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Commentary

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[Editor's Note: Jean-Pierre Harb is a Partner at the Paris office of Baker & McKenzie. He practices in the area of international arbitration. The author would like to thank Julie Fabreguettes for her valuable assistance in the preparation of this article. Copyright © 2011 by Jean-Pierre Harb. Responses are welcome.]

The definition of the term investment has become one of the most controversial issues in investment treaty arbitration, in particular as it relates to jurisdiction. In the absence of an investment, the jurisdiction of the arbitral tribunal fails *ratione materiae*. Hence, in most cases the arbitral tribunal will address the question whether the claimant has made a protected investment at the outset of the proceeding.

Settling this question is relatively complex, as the definition of "investment" contained in multilateral and bilateral investment treaties ("BITs") scarcely gives a straightforward answer. It is thus incumbent on arbitrators to decide whether the investment at hand fulfils the criteria set forth in the treaties and interpreted by previous decisions or new criteria to be developed for the situation.

The requirements in terms of the burden of proof regarding the existence of an investment at the jurisdictional stage will first be exposed (I), before turning to the definitions of investment contained both in BITs and in the ICSID Convention and analyzing the assets characterized as investments under these instruments by arbitral tribunals (II).

I. The Claimant Must Establish The Existence Of A Protected Investment

It is generally accepted that the claimant must bear the burden of proving that it owns a protected investment in the Host State.[1] Arbitration rules generally provide that the party alleging a fact or submitting a claim bears the burden of proving the fact or substantiating the claim. The first controversy relating to the existence of a protected investment will often arise regarding the standard of proof. Under Article 24(1) of the UNCITRAL rules *"[e]ach party shall have the burden of proving the facts relied on to support his claim or defence."*

Numerous tribunals acting under both the ICSID[2] and UNCITRAL[3] arbitration rules have applied this principle. In the words of the UNCITRAL Tribunal in *Saluka v. Czech Republic*: *"[a]s the party asserting that the Tribunal has jurisdiction to hear and determine the counterclaim which it seeks to bring before the Tribunal, the Respondent carries the burden of establishing that jurisdiction exists."*[4] The onus is therefore on the party asserting an affirmative jurisdiction claim.

At the jurisdictional stage, the burden of proof is twofold. If jurisdiction rests on the existence of certain facts, the claimant has to prove them, whereas facts that make up the merits of the case – i.e. the facts capable of being analyzed as a breach of the BIT- need only be established *prima facie*.[5] In *Phoenix*, the arbitral tribunal clearly distinguished between the facts that only need to be established prima facie and those on which the jurisdiction of the tribunal rests. For the latter, *"it seems evident that the tribunal has to decide on those facts, if contested between the parties, and cannot accept the facts as alleged by the claimant. The tribunal must take into account the facts and their interpretation as alleged by the claimant, as well as the facts and their interpretation as alleged by the respondent, and take a decision on their* *existence and proper interpretation. To take a simple example, if under a BIT entered into by Italy, a tribunal only has jurisdiction if the claimant is an Italian investor and if, at the jurisdictional level, a claimant asserts that he is Italian, and the respondent alleges that he is not, the tribunal cannot simply accept the facts as asserted by the claimant and confirm its jurisdiction, but it has to make a decision in order to verify whether or not it has jurisdiction ratione personae over the investor, based on his Italian nationality"*.[6] This test is nearly unanimously applied by arbitral tribunals.[7]

Hence, in order to establish the existence of an investment protected under a BIT the party assessing that an arbitral tribunal has jurisdiction would first have to prove that an investment has been made at a certain time and by an investor of a certain nationality and, second, to establish prima facie that the facts he alleges amount to a violation of the applicable BIT.

II. The Absence Of A Uniform Definition Of "Investment"

Many countries – mainly those of the OECD[8] - have formulated Bilateral Investment Treaty "models". The initial aim behind the adoption of such treaties - which also explains their quick proliferation - was to secure a degree of consistency in those countries' treaties to attract investors from contracting states. Regarding the definition of "investment" under BITs, the tendency was to broaden the definition in order to widen the protection offered by those instruments. The category of assets falling within the definition of "investment" determines indeed the scope *ratione materiae* of the protection under a particular treaty.

