, negotiating power and foreign investment: An international and comparative law study on Africa' (Dphil thesis, University of Edimburgh

References List

- **Books and Articles:**

1) Alex Grabowski, 'The Definition of Investment under the ICSID Convention: A Defense of Salini' (2014) 15 Chicago Journal of International Law, 297.
2) Andrew Newcombe, 'General Exceptions in International Investment Agreements' (2008) Draft Discussion Paper prepared for BIICL Eight Annual WTO Conference, 1.
3) Campbell McLachlan, Laurence Shore and Matthew Weiniger, International Investment Arbitration: Substantive Principles (Oxford: Oxford University Press, 2007).
4) Christoph Schreuer, The ICSID Convention: A Commentary (Cambridge: Cambridge University Press, 2009).
5) Cornélie Marianne den Outer, 'ICSID Jurisdiction over Sovereign Bonds' (Master's Thesis for the Master International Trade and Investment Law of the University of Amsterdam 2015) 8.
6) Devashish Krishan, 'A Notion of ICSID Investment' (2008) 1 Transnational Dispute Management, 5-7 cited in den Outer (note 20) 11.
7) Emmanuel Gaillard, ''Biwater', Classic Investment Bases: Input, Risk, Duration' (2008) 240 New York Law Journal, 3.
8) Emmanuel Gaillard and Yas Banifatemi, 'Introductory notes to ICSID: Salini Costruttori SPA and Italstrade SPA v. Kingdom of Morocco (Proceeding on jurisdiction)' (2003) 42 International Legal Materials, 606.
9) Felix Okpe, 'Endangered Element of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment, and the Promise of Economic Development in Host States (2014) 13 (2) Richmond Journal of Global Law and Business, 258.

jurisprudence"; indeed, "upsetting decades old doctrine would create unnecessary uncertainty in the area of international investment".(141)

Therefore, this paper recommends that:

1- It is crucial for tribunals to use the "Salini criteria" as an objective test that fixes the outer limits of the meaning of an "investment" because it is the most faithful to both the spirit and letter of the ICSID Convention.(142)

2- This paper also recommends the adoption of the deductive method by the ICSID arbitrators because it avoids the risk of "rendering superfluous" the definition of an "investment" under the Washington Convention.(143)

3- Finally, this paper recommends to not replace the "Salini criteria" with the "double-barrelled test" because the preamble of the Washington Convention is in favour of the fourth element of the objective test that is "a contribution to the host State's economic development", bearing in mind that the objective method would help the Centre to further its objectives and to implement an efficient culture of precedence into its jurisprudence.(144)

---

(141) Grabowski (note 93) 309.
(142) See Gaillard (note 137) 3.
(143) Ibid
(144) See Grabowski (note 93) 308-309.

Indeed, its Article 25(1) –which is related to the Centre's jurisdiction ratione materiae– made the term "investment" a cornerstone of the mechanism of protection related to the investment treaty. However, an objective definition of the concept of "investment" was not given by the Convention's drafters and signatories. This paper concludes that, in practice, the "Salini criteria" constitute an objective test fixing the outer boundaries of the meaning of the term "investment". However, the following must be noted:

1- This test was first introduced in the Fedax case, consecrated in the Salini case, and has been followed in many ICSID arbitration cases. However, this objective test is also considered by tribunals to not be sufficient to cover the broad range of economic activities that investors and States consider to be worth of treaty protection because its application depends on the arbitrators' subjectivity. In other words, the "Salini criteria" are not unanimously adopted by ICSID arbitrators. Thus, they were rejected in many ICSID arbitral cases.

2- Moreover, this objective test is also sometimes replaced with another test: the "the double-barrelled test" by ICSID tribunals. This other test puts the burden on the definition of "investment" included within the relevant BITs and does not rely on some objective criteria of "investment". Notwithstanding, replacing the "Salini criteria" with the "double-barrelled test" is considered by a certain number of scholars as a mistake. As Grabowsky noted, consistent adoption of the "Salini criteria" would allow ICSID to

Also, Harb argued that a harmony between the subjective definition of the relevant BIT and the objective definition of the Washington Convention is difficult to find.[137] That is why a part of academia does not agree with this subjective test. Indeed, for Grabowski, attempting to replace the "objective test" is a mistake because: (1)the ICSID Convention's preamble is in favour of the fourth element of the "Salini criteria" that is "a contribution to the host State's economic development" and (2)the "Salini criteria" would help ICSID to further its goals and to introduce a stronger culture of precedence into its jurisprudence[138].

Grabowski's approach is particularly relevant: the "Salini criteria" contribute more in favour of the enhancement of the security and predictability of the jurisprudence of ICSID than the "double-barrelled test". Also, Gaillard argued that the objective test consecrated by the "Salini criteria" is the most faithful to both the spirit and letter of the Washington Convention.[139] The scholar added that, on the opposite to the subjective test, the objective test avoids the risk of "rendering superfluous" the qualification of an "investment" under the ICSID Convention.[140]

4. Conclusion

It is clear that –within the practice of international investment– the "Salini criteria" strongly contributed as a deductive method attempting to give a true and objective definition of "investment" and responding to the silence of the Washington Convention.

[137] Harb (note 57) 13.
[138] Grabowski (note 93) 308-309.
[139] Emmanuel Gaillard, ''Biwater', Classic Investment Bases: Input, Risk, Duration' (2008) 240 New York Law Journal, 3.
[140] Ibid.

Washington and the BIT; thus, the Centre's jurisdiction ratione materiae lied "on the intersection of two definitions".[131]

It is noteworthy, however, that the case CSOB v The Slovak Republic[132] was the first illustration of a clear adoption of the subjective approach in ICSID jurisprudence. In this case – which was brought under the Czechoslovakia-Slovakia BIT – the arbitrators pointed out that because of the choice of the Convention's drafters to not introduce any limits on the definition of an investment as a concept, "it should be interpreted broadly".[133] However, this subjective test was also subject to criticisms from ICSID arbitrators. Indeed, in the case Joy Mining v. Egypt[134], the arbitrators pointed out that it is not because the Washington Convention has not defined "investment" that anything agreed to by the parties might constitute – under the Convention – an "investment".[135] As Krishan noted, the "double-barrelled test" puts the burden on the definition of the term "investment" included within the relevant BIT; hence, without any boundary to the concept of "investment" in the Washington Convention, the outer limits set by the Convention are de facto very broad.[136]

---

[131] Ibid 29 §74.