This approach has been heavily criticized. Twenty years ago, in light of the multiplication of ICSID clauses in BITs providing such broad definitions of investment, Professor Juillard noted that: "*The interweaving between ICSID jurisdiction and BITs has became so close that one day, by the interplay of the inclusion of ICSID clauses in these treaties . . . the Centre will be in a position to examine legal disputes relating to foreign asset status, which do not present any link, of any sort, with an investment*."[9] In other words, the liberal trend promoting BITs and ICSID arbitration would lead to an extension of ICSID jurisdiction to economic operations without any connection to a "real" investment.[10] Hence, a legitimate question arose as to whether BITs enable the construction of a "core meaning" of the notion of investment or whether they contribute to the demeaning of this notion.

Concerning the notion of investment in BITs, substantial differences must be highlighted between the main models, either in the coverage of the protected investments or the terms used in such BITs. The definitions of investment contained in a selection of three models of BITs- the French, the US, and the Canadian- will first be analyzed (A). A review of the content given by arbitral tribunals to the notion of "investment" in the context of certain specific transactions will follow (B). The definition of "investment" in light of Article 25 of the ICSID Convention will then be addressed (C), before visiting the attempts to find an "objective" definition through the so-called *Salini test* (D) and the recent alternative to the *Salini test*, known as the "double barrelled" test (E).

A. Definition Of Investment In BITs

Most BITs define the term "investment" broadly. An all-encompassing declaration that the term shall include "every kind of asset" is usually followed by a detailed but non-exhaustive enumeration of specific categories of assets. The French and the US models of BITs are a good illustration.

The 2004 US Model:

"investment" means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

a. *an enterprise;*

b. *shares, stock, and other forms of equity participation in an enterprise;*

c. *bonds, debentures, other debt instruments, and loans;*[1]

d. *futures, options, and other derivatives;*

e. *turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;*

f. *intellectual property rights;*

g. *licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;*[2, 3] and

h. *other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.*

The 2006 French Model:
1. The term "investment" means every kind of assets, such as goods, rights and interests of whatever nature, and in particular though not exclusively:

a. *movable and immovable property as well as any other right in rem such as mortgages,liens, usufructs, pledges and similar rights;*

b. *shares, premium on share and other kinds of interest including minority or indirect forms, in companies constituted in the territory of one Contracting Party;*

c. *title to money or debentures, or title to any legitimate performance having an economic value;*

d. *intellectual, commercial and industrial property rights such as copyrights, patents, licenses, trademarks, industrial models and mockups, technical processes, know-how, tradenames and goodwill;*

e. *business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources, including those which are located in the maritime area of the Contracting Parties.*

Not only is the list of assets in this definition non-exhaustive, but the use of broad generic terms, such as "every kind of assets", "movable and immovable property", "claims to money" etc., can complicate whether the transaction falls within one of the categories of investments protected by the BIT.

In the 2004 US Model, the definition is more detailed and accompanied by explanatory footnotes unlike the French Model. These footnotes provides indications on the forms of debt, licences and authorisation which are likely to constitute an investment (footnotes 1 and 2),[11] and also clarifies that the term "investment" does not include an order or judgment entered in a judicial or administrative action (footnote 3).[12]

Contrarily to the 2006 French Model and the 2004 US Model, the Canadian Model of BIT adopted a finite list of investment and clearly excludes some types of assets of this list.

The 2004 Canadian Model:
investment means:

(I) an enterprise;

(II) an equity security of an enterprise;

(III) a debt security of an enterprise

(i) where the enterprise is an affiliate of the investor, or

(ii) where the original maturity of the debt security is at least three years,

but does not include a debt security, regardless of original maturity, of a state enterprise;

(IV) a loan to an enterprise

(i) where the enterprise is an affiliate of the investor, or

(ii) where the original maturity of the loan is at least three years,

but does not include a loan, regardless of original maturity, to a state enterprise;

(V)

(i) notwithstanding subparagraph (III) and (IV) above, a loan to or debt security issued by a financial institution is an investment only where the loan or debt security is treated as regulatory capital by the Party in whose territory the financial institution is located, and

(ii) a loan granted by or debt security owned by a financial institution, other than a loan to or debt security of a financial institution referred to in (i), is not an investment;

for greater certainty:

(iii) a loan to, or debt security is sued by, a Party or a state enterprise thereof is not an investment; and

(iv) a loan granted by or debt security owned by a cross-border financial service provider, other than a loan to or debt security issued by a financial institution, is an investment if such loan or debt security meets the criteria for investments set out elsewhere in this Article;

(VI) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

(VII) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraphs (III) (IV) or (V);

(VIII) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and

(IX) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or

(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;

but investment does not mean,

(X) claims to money that arise solely from

(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party, or

(ii) the extension of credit in connection with a commercial transaction, such a trade financing, other than a loan covered by subparagraphs (IV) or (V); and

(XI) any other claims to money,

that do not involve the kinds of interests set out in subparagraphs (I) through (IX);

The Mexico/Korea BIT (2002) adopted the same approach: whereas article 1 provides a non-exhaustive definition of investment, it also provides a negative definition of investment: *". . . but investment does not include, a payment obligation from, or the granting of a credit to a Contracting Party or to a state enterprise. . . but investment does not mean, claims to money that arise. . . from: i) commercial contracts for the sale of goods or services by an investor in the territory of a Contracting Party to a company or a business of the other Contracting Part, or ii) the extension of credit in connection with commercial transaction. . . iii) any other claims to money that do not involve the kinds of interests set out in subparagraphs a) through e)."*

This approach obviously reduces the risk of the "demeaning" of the notion of investment expressed by Professor Juillard by expressly excluding all assets which do not constitute "authentic" investments.

Finally, adding to the complication to establish the categories of assets falling within BITs' definition of "investment", the question of the legality of the investment has somehow added another condition to the definition. The French model is an example of BIT which contains in its definition of "investment" the condition of validity of the investment, not only *ab initio* but after the investment is made. Indeed, after the list of assets that may constitute investment, the French treaty model provides that: *"it is understood that those investments are investments which have already been made or may be made subsequent to the entering into force of this Agreement, in accordance with the legislation of the Contracting Party on the territory or in the maritime area of which the investment is made. Any alteration of the form in which assets are invested shall not affect their qualification as investments provided that such alteration* *is not in conflict with the legislation of the Contracting Party on the territory or in the maritime area of which the investment is made."*

The plain meaning of this extract is that investments which would become illegal in the territory of the host state are disqualified from the protection of the BIT. This approach, which enables to address illegalities that arise after the establishment of an investment– due to a change of the host stage legislation or due to the investor's acts-, finds support in the language of many BITs.[13]

In a recent award, applying the requirements of legality of article 1(g) of the BIT between Canada and Costa Rica, the arbitral tribunal found that – even though the deposit of funds was an "asset" under the BIT[14]- no investment has been made within the BIT since the transaction was not in accordance with the law of Costa Rica.[15] On this basis the arbitral tribunal rejected its jurisdiction over the claim.

Yet, arbitral tribunals remain divided on the application of the "legality" requirement. It is suggested in some decisions that the investor must comply with the law of the host state at the time the investment was made.[16] Contrarily, some tribunals have considered that the legality of the investment during the life of the investment is a merit issue.[17]

In *Saba Fakes v. Republic of Turkey* the arbitral tribunal considered that, as the ICSID Convention is "*neutral*" on the question of legality of the investment, the issue of whether an investment has been made in compliance with the law of the host state should only be addressed by arbitral tribunals assessing their jurisdiction when the applicable BIT imposes such a legality requirement. According to the *Saba Fakes* tribunal: *"As far as the legality of investments is concerned, this question does not relate to the definition of investment? provided in Article 25(1) the ICSID Convention and in Article 1(b) of the BIT. In the Tribunal's opinion, while the ICSID Convention remains neutral on this issue, bilateral investment treaties are at liberty to condition their application and the whole protection they afford, including consent to arbitration, to a legality requirement of one form or another. This is precisely the case of the Netherlands-Turkey BIT, which contains such a requirement in its Article 2(2)."*[18] This tribunal, in the silence of BITs, separated clearly the issue of the existence of a protected investment from the issue of its legality, stating that "*an investment might be 'legal' or 'illegal', made in good faith or not: it remains an investment.*"[19] Accordingly, the legality issue has no impact on the definition of the "investment."