[132] International Centre for Settlement of Investment Disputes Case No. ARB/97/4, Ceskoslovenska Obchodni Banka, A.S.(CSOB) v. The Slovak Republic (Decision of the Tribunal on Objections to Jurisdiction of May 24 1999).

[133] Ibid 273 §64.

[134] International Centre for Settlement of Investment Disputes Case No. ARB/03/11, Joy Mining (note 97).

[135] Ibid 11 §49.

[136] Devashish Krishan, 'A Notion of ICSID Investment' (2008) 1 Transnational Dispute Management, 5-7 cited in den Outer (note 20) 11.

particular test constitutes the second step of the subjective test. The combination of these two steps constitutes the "double-barrelled test" as theorised by Schreuer. According to this theory, the tribunal must verify cumulatively (1)if the jurisdiction of the Centre is to be grounded on a treaty including "an offer of consent" from the parties and (2)if the activity constitutes an "investment" under the Article 25(1) of the Convention of Washington.[128] The existence of the subjective approach is justified by the fact that the term "investment" remains ambiguous because of (1) the absence of generally accepted objective criteria of this concept from ICSID jurisprudence; and, (2)the evident dissimilarities between the subjective definitions of this concept provided by BITs.

For Fouret and Khayat, the "double-barrelled test" should be understood as a rule in which "the investment must fit within both definitions of the Convention and BITs" and not as "one definition that constitutes the outer boundaries in which the other definition needs to fit".[129] This approach was adopted in particular ICSID cases. Indeed, in the Phoenix v. The Czech Republic[130] case, the arbitrators adopted the subjective approach and found that the contract constituted an "investment" under the Convention of

[128] Schreuer (note 43) 117.

[129] Julien Fouret and Dany Khayat, 'International Centre For Settlement Of Investment Disputes (ICSID) Case Law Review' (2013) 12 The Law & Practice of International Courts and Tribunals, 113-161 cited in den Outer (note 20) 11.

[130] International Centre for Settlement of Investment Disputes Case No. ARB/06/5, Phoenix Action, Ltd. v. The Czech Republic (Award of April 15 2009).

Thus, the criterion of the "contribution of the host State's economic development" consecrated in the Salini case is more and more disregarded by ICSID arbitrators.(124) Therefore, even though the jurisprudence attempted to establish, in a concrete manner, an "objective" definition of the term "investment" with the adoption of the objective test; the "Salini criteria" are still considered as non-binding indications by ICSID tribunals.

3.2. The "Double-barrelled test", a subjective test and possible alternative to the "Salini criteria" for the ICSID arbitrators

Den Outer explained that, before the quantitative growth of BITs, tribunals usually admitted that the insertion of an ICSID arbitration clause in an international investment contract established – in an implicit manner – the parties' consent on the existence and presence of an "investment" as defined and covered by the Washington Convention's Article 25(1).(125) This way of establishing the parties' consent by only the inclusion of an ICSID arbitration clause forms the first step of the subjective test. Later, with the proliferation of BITs containing both a subjective definition of the term "investment" and an ICSID arbitration clause, the parties' consent to ICSID arbitration was established only when recognising that the dispute was related with an "investment" as defined in the relevant BIT.(126)

In other words, ICSID's competence ratione materiae became dependent upon the establishment of investment under both the respective BIT and the Washington Convention.(127) This

(124) Harb (note 57) 13.
(125) den Outer (note 19) 10.
(126) Ibid.
(127) Harb (note 57) 13.

case."[116] Nevertheless, even if all the items are present, the Centre will still assess their degree as well as nature in consideration of concluding whether, on an examination of a holistic nature, the economic activity in question is an "investment" in accordance with the Washington Convention.[117]

Furthermore, in Pey Casado v. Chile[118] and L.E.S.I – Dipenta v. Algeria[119], the arbitrators took into consideration the fact that is not required to prove that the economic transaction satisfies the condition of "a contribution to the host State's economic development", such prerequisite being implied already in an implicit manner by the three other elements from the "Salini criteria".[120] Nevertheless, in other cases such as Saba Fakes v. Republic of Turkey[121] and Phoenix Act. Ltd. v. Czech Republic[122], the Centre argued that the condition "contribution to development" was not possible to satisfy.[123]

---

[116] Ibid 67 §206.
[117] Ibid.
[118] International Centre for Settlement of Investment Disputes Case No. ARB/98/2, Victor Pey Casado and President Allende Foundation v. Republic of Chile (Award of May 8 2002 in French) 41 §113. For the English version of the excerpt and award, see Emmanuel Gaillard and Yas Banifatemi, Precedent In International Arbitration (1st edition, Juris Publishing, Inc 2008) Annex 4.
[119] International Centre for Settlement of Investment Disputes Case No. ARB/03/08, L.E.S.I. (note 96) §14.
[120] Harb (note 57) 12.
[121] International Centre for Settlement of Investment Disputes Case No. ARB/07/20, Saba Fakes v. Republic of Turkey (Award of July 14 2010) 36 §111.
[122] International Centre for Settlement of Investment Disputes Case No. ARB/06/5, Phoenix Action, Ltd. v. The Czech Republic (Award of April 15 2009) 34 §85.
[123] Ezejiofor (note 12) 59.