Also of interest, another recent ICSID award set a limit to the "disqualification" of an investment which would have become illegal. The arbitral tribunal recognized its jurisdiction despite the jurisdictional defence of the violation of the law of the host state. Invoking the principle of fairness, the arbitral tribunal considered indeed that*" (. . .) Even if FEGUA's actions with respect to Contract 41/143 and in its allowance to FVG to use the rail equipment were ultra vires (not "pursuant to domestic law"), "principles of fairness" should prevent the government from raising "violations of its own law as a jurisdictional defence when [in this case, operating in the guise of FEGUA, it] knowingly overlooked them and [effectively] endorsed an investment which was not in compliance with its law 147. Based on these considerations, the Tribunal finds that Respondent is precluded from raising any objection to the Tribunal's jurisdiction on the ground that Claimant's investment is not a covered investment under the Treaty or the ICSID Convention."*[20]

The wording of the relevant BIT remains though crucial and no general solution can be inferred on the question whether the legality has any impact on the definition of an investment.

B. Investments On The "Border Line" Of The Scope Of The Definition

As previously mentioned, definitions of "investment" in BITs are very broadly stated. Terms in the definition such as *every kind of assets* often encourage claimants to seek protection under the BIT. However, if any asset or anything of financial value were considered an investment the definition of investment would be limitless because almost every transaction conducted in a host state has some financial value. Under this definition, oil crossing a country through pipelines would be an investment, and so would funds transferred through a country's financial system. It is commonly agreed that such a broad definition of investment cannot have been intended by Contracting States when entering into BITs.

As stated by Noah Rubins, *"the state's sacrifice of freedom of action is done for a particular purpose, and that purpose closely defines the extent of the treaties' operation. The* *primary motivation for both developing and developed States in concluding these agreements is, in the words of Washington Convention preamble, 'the role of private international investment' in 'international cooperation for economic development' Thus, there is a recognition that a certain category of cross-border economic activity, called investment,' helps expand welfare around the world. The corollary is that other kinds of operations do not necessarily have that effect: short-term capital flows, particularly those involving speculation in debt or currency, are widely seen by Host States as sources of monetary or economic instability. The derogation of state sovereignty necessary for a direct investor state dispute resolution system is therefore only worth undertaking to the extent it helps a developing country compete to attract the constructive sort of asset flows, designated 'investment.' Ian Brownlie, in a dissenting opinion in the CME v. Czech Republic final award, issued this March, was adamant on this point. 'Investment,' he insisted, does not include all kinds of property, and it is essential that arbitrators confer the benefits of investment protection treaties only on property rights that qualify as investment. To do otherwise would betray the intent - and - consent - of the parties to arbitrate their disputes with aliens operating in their territory.*"[21] Thus, there must be limits on the definition of investments. Some treaties, such as the 2004 Canadian Model, and some awards have identified what should not be considered as an investment. In particular, the question was raised whether a contractual entitlement, a court decision or an arbitral award to be enforced in the host country, could constitute an asset protected by BITs.

1. Contractual Entitlements

Article 1 of the US Model BIT, states that "*[s]ome forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.*"

The tribunal in *Fedax v. Venezuela* stated that promissory notes are a form of loan that involves "*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.*"[22] Consequently, promissory notes do constitute an investment.

In *GEA v. Ukraine*, the arbitral tribunal held that a settlement agreement which "*merely established an inventory of undelivered goods and recorded the difference as a debt*" and a repayment agreement which "*merely established a means for the repayment*" of a debt, were not investments.[23]

The question arose whether mere expectations from a contract which is not pursued, could constitute an investment. In this regard, the tribunal in *Malicorp v. Egypt* reasoned that the commitment to be bound by contractual obligations and hence make contributions in the future deserves protection under the treaty. In the tribunal's view, the investor had legitimately expected revenues in consideration for the future contributions he committed to make. Such commitments and expectations amount to "claims", "performance under contract having a financial value" and "deprivation of a business concession", covered in the definition of investment in the BIT between Egypt and the United Kingdom.[24]

Fortunately, no tribunal went as far as to consider that the costs incurred during negotiations of a contract, which eventually is not concluded by the State, may constitute an investment.[25]

As regards the sale of goods, it is well established that a simple transaction does not amount to an investment. One-time sales or purchases of goods would not normally be investments. Commercial transactions are not investments when *"they are ephemeral, speculative (in the sense that a profit will be realized with little or no sacrifice from the foreign actor), or eminently predictable in outcome (like a sale of goods, where the costs and revenues are known in advance)."*[26] In the words of Messrs Shihata and Parra, "[a] *simple sale of goods is often cited as an example of a transaction that clearly is not an investment.*"[27] These authors also cite ICSID Model Clauses and the Additional Facility Rules as further evidence that a sale of goods is not an investment.

Likewise, Professor Oman wrote that "*if the principle reason for a foreign company to participate is to sell some resources in connection with the project (for example, equipment, technology, etc.), and not to obtain for itself a part of the profits generated by the exploitation of the project [. . .] then, from the company perspective, the operation is a sale, and not an investment.*"[28]

This was confirmed by the tribunal in *Joy Mining v. Egypt*. The tribunal had to consider whether bank guarantees under a "Contract for the Provision of Longwall Mining Systems and Supporting Equipment for the

Abu Tartur Phosphate Mining Project" were an investment under both the BIT between the United Kingdom and Egypt and the ICSID Convention. The tribunal declined jurisdiction and stated that: "*the Tribunal is also mindful that if a distinction is not drawn between ordinary sales contracts, even if complex, and an investment, the result would be that any sales or procurement contract involving a State agency would qualify as an investment. International contracts are today a central feature of international trade and have stimulated far reaching developments in the governing law, among them the United Nations Convention on Contracts for the International Sale of Goods, and significant conceptual contributions. Yet, those contracts are not investment contracts, except in exceptional circumstances, and are to be kept separate and distinct for the sake of a stable legal order. Otherwise, what difference would there be with the many State contracts that are submitted every day to international arbitration in connection with contractual performance, at such bodies as the International Chamber of Commerce and the London Court of International Arbitration?*"[29]

In the *Asian Express v. Greater Colombo Economic Commission* case, the Secretary General of ICSID has refused to register a notice of arbitration dealing with a dispute arising out of a mere sale of goods. The request was refused "*despite the fact that the request had been made on the basis of a BIT providing for arbitration under the Convention in respect of disputes arising out of investments which, as defined in the BIT, could be understood as including sale of goods transactions*."[30]

In this regard, it is commonly agreed that there should not be dual standards of interpretation depending on whether or not the arbitration is conducted under the ICSID Convention. An arbitral tribunal in an UNCITRAL arbitration found that under the universally recognized principles of international law, a sale of goods cannot be considered an investment: "*In fact, despite the well-known formula, the actual contents of 'the universally recognised principles of international law' is uncertain, indeed frequently contentious. Suffice it for present purposes to note the following. 'Foreign investment' is mostly defined as a transfer of tangible or intangible property from one country to another for the purpose of use in that country with a view to generating profit, or at least wealth, under the control of the owner of the property. Such transfers are to be distinguished from the much more frequent export transactions where goods are sold by manufacturers, or owners, in one state to traders or users in another state. Foreign investment involves a more permanent relationship between the foreign investor and the host state than is involved in the transitory international sales transaction. [The Contract] falls unquestionably into the latter category.*"[31]

The tribunal in *Romak v. Uzbekistan* was of the view that on the basis of the freedom of contract, contracting States are free to consider any asset or economic transaction as an investment protected by the treaty. This tribunal stated that "*Contracting States can even go as far as stipulating that a "pure" one-off sales contract constitute an investment (...). However, in such cases, the wording of the instrument in question must leave no room for doubt that the intention of the contracting States was to accord to the term "investment" an extraordinary and counterintuitive meaning.*"[32] This decision was rendered in the context of the sale by Romak of fifty thousand tons of wheat to an entity in Uzbekistan.