"consequence" of a "prosperous and successful investment" but not a "mandatory condition" of an "investment".(111)

Also, in the case Malaysia Historical Salvors v. Malaysia(112), the tribunal – before declining its competence ratione materiae over the foreign investor's economic activity in an operation of marine salvage – made an explicit reference to the "Salini criteria" and argued that the usual objective test consecrated by the "Salini criteria" should not be considered as a "checklist of items" which, if all its boxes are ticked, will immediately qualify an economic activity as "investment."(113) Otherwise, in case of an absence of these items, it would be uncertain to declare whether the economic activity constitutes an "investment" pursuant to the Washington Convention's Article 25(1) or not.(114)

In Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Uruguay(115), the Tribunal viewed that "the four constitutive elements of the Salini list do not constitute jurisdictional requirements to the effect that the absence of one or the other of these elements would imply a lack of jurisdiction. They are typical features of investments under the ICSID Convention, not "a set of mandatory legal requirements". As such, they may assist in identifying or excluding in extreme cases the presence of an investment but they cannot defeat the broad and flexible concept of investment under the ICSID Convention to the extent it is not limited by the relevant treaty, as in the present

(111) Ibid 76 §220.
(112) International Centre for Settlement of Investment Disputes Case No. ARB/05/10, Malaysian Historical Salvors (note 100).
(113) Ibid 35 §106(e).
(114) Ibid.
(115) International Centre for Settlement of Investment Disputes Case No. ARB/10/7, Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay (Decision on Jurisdiction).

Furthermore, it is noteworthy that in some other cases, the arbitrators have explicitly rejected the adoption of the objective test. Indeed, in the case Alpha Projektholding GmbH v. Ukraine[105], the Centre pointed out that the components of the so-called "Salini criteria" – which some arbitrators have put into use cumulatively and mandatorily – are nowhere to be "found" within the Washington Convention's Article 25(1).[106] In this particular case, it was even considered that by applying the test in such a fashion, the previous tribunals have aimed at a "universal definition" of "investment" under the Washington Convention's Article 25(1) despite the fact that the Convention's signatories (as well as drafters) "chose to not have one".[107] Besides, in the Biwater Gauff v. Tanzania[108] case, the tribunal considered that it is preferable to adopt a more pragmatic and flexible approach to the definition of the term "investment" that takes into consideration the criteria consecrated in the Salini case but also every other circumstance of the case.[109]

In addition, in the Quiborax v. Bolivia[110] case, it was stated by the tribunal that the fourth element of the "Salini criteria" (which is "a contribution to the host State's development") can be the

---

[105] International Centre for Settlement of Investment Disputes Case No. ARB/07/16, Alpha Projektholding GmbH v. Ukraine (Award of November 8 2010).
[106] Ibid 109 §311.
[107] Ibid.
[108] International Centre for Settlement of Investment Disputes Case No. ARB/05/22, Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania (Award of July 24 2008).
[109] Ibid 87 §316.
[110] International Centre for Settlement of Investment Disputes Case No. ARB/06/2, Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia (Decision on Jurisdiction of September 27 2012).

3. The insufficiency of the "Salini Criteria" as non-binding indications depending on the arbitrators' subjectivity

The "Salini criteria" are non-binding indications because they stand as an objective test that is not unanimously adopted by ICSID tribunals (3.1) and that is sometimes replaced by a subjective test known by arbitrators and scholars as the "double-barrelled test" (3.2).

3.1. The "Salini criteria", an objective test not unanimously adopted by the ICSID arbitrators

The reliability of the "Salini criteria" was massively disapproved by ICSID arbitrators although they have been explicitly referred to in many cases[101]. Indeed, there have been irregularities in ICSID arbitration's case-law on the adoption of the "Salini criteria" – in order to define objectively an "investment" under the Washington Convention's Article 25(1).[102] The following examples clearly illustrate these irregularities within ICSID jurisprudence. In the case Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine[103], the "Salini criteria" were implicitly rejected by the Centre because it considered that it was not "appropriate" to impose – through jurisprudence – such a compulsory meaning while the Contracting States to the Washington Convention chose not to specify one.[104]

---

[101] Harb (note 57) 11.
[102] Ezejiofor (note 12) 59.
[103] International Centre for Settlement of Investment Disputes Case No. ARB/08/8, Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine (Decision on Jurisdiction of March 8 2010) 59 §129.
[104] Ibid 59 §129.

de Nul v. Egypt[95], Kardassopoulos v. Georgia[96], L.E.S.I.-DIPENTA v. Algeria[97], Joy Mining v. Egypt[98], Bayindir v. Pakistan[99] , and Malaysian Historical Salvors v. Malaysia[100]. Therefore, the Salini case is a significant milestone in the evolution of the jurisprudence of the Centre concerning foreign investments' protection and the outer boundaries of the term "investment" under the Washington Convention. Notwithstanding, despite this important contribution, the "Salini criteria" remain insufficient to contain the broad range of economic activities that investors and States consider to be worth of treaty protection because they only constitute non-binding indications toward ICSID tribunals.

---

[95] International Centre for Settlement of Investment Disputes Case No. ARB/04/13, Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt (Decision on Jurisdiction of June 16 2006) 29-29 §91,92.

[96] International Centre for Settlement of Investment Disputes Case No. ARB/05/18, Ioannis Kardassopoulos v. The Republic of Georgia (Decision on Jurisdiction of July 6 2007) 32-33 §116,117.

[97] International Centre for Settlement of Investment Disputes Case No. ARB/03/08, Consortium Groupement L.E.S.I.- DIPENTA v. République algérienne démocratique et populaire (Award of January 10 2005) §13,14 and 15.

[98] International Centre for Settlement of Investment Disputes Case No. ARB/03/11, Joy Mining Machinery Limited v. The Arab Republic of Egypt, (Award of August 6 2004) (2004) 19 ICSID Review, 486.

[99] International Centre for Settlement of Investment Disputes Case No. ARB/03/29, Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (Decision on Jurisdiction of November 14 2005) 35 §130 and 37 §138.

[100] International Centre for Settlement of Investment Disputes Case No. ARB/05/10, Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia (Award on Jurisdiction of May 17 2007) 23 §73-74, 35 §107 and 49 §146.