Despite the general formula used in decisions and by commentators, it does not mean that any sale of goods must be disqualified as investment. Sales of goods might, in certain circumstances, be treated as investments. That would be the case for instance if the consideration is not exclusively the payment of the sale price, but includes a portion of revenues calculated in accordance with the performance of the venture operation in the host state. The bottom line is and must always be the treaty, but also the surrounding circumstances of the transaction.

2. Arbitral Awards Or Court Decisions

The question arose whether refusal to enforce an arbitration award or a court decision ordering the transfer of an asset or the payment of certain sums falls within the scope of the treaty protection. The preliminary issue is hence whether awards and court decisions could qualify as investments.

The large majority of arbitral tribunals and doctrine agree that an arbitration award or a court decision can only constitute an investment if – and only if - the underlying transaction is an investment. If it were otherwise, many civil, commercial and even criminal decisions issued by courts and tribunals would be investments. This cannot be the purpose of the treaties. As stated *obiter dicta* by the tribunal in *Saipem v.*

Bangladesh: "*[t]he Tribunal agrees with Bangladesh that the rights arising out of the ICC Award arise only indirectly from the investment. Indeed, the opposite view would mean that the Award itself does constitute an investment under Article 25(1) of the ICSID Convention, which the Tribunal is not prepared to accept. (. . .) as already mentioned, the notion of investment pursuant to Article 25 of the ICSID must be understood as covering all the elements of the operation, that is not only the ICC Arbitration, but also inter alia the Contract, the construction itself and the Retention Money (see above No. 110). Hence, in accordance with previous case law, the Tribunal holds that the present dispute arises directly out of the overall investment.*"[33] Similarly, in *Frontier Petroleum Services Ltd. v. Czech Republic*, the tribunal held that "*by refusing to recognize and enforce the Final Award in its entirety, the Tribunal accepts that Respondent could be said to have affected the management, use, enjoyment, or disposal by Claimant of what remained of its original investment.*"[34]

In *Romak v. Uzbekistan*, the UNCITRAL tribunal has advocated that not every contract or every award or judgement constitutes an investment under the treaty. Otherwise this would mean that by entering into a BIT, the contracting states "*have renounced, in respect of every contract entered into with a national of the other Contracting Party, the application of domestic (or the chosen governing) law, and surrendered the jurisdiction of their own domestic courts (or the chosen dispute-resolution forum), even if the contract is a simple one-off sales transaction.*"[35] Romak claimed that the right (to money) conferred to it by the contract and by the earliest arbitration award constitute an investment under the BIT. The tribunal responded that the arbitration award is inextricably linked to the underlying transaction which is a sales contract. Hence, as the transaction could not be considered as an investment, the crystallization of rights thereunder (the arbitration award) cannot either be considered as an investment.[36]

Those decisions are consistent on this point. The only circumstances in which an arbitration award or a court judgment can be considered an investment are where the underlying transaction could be defined as an investment.

In sum, whether contractual entitlements, an arbitration award or a court decision are investments could be answered by the *Petrobart* decision: "*the Contract and the judgement are not in themselves assets but merely legal documents or instruments which are bearers of legal rights, and these legal rights, depending on their character, may or may not be considered assets.*"[37]

However, more recently an arbitral tribunal in *GEA v. Ukraine* adopted a more stringent approach and concluded that even though "*the ICC Award could be characterized as directly arising out of the Conversion Contract or the Products, the Tribunal considers that the fact that the Award rules upon rights and obligations arising out of an investment does not equate the Award with the investment itself.*"[38] In the eyes of this tribunal, the award is not an investment but a mere legal instrument, which provides for the disposition of rights and obligations arising out of a contractual relationship. More decisions are expected on this issue within the coming months and time will tell whether the new tendency heads towards a total isolation of the legal instrument from the original legal rights.

C. Definition Of Investment Under The ICSID Convention

The analysis of different examples of models of BITs reveals that there is no general definition of investment applicable to all investment relations, despite of some common features between the definitions. Unlike BITs, the ICSID Convention does not provide a definition of "investment": Article 25(1) of the Convention only provides that the dispute must arise *'directly out of an investment'* in order for an ICSID tribunal to have jurisdiction.[39] The wording of Article 25(1) of the Convention focuses more on the consent of the parties to the ICSID Convention than on the nature of the investment which should normally condition the jurisdiction of the arbitral tribunal. In practice, this consent to ICSID arbitration is often expressed in a contract or/and in a BIT which will provide this detailed definition of "investment."

Consequently, to a certain extent, interplay exists between the definitions of investment contained in the BITs and Article 25(1) of the ICSID Convention. From a certain point of view, the differences between the definitions provided by BITs constitute an obstacle to the predictability and consistency of decisions on jurisdiction and the question arose whether these definitions should be 'neutralized' or ignored by arbitrators. In other words, should arbitral tribunals limit the protection offered by international legal instruments by restoring an "authentic" meaning of the notion of investment?

In the name of the predictability some ICSID tribunals have considered that Article 25(1) contains an objective definition of the investment. Yet, arbitral tribunals remain divided on the "objective" criteria that should be applied in order to establish the existence of an investment that is an investment distinct from an "ordinary commercial transaction."[40] Some ICSID tribunals have defined five characteristics that should be applicable to establish an investment under Article 25: (i) duration; (ii) regularity of profit and return; (iii) risk; (iv) substantial financial or know-how commitment; and (v) significance for the host State's development. This method had been applied for the first time in *Fedax v. Venezuela*,[41] but it commonly became known informally as the "Salini test", taking the name of the award in *Salini v. Morocco.*[42]

The *Salini test* illustrates the most restrictive approach in the definition of an investment. Arbitral tribunals have not unanimously adopted and applied the *Salini test*, and the identification of an investment under Article 25 of the ICSID convention remains thus dependant, to a certain extent, on the subjectivity of arbitrators.

D. The Hallmarks Of The "Salini Test": An Attempt For A Uniform Definition Of The Term Investment In The Treaties

1. The "Salini Test" Has Been Followed By A Large Number Of Tribunals

Claimants sometimes feel compelled to meet the hallmarks of an investment set by arbitral tribunals, even though the decisions of such tribunals are not binding. The hallmarks of the *Salini test* were first stated explicitly by the tribunal in *Fedax* as follows: *"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 significance for host State's development."*[43]

These criteria have been applied consistently by tribunals and were referred to expressly in several decisions including *Salini v. Morocco*,[44] *Joy Mining v. Egypt*,[45] *Jan de Nul v. Egypt*,[46] *Malaysian Historical Salvors v. Malaysia*,[47] *L.E.S.I.-DIPENTA v. Algeria*,[48] *Bayindir v. Pakistan*,[49] and *Kardassopoulos v. Georgia*.[50] They were also stated by Professor Schreuer in his book on the ICSID Convention.[51]

The *Salini* hallmarks of investment were identified on the basis of Article 31 of the Vienna Convention on the Law of Treaties, which requires that the term investment "*be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*" and the Preamble of the ICSID Convention.[52]

The Preamble to the BIT is of particular importance when assessing its object and purpose. The Preamble usually states unambiguously that the purpose of the BIT is to encourage cross-border economic cooperation and development in the territory of the Contracting Parties: "*[*the Contracting Parties*] desiring to intensify economic co-operation between the two States, [. . .]recognizing that the encouragement and contractual protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both nations*" (2008 German Model BIT). The Preamble's wording is strikingly similar to that of the preamble to the ICSID Convention, which refers to "*the need for international cooperation for economic development*." It is on the basis of this wording, doctrinal analysis and ICSID case law that numerous ICSID tribunals have tried to identify the hallmarks of an investment.