– that were observed in the Salini case – which, for him, were "typical to most of the (investment) operations".[88] For Schreuer, these features are the following: a certain "regularity of return and profit", a certain "duration" of the projects, the "risk assumption" by both sides, and a "substantial" commitment.[89] He added, regarding the feature as to the significance of the operation "for the host State's development", that it should be understood as a part of both the "purpose" and "object" of the Convention.[90] Also, Zivkovic argued that most of the features introduced by the academia as well as Fedax were considered and followed by the Centre in the Salini case, excepted the one requiring "certain regularity of return and profit".[91]

In addition, Den Outer noted that three elements were extrapolated by the arbitrators from the case law after having looked at past international investment law decisions.[92] For Grabowski, it is after analysis of the preamble of the Washington Convention which mentions the importance of "the role of international investment in the host States' economic development" that the arbitrators added the fourth criterion.[93] In practice, "The Salini criteria" have been adopted in a great number of ICSID arbitral cases. Indeed, according to the academia[94], this test has been applied consistently by arbitrators and was referred to explicitly in numerous decisions such as Jan

---

[88] Schreuer (note 43) 128.
[89] Ibid.
[90] Ibid.
[91] Zivkovic (note 72) 25.
[92] den Outer (note 19) 13-14.
[93] Alex Grabowski, 'The Definition of Investment under the ICSID Convention: A Defense of Salini' (2014) 15 Chicago Journal of International Law, 297.
[94] Harb (note 57) 9.

ICSID lacked ratione materiae jurisdiction for the reason that, under Moroccan law – which was the applicable law under the BIT – a construction contract for a highway could not constitute an investment but a contract for services (contrat d'entreprise).[79]

The tribunal, in order to establish its competence ratione materiae, decided to develop explicitly an objective test that could qualify the Italian companies' work as an "investment". ICSID's ruling brought four criteria of the concept of "investment" covered by the Washington Convention's Article 25(1): "(1)a contribution of money or assets[80], (2)a certain duration of performance of the contract[81], (3)an element of risk[82] and (4)a contribution to the economic development of the host State[83]." This approach consecrated the so-called "Salini criteria". The arbitrators considered them to be cumulative[84]. However, they stated that for this specific case, the tribunal assessed them individually.[85]

The Salini case was very commented on by the academia. Indeed, with respect to the reasoning of the tribunal, Mortenson argued that the arbitrators followed Schreuer's approach that was elaborated in the first edition[86] of its seminal treatise on the ICSID Convention.[87] Indeed, Schreuer mentioned some features

---

[79] Emmanuel Gaillard and Yas Banifatemi, 'Introductory notes to ICSID: Salini Costruttori SPA and Italstrade SPA v. Kingdom of Morocco (Proceeding on jurisdiction)' (2003) 42 International Legal Materials, 606.
[80] International Centre for Settlement of Investment Disputes Case No. ARB/00/4, Salini (note 32) 622 §52.
[81] Ibid.
[82] Ibid.
[83] Ibid.
[84] den Outer (note 19) 14.
[85] International Centre for Settlement of Investment Disputes Case No. ARB/00/4, Salini (note 32) 622 §52.
[86] See Schreuer (note 41) 140.
[87] Mortenson (note 38) 271-272.

Professor Schreuer's writings.[72] Furthermore, in practice, the definition of "investment" contained within the United States 2012 Model BIT took up the features of "investment" posited in the Fedax case, although without directly referring to the case.[73] These basic features of "investment" introduced in Fedax will be consecrated in the Salini[74] case as the "Salini criteria".

2.2.2. The consecration of the objective test in the Salini case

It is in the case Salini v. Morocco[75] that ICSID jurisprudence consecrated a four-element objective test. The facts of this important case were the following: Two companies from Italy, Salini Costruttori and Italstrade (hereinafter Salini), jointly submitted and won a bid issued by the Société Nationale des Autoroutes du Maroc, a state-controlled body for the construction of a fifty kilometres highway.[76] Thirty-six months later, the two companies completed the highway, going four months beyond the schedule stipulated and agreed in their contract.[77] The Moroccan authorities refused to pay for the highway.[78] As a consequence, after exhausting the domestic channels, Salini submitted the dispute to ICSID arbitration claiming that "the contract constituted an investment pursuant the stipulations of the 1990 BIT between Italy and Morocco". The government of Morocco alleged that

---

[72] Velimir Zivkovic, 'Contractual Rights As Protected Investments In International Investment Law' SSRN Electronic Journal, 25. This article is also available in Oxford Student Legal Studies Paper No. 08/2011.
[73] McLachlan, Shore and Weiniger (note 42) 172.
[74] International Centre for Settlement of Investment Disputes Case No. ARB/00/4, Salini (note 32).
[75] Ibid.
[76] Ibid 610 §2.
[77] Ibid 610 §4.
[78] Ibid 610 §5.

Netherland-Venezuela BIT as well as ICSID Convention – as they did not constitute portfolio investments or FDIs.(65) Indeed, the respondent affirmed that investments in an economic context mean "the laying out of property or money in business projects/ventures, so that it can generate an income or revenue", a feature that the financial instruments did not have.(66) The tribunal concluded that "the promissory notes stand as a proof of a loan", for the reason that the commitment of capital was for "a certain duration"(67), "relatively substantial"(68), and involving an "element of risk" as well as "regular profit and return by means of interest payments"(69). In other words, the tribunal introduced for the first time an objective test related to the meaning of "investment" in a form of a set of "basic features".

Ezejiofor noted that a significant connection between "the host State's development and the economic transaction" was also established by the arbitrators in this case.(70) In addition, according to Zivkovic, the arbitrators have followed(71) in their decision

(65) Ibid 1381 §18-19.
(66) Ibid 1381 §19.
(67) Ibid 1387 §43.
(68) Ibid.
(69) Ibid.
(70) Ezejiofor (note 12) 58. The scholar noted as well that there were similar findings with respect to this significant connection in some other cases such as International Centre for Settlement of Investment Disputes Case No. ARB/97/4, Ceskoslovenska Obchodni Bank, A.S. (CSOB) v. The Slovak Republic, (Decision of Objection to Jurisdiction of May 24 1999) (1999) ICSID Review, 251; International Centre for Settlement of Investment Disputes Case No. ARB/00/06, Consortium RFCC v. Kingdom of Morocco (Award of December 22 2003) (2003) ICISD Review, 391 and International Centre for Settlement of Investment Disputes Case No. ARB/03/11, Joy Mining Machinery Limited v. The Arab Republic of Egypt, (Award of August 6 2004) (2004) 19 ICSID Review, 486.
(71) Schreuer (note 41) 140.

in their BITs as they wish. However, to provide a more uniform and predictable rule to them, hallmarks on the definition of "investment" had to be established by ICSID tribunals. Most precisely, it is the important Salini v Morocco[63] case that consecrated these outer limits of the term "investment" along with an objective test: the "Salini criteria".