The reasoning underpinning the test for arbitrations that are subject to the ICSID Convention should also be transferable to arbitration governed by UNCITRAL or any other institutional rules for two main reasons. First, the ordinary meaning of investment is usually the same whether under the BIT or the ICSID Convention, and second, the Preamble of the BIT(s) and the ICSID Convention frequently use similar wording and stress a similar purpose.

The four hallmarks of the *Salini test* are the following:

i. Duration Of The Contract

The investor's commitment to the investment must be evidenced by a certain length of time. Indeed, commercial transactions cannot amount to investments if they are "*ephemeral*".[53] Case law and doctrine have established that the required duration is of at least two years. The *Salini* tribunal, for instance, verified that "[t]*he transaction, therefore, complies with the minimal* *length of time upheld by the doctrine, which is from 2 to 5 years* [. . .]."[54]

Likewise, the *Malaysian Historical Salvors* tribunal found that, because the contract giving rise to the alleged investment took almost four years to complete, it fulfilled the minimum length of time of two to five years.[55] This is confirmed by Professor Schreuer, who makes reference to the existence of, or at least the expectation of, a "*long term relationship*."[56]

The tribunal in *Joy Mining* applied this rule when it concluded that the transaction was not an investment because "[t]*he duration of the commitment is not particularly significant, as evidenced by the fact that the price was paid in its totality at an early stage*."[57] The contract was therefore a normal sales contract that could not amount to an investment.

Notwithstanding the foregoing decisions and opinions, we believe as a matter of principle that there should not be a mandatory minimum duration that determines whether the transaction qualifies as an investment. The duration of the transaction, even if it is less than two years, should be analyzed only in light of all the surrounding circumstances.

ii. Regularity Of Profits And Returns

It has been suggested that an investment should imply some expenditures of money, assets or efforts in consideration of a return of profits. A contract of a one-time sale of goods for instance does not fulfil the requirement concerning regularity of profit and return.

This criterion echoes the findings of the majority in *Tokios Tokeles*: *"an investment under the BIT is read in ordinary meaning as every kind of asset for which an investor of one Contracting Party caused money or effort to be expended and from which a return or profit is expected in the territory of the other Contracting Party. In other words, the Claimant must show that it caused an investment to be made in the territory of the Respondent. [. . .] The investment would not have occurred but for the decision by Claimant to establish an enterprise in the Ukraine and to dedicate to this enterprise financial resources under the Claimant's control. In doing so, the Claimant caused the expenditure of money and effort from which it expected a return or profit in Ukraine*."[58]

In *Joy Mining*, the tribunal stated that bank guarantees did not provide regular profit and returns before concluding that they were not an investment.[59] Professor Brownlie in his concurring opinion in *CME*, suggested that the Netherlands-Czech treaty requires that a form of expenditure or transfer of funds for the precise purpose of obtaining a return be one of the elements of the investment.[60]

iii. Risk Assumed By The Investor

The third requirement of the Salini test is that the transaction entailed a risk for the contributor and, more precisely, an economic risk "in the sense of an uncertainty regarding its successful outcome."[61] Yet, a risk may be present in ordinary commercial transactions and not only in front of an investment. Consequently, arbitral tribunals have tried to define what kind of risk would meet the standard of the Salini test.

The mere non performance by the other contracting party of its contractual obligations does not meet the standard of risk. The risk of non-performance is inherent to any commercial transaction and is not sufficient to characterize an investment. If the non-performance of a contractual obligation characterizes an investment, any contract would then be considered as an investment. Defaulting in paying the purchase price would transform a sale of goods into investment. As Dr. Bouhacene argued: "*the title of 'investor' should only be bestowed upon economic agents who incur or share the industrial risk arising from the setting-up or operation of the investment. The classification of an industrial plant seller as an investor is ill-founded*."[62] This was confirmed by the *Joy Mining* tribunal, which stated that "*[r]isk there might be indeed, but it is not different from that involved in any commercial contract, including the possibility of the termination of the Contract*"[63] and accordingly ruled that such normal commercial risk was not sufficient.

It has been considered that where the investor is aware of the nature of the risks on the investment in the host state, but took no contractual precautions for protecting the investment, it is deemed that no risk is assumed