2.2. The consecration of the "Salini-criteria" by ICSID jurisprudence as an objective test fixing the outer boundaries of the definition of "investment"

Before consecrating the "Salini Criteria" in the Salini case (2.2.2), the objective test with respect to the definition of "investment" was first introduced by ICSID jurisprudence in the Fedax case (2.2.1).

2.2.1. The introduction of the objective test in the Fedax case

For the first time, ICISID arbitration dealt with the notion of "investment" using an objective view in the Fedax[64] case. The facts of this case were the following: Fedax, a Dutch company, was operating in the Republic of Venezuela. In 1996, a claim was filed by the company before ICSID because of a dispute over promissory notes issued by the Venezuelan government and assigned by means of endorsement to the corporation. Consequently, objections were raised by the Republic of Venezuela to the jurisdiction of the Centre on the ground that the financial instruments were not "investments" under both the

(63) International Centre for Settlement of Investment Disputes Case No. ARB/00/4, Salini (note 32).
(64) International Centre for Settlement of Investment Disputes Case No. ARB/96/3, Fedax (note 31).

"immovable and movable property" or "every kind of assets") may cause confusion on whether the transaction qualifies within one of the categories of investments protected by the treaty.(57) In addition, some other BITs include a limited list of investments and exclude certain forms of assets from this list. By way of illustration, one may cite the provisions concerning the notion of "investments" contained within the Cana da 2004 Model BIT.(58) A scholar noted that this method reduces the risk of the "demeaning" of the term "investment" by the express exclusion of all assets that do not constitute "authentic" investments.(59)

Also, it is noteworthy that the term "investment" may also be drafted in a detailed manner. It is the case of the provisions related to the notion of "investments" included within the United States 2012 Model BIT(60). This Model BIT chose a different approach to other models currently used(61): the definition is itemized and accompanied by explanatory references that give information on the type of authorisation, licences, and debt that may form an "investment". In addition, this Model BIT also stipulates that the notion of "investment" does not involve any judgement or order entered in administrative or judicial action.(62) Therefore, in practice, the parties are free to define the notion of "investment"

(57) Jean-Pierre Harb, 'Definition Of Investments Protected by International Treaties : An On-Going Hot Debate' (2011) 26 Mealey's International Arbitration Report, 3.
(58) See Section A – Article 1 (Definitions) of the Agreement between Canada and […] for the Promotions and Protection of Investments (2004 Canada Model BIT) 4-5.
(59) Harb (note 57) 4.
(60) See the Treaty between the Government of the United States of America and the Government of [Country] concerning the Encouragement and Reciprocal protection of Investments (United States Model BIT) 3-4.
(61) McLachlan, Shore and Weiniger (note 42) 171.
(62) Harb (note 57) 3.

One may admit that the current practice of international investment confirms the theory of these scholars. Indeed, the definition of the term "investment" can take various forms within BITs.(51) It may be defined by the parties in a very broad way as in the France 2006 Model BIT(52), United Kingdom 2008 Model BIT(53), Germany 2008 Model BIT(54) , or the Netherlands 2004 Model BIT(55). These treaties provide a very wide definition of the term "investment" – by starting with a broad sentence and then giving a list of nearly five specific classifications of "rights".(56) Harb, who commented on these Model BITs, argued that the use of broad generic notions in the French BIT (for example

(51) According to Noah Rubbins, the notion of "investment" in international investment arbitration could be classified into three categories for the purposes of defining investment: those that contain an "illustrative list" of assets (broad definition of investment); an "exhaustive list" (which sets out elements that are not to be considered investment); and "hybrid list" (which defines investment broadly, and include non-exhaustive list of forms an investment may take). See Noah Rubbins, "The Notion of Investment in International Investment Arbitration", in ed. Arbitration Foreign Investment Disputes: Procedural and Substantive Legal Aspect, (Kluwer Law International, 2004).

(52) See Article 1 (1) of the Draft Agreement between the Government of the Republic of France and the Government of the Republic of […] on the Reciprocal Promotion and Protection of Investments (2006 France Model BIT) 2.

(53) See Article 1 of the Draft Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of […] for the Promotion and Protection of Investments (2008 UK Model BIT).

(54) See Article 1 of the Treaty between the Federal Republic of Germany and […] concerning the Encouragement and Reciprocal Protection of Investments (2008 Germany Model BIT) 2-3.

(55) See Article 1 of the Agreement on Encouragement and Reciprocal Protection of Investments between […] and the Kingdom of the Netherlands (2004 Netherlands Model BIT) 2.

(56) McLachlan, Shore and Weiniger (note 42) 171.

word "investment".[43] This sentence states: "the need for international co-operation for economic development and the role of private international investment therein".[44]

Furthermore, this theory on the interpretation of the ICSID Convention's preamble was cited in the case Patrick Mitchell v Democratic Republic of Congo[45]. Indeed, for the tribunal, the "only possible indication" of "an objective meaning"[46] related to the term "investment" was "the contribution to economic development".[47] In addition, Schreuer noted as well that Rule 2 of the "Institution Rules" confirmed that "investment" has an "objective definition" that does not depend on "the disposition of the parties".[48] Indeed, the Schreuer pointed out that even though the parties have a lot of "freedom" in defining their business relationship as "investment", they cannot describe as "investment" an activity that is "squarely out of the concept's objective meaning".[49] Notwithstanding, certain scholars do not agree with Schreuer. Indeed, for McLachlan, Shore, and Weiniger, the limits of what qualifies as an "investment" fall to be given by the consent of the parties within a broad area of discretion.[50]

---

[43] Christoph Schreuer, The ICSID Convention: A Commentary (Cambridge: Cambridge University Press, 2009) 116-117.
[44] See the first sentence of the preamble of the ICSID Convention (note 17).
[45] International Centre for Settlement of Investment Disputes Case No. ARB/99/7, Mr. Patrick Mitchell v. Democratic Republic of Congo (Decision on the Application for Annulment of the Award of November 1st 2006).
[46] Ibid 13 §31.
[47] Felix Okpe, 'Endangered Element of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment, and the Promise of Economic Development in Host States (2014) 13 (2) Richmond Journal of Global Law and Business, 258.
[48] Schreuer (note 43) 117.
[49] Ibid.
[50] McLachlan, Shore and Weiniger (note 42) 164.

Indeed, for the drafters and the signatories of the Convention, an economic activity, enterprise, or asset will be subject to the jurisdiction of the Centre only if it qualifies as an "investment" under the Washington Convention's Article 25(1).[38] Therefore, the claimants' procedural as well as substantive guarantees under multilateral and bilateral treaties solely depend on this qualification.[39] However, the precise scope of the term "investment" is not provided by the Convention's Article 25(1). Indeed, according to the Executive Directors' Report: "Given the means by which the Member States can make known in advance, if they so want, the types of disputes that they would (or not) consider bringing before ICSID, and the important condition related to consent by the parties; no attempt was made to define the notion of investment".[40]

It is noteworthy that Schreuer demonstrated[41] that many distinct views with respect to the meaning of "investment" were debated by the Executive Directors; however, no decision was unanimously adopted at the end.[42] Nevertheless, Schreuer also argued that a "possible indication" was given by the first sentence of the Convention's preamble on "an objective meaning" of the

---

[38] Julian Davis Mortenson, 'The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law' (2010) 51 Harvard International Law Journal, 259.

[39] Sattorova (note 36) 13.

[40] For the exact and detailed wording of the Report related to this matter; see World Bank (note 34) 44 §27.

[41] Christoph Schreuer, The ICSID Convention: A Commentary (Cambridge: Cambridge University Press, 2001) 121-125.

[42] Campbell McLachlan, Laurence Shore and Matthew Weiniger, International Investment Arbitration: Substantive Principles (Oxford: Oxford University Press, 2007) 164.

"Salini-criteria" –as a response to the silence of the Convention of Washington– developed an objective test fixing the outer boundaries of the legal definition of the term "investment" (2.2).

2.1. The absence of a definition of "investment" in the ICSID Convention and the presence of various definitions of "investment" in BITs

Usually, the legal notion of "jurisdiction" is defined by academia as "the competence of a court to make a certain order or decide and hear a case"[33]. Moreover, according to the Executive Directors' Report on the Washington Convention, the notion of "jurisdiction of the Centre" introduced within the ICSID Convention should be understood as "the limits" within which the Centre's facilities will be available and the Convention's provisions will apply for the proceedings of arbitration and conciliation.[34] Most precisely, it is the Convention's Article 25(1) that limits the jurisdiction ratione materiae of ICSID to "any legal disputes arising directly out of an investment"[35]. In other words, the term "investment" forms the cornerstone of the mechanism of protection related to investment treaties.[36] Hence, if there is no "investment", the ICSID arbitrators will not have the competence to address the case.[37]

---

[33] Jonathan Law (ed) A dictionary of Law, 8th edition (Oxford: Oxford University Press, 2013) 348.
[34] See World Bank, ICSID Convention, Regulations and Rules (Washington: ICSID 2006) 43 §22.
[35] Boddicker (note 15) 1034.
[36] Mavluda Sattorova, 'From Expropriation to Non-Expropriatory Standards of Treatment: Toward a Unified Concept of an Investment Treaty Breach' (Dphil thesis, University of Birmingham 2010) 13.
[37] Schefer (note 3) 69.

Republic of Venezuela[31] case (hereinafter Fedax case) and then consecrated by the Salini v Morocco [32] case (hereinafter Salini case).

The third section will try to show that despite this contribution, the "Salini criteria" only constitute –for ICSID tribunals– non-binding indications related to the outer boundaries of the term "investment". This section will explain that the objective test (with the so-called "Salini criteria") is still not unanimously adopted by ICSID tribunals; hence, it is also sometimes replaced by a subjective test (known as the "double-barrelled test") by ICSID arbitrators. This section will then be followed by concluding remarks.

2. The contribution of the "Salini Criteria" as a deductive method aiming at an objective definition of "investment"

The legal notion, as well as the concept of "investment", is referred to, within the Washington Convention, as an investor-State claim's ratione materiae element. Therefore, trying to show that the "Salini criteria" contribute as a deductive method aiming at an objective definition of the concept of "investment" implies, first, to explain that the legal definition of the notion of "investment" – which is absent from the Convention of Washington – has various forms in BITs (2.1); and, secondly, to demonstrate that the consecration by ICSID arbitrators of the

[31] International Centre for Settlement of Investment Disputes Case No. ARB/96/3, Fedax N.V. v. The Republic of Venezuela (Decision on Objection to Jurisdiction of July 11 1997) (1998) 37 International Legal Materials, 1378.

[32] International Centre for Settlement of Investment Disputes Case No. ARB/00/4, Salini Costruttori S.p.A., and Italstrade S.p.A. v. Kingdom of Morocco (Decision on Jurisdiction of July 23 2001) (2003) 42 International Legal Materials, 609.

commentators and arbitrators.[29] With this problem in mind, this paper seeks to show that the development of the objective approach (with the so-called "Salini criteria") on a definition of "investment" is considered by ICSID arbitrators to not be sufficient to cover the economic activities that investors and States deem to be worth of treaty protection.

1.2 Scope of this paper:

The scope of this paper will cover the analysis of certain Model BITs, ICSID case-law, and scholarly contributions in respect of the legal meaning as well as interpretation of the notion of "investment" within the range of international investment law and provisions of the ICSID Convention.

Thus, this paper will be organised into three main parts. Following the introduction, the second section will try to show that the "Salini criteria" constitute – for ICSID tribunals – a deductive method[30] aiming at an objective definition of the concept of "investment". In this section, the absence of an objective definition of the term "investment" in the Convention of Washington and the presence of various subjective definitions of the notion of "investment" within BITs will be explained.

Then, the contribution of the "Salini criteria" as an objective test fixing the outer boundaries of the definition of the term "investment" will be discussed. It will be shown that this test was first introduced by ICISD's arbitrators in the Fedax N.V. v The

---

[29] Jean Ho,'The Meaning Of 'Investment' In ICSID Arbitrations' (2010) 26 Arbitration International, 634.

[30] The concept of "deductive method" can be understood as "a method of reasoning by which (1) theorems (or general principles) are deduced from postulates and definitions or (2) concrete consequences or applications are deducted from general principles (as well as theorems)".

"international investment treaties" such as BITs[24], by allowing the foreign investor to directly bring claims against the host State by way of conciliation or arbitration procedures. Usually, it is a panel of three arbitrators that constitutes ICSID arbitral tribunals; most precisely, the disputing parties appoint these arbitrators on an "ad hoc[25] basis".[26]

Moreover, the Convention restricts the jurisdiction of the Centre to "any legal disputes arising directly out of an "investment" between a Contracting State […] and a national of another Contracting State".[27] Nevertheless, it is noteworthy that a clear and precise definition of an "investment" is nowhere to be found within the Washington Convention. Indeed, Garcia-Bolivar argued that an express decision was made by the drafters of the Convention to not introduce such a definition.[28] As result, an objective approach of the term "investment" (composed by a set of hallmarks known as the "Salini criteria") was consecrated by ICSID jurisprudence.

1.1 The problem of the study:

The adoption of the above-mentioned criteria related to an objective meaning of "investment" by ICSID tribunals keeps producing opposing views and divergent opinions from both

---

[24] Boddicker (note 15) 1033-1034.

[25] The Latin notion of ad hoc is understood as "Done or created for a particular purpose as necessary".

[26] Lise Johnson, 'International Investment Agreements: Are their policy aims served by their broad definitions of covered "investors" and "investments"?' [2014] European International Business Academy, 13.

[27] See ICSID Convention (note 17), Article 25 (1).

[28] Omar E. Garcia-Bolivar, 'Defining an ICSID Investment : Why Economic Development Should be the Core Element' (Investment Treaty News, 13 April 2012).

disputes between host States and foreign investors.[15] The Centre was established under a multilateral treaty[16] – the ICSID Convention[17] (or Washington Convention) dating back to 1965 and ratified by 154 Contracting States[18] – which came into force in 1966.[19] Nevertheless, this international instrument does not contain substantive standards of protection for investments; hence, "participating" in the Washington Convention does not equal "consenting" to arbitration.[20] In other words, consent to arbitration under the Washington Convention is given by the host State (or State entity) and the foreign investor in the form of an agreement between them.[21] Thus, ICSID is just a procedural framework provided by the "Convention on the Settlement of Investment Disputes" within which the investment disagreements between foreign investors and host States can be resolved by conciliation[22] or arbitration[23]. This framework facilitates the "settlement of disputes" that arise "out of investments" covered by

---

[15] Joseph M. Boddicker, 'Whose Dictionary Controls?: Recent Challenges to the Term "Investment" in ICSID Arbitration' (2010) 25 (5) American University International Law Review, 1033.
[16] Dolzer and Schreuer (note 11) 13.
[17] The Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States (adopted on March 18th 1965 and entered into force on October 14th 1966) (1975) 575 United Nations Treaty Series, 159 (The ICSID Convention or the Washington Convention).
[18] See the Centre's website: <https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx> accessed 03 March 2020.
[19] Cornélie Marianne den Outer, 'ICSID Jurisdiction over Sovereign Bonds' (Master's Thesis for the Master International Trade and Investment Law of the University of Amsterdam 2015) 8.
[20] Dolzer and Schreuer (note 11) 13.
[21] Ibid 13, 254.
[22] See ICSID Convention (note 17), Chapter III: Article 28 to 35.
[23] See ICSID Convention (note 17), Chapter IV: Article 36 to 55.

agreements and treaties provides significant protection to foreign investors[10].

Indeed, these international instruments (1) restrain the host States' incentives to nationalise or expropriate by the means of an "explicit engagement" from them stating that nationalisation or expropriation would be followed by a "payment of an effective, adequate and prompt compensation", and (2) subject the host States to international investment arbitration".[11] It is noteworthy that this dispute settlement mechanism takes away the disagreement between "host States and foreign investors" from the jurisdiction of domestic courts.[12]

In particular, the World Bank – with the objective to promote investment in developing States and to assure the protection of the foreign investors' rights[13] – operates the "International Centre for Settlement of Investment Disputes" (hereinafter the Centre or ICSID). It is recognised as one of the principal fora[14] for settling

---

[10] Fenghua Li, 'The Divergence and Convergence of ICSID and Non-ICSID Abitration' (Dphil thesis, University of Glasgow 2014) 1.

[11] For more details on the various provisions included within BITs, see Rudolph Dolzer and Christoph Schreuer, Principles of international investment law (Oxford: Oxford University Press, 2012) 13.

[12] Obianuju Chioma Ezejiofor, 'Domestic courts and international investment arbitral tribunals: nurturing a profitable and symbiotic relationship' (Dphil thesis, Queen Mary University of London 2014) 30.

[13] For more details on the aims of the World Bank toward foreign investment, see "Legal Framework for the Treatment of Foreign Investment, Volume II: Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment" prepared by the World Bank Group in 1992.

[14] The Latin notion of "fora" is the plural form of "forum" which means a Tribunal or Court.

direct investments (FDIs)[4] and portfolio investments[5] and are protected through international investment treaties. The parties of these treaties are generally represented by two different actors: (1) public actors that hold political power and pursue public interest (which are embodied by host States or State entities), and (2) private actors that hold economic power and pursue private interests (which are principally embodied by multinational enterprises).[6] The relationship between these two different actors is governed by bilateral investment treaties[7] (hereinafter BITs), international investment agreements[8] (hereinafter IIAs), and other international instruments. This "network" [9] of international

[4] The concept of "FDI" is understood as a transfer of assets (that may be intangible or tangible) "from one State to another" for use in the recipient State in order to "create wealth under the owner of the assets' partial or total control"; see Muthucumaraswamy Sornarajah, The International Law on Foreign Investment (Cambridge: Cambridge University Press 2010) 8.

[5] The concept of "portfolio investment" is understood as a movement of money from one State for the aim of purchasing shares in a business functioning or established in another State; see Sornarajah (note 4) 8.

[6] Shokouh Hossein Abadi, 'Power in Investor-State Arbitration' (Dphil thesis, King's College London, University of London 2014) 11.

[7] BITs are international instruments – that are legally binding – between two States in which they each agree reciprocally to abide by the terms stipulated by the treaty in their relationships with the other State's investors; see Peter Muchlinski, Multinational Enterprises and the Law (2nd Ed, Oxford University Press 2007), 117.

[8] Certain scholars use IIAs as a reference to specific multilateral and sectoral agreements (such as the Energy Charter Treaty) "that include investment obligations" and to regional and bilateral Free Trade Agreements (FTAs) "that include foreign investment obligations" as well as Bilateral Investment Treaties (BITs); see Andrew Newcombe, 'General Exceptions in International Investment Agreements' (2008) Draft Discussion Paper prepared for BIICL Eight Annual WTO Conference, 1.

[9] Statistically, according to the United Nations Conference on Trade and Development (UNCTAD), the end of 2015 was marked with a total number of 3,304 concluded international investment agreements; also, nearly "150 economies were engaged in negotiating at least 57 new international investment agreements" by the end of May 2016; see UNCTAD, World Investment Report 2016 (United Nations 2016) xii.

1. Introduction

In 1951, Viner wrote: "As I read the evolution of international law under modern capitalism, as revealed from 1600 to 1914 in the detailed provisions of international treaties, one of its outstanding characteristics was its attempt to build legal protection for property and for private enterprise from the power activities of foreign states both in times of peace and in times of war".(1) Certainly, the scholar described the significance – through time and history– of the protection of foreign investments (particularly, the foreign investors' property rights(2)) in a specific area of law recognised as "international investment law".

Indeed, according to the literature, one of the principal objectives of this important field of law is to ensure the "foreign property's protection by the government of the State in which it is found (understood as "host State" in opposition to the notion of "home State" that covers the State of which the foreign investor is the national)".(3) These foreign properties are comprised of foreign

(1) Jacob Viner, International Economic: Studies (Glencoe, Illinois: Free Press 1951) 218 cited in Nicolàs Marcelo Perrone, 'The International Investment Regime and Foreign Investor's Rights: Another View of a Popular Story' (Dphil thesis, The London School of Economics and Political Science 2013) 12.

(2) It is noteworthy that "property rights" are defined as "legal relations among persons with respect to the control of valued resources"; See Lorenzo Cotula, 'Property rights, negotiating power and foreign investment: An international and comparative law study on Africa' (Dphil thesis, University of Edimburgh 2009) 8.

(3) Krista Nadakavukaren Schefer, International investment law: text, cases and materials (Cheltenham: Edward Elgar Publishing, 2016) 2.

تعريف "الاستثمار" في ضوء اتفاقية تسوية منازعات الاستثمار (الأكسيد) (قضية ساليني)

وضاح بن طالب بن يحيى الهنائي*

الدكتور/ صالح بن حمد بن محمد البراشدي*

الملخص:

اتفاقية تسوية منازعات الاستثمار "اتفاقية الأكسيد" لم تعرف المقصود بالاستثمار، وكمحاولة لتفسير المقصود بها ظهرت هناك ما يسمّى "بمعايير ساليني" والتي تم التطرق إليها في القضية القضائية المشهورة والمعروفة باسم "ساليني". إلاّ أن السوابق القضائية للمركز الدولي لتسوية منازعات الاستثمار والاتفاقيات الثنائية للاستثمار يشيران إلى أن "معايير ساليني" قد لا تكون كافية لتغطية مجموعة واسعة من الأنشطة الاقتصادية التي تعتبرها الدول والمستثمرون جديرة بالحماية من قِبل اتفاقية الأكسيد. وفي ضوء غياب تعريف واضح للاستثمار في الاتفاقية، اتبع محكِّمي مركز الأكسيد في تناولهم للمنازعات المعروضة عليهم أحد اتجاهين: الأول يحدد مسألة الاستثمار وفقاً لمعايير موضوعية (أصول المستثمر، مدة المشروع، المخاطر التي يتحمَّلها المستثمر)، والأخر يحدد اتجاهه وفقاً لمعايير ذاتية بناءً على اتفاق الطرفين الذي يُبيّن نطاق الأنشطة الاقتصادية الاستثمارية. تسعى هذه الورقة إلى تحليل معنى الاستثمار في ضوء الاتفاقيات الثنائية للاستثمار، وقضايا مركز الأكسيد، والاتجاهات الفقهية في هذا الشأن، وكذلك في ضوء ما ورد باتفاقية تسوية منازعات الاستثمار.

الكلمات المفتاحية: اتفاقية تسوية منازعات الاستثمار – الاستثمار – قضية ساليني.

---

* باحث قانوني بدائرة الشؤون القانونية – جامعة السلطان قابوس.

* أستاذ مشارك بكلية الحقوق – جامعة السلطان قابوس.

The Path Towards Defining "Investment" under the ICSID Convention: The Salini Criteria

Wadhah Talib Yahya ALHINAI *
Dr. Saleh Hamed Mohammed ALBARASHDI *

Abstract:
The problem of the lack of a definition of 'investment' in the ICSID Convention has been partially solved through the development of the so-called 'Salini criteria'. However, the ICSID case-law and the most recent BITs show that the 'Salini criteria' may no longer be sufficient to cover the wide range of economic activities that States and investors deem to be worth of treaty protection. In the absence of a definition of "investment" in the Convention, the cases decided by ICSID arbitrators have followed one of two trends: objective, which determines the investment question according to objective criteria (investor assets, project duration, risk borne by the investor), and subjective, based on the parties' agreement to qualify an economic operation as an investment. This paper provides a certain assessment of the Model BITs, ICSID case law, and scholarly contributions in respect of the legal meaning as well as interpretation of the notion of "investment" within the range of international investment law and provisions of the ICSID convention.

Keywords: ICSID Convention – Investment – Salini Case.

* Legal Researcher at Legal Affair Department, Sultan Qaboos University.
* Associate Professor at Law College, Sultan Qaboos University.

المعهد العالي للقضاء

HIGHER JUDICIAL INSTITUTE

Journal Of Jurisprudence And Legal Studies

Specialized & Refereed Scientific Journal (Quarterly)
Issued by the Higher Judicial Institute
Sultanate of Oman

In This Issue:

Ninth Issue - Jumada Al-Thani 1443 - January 2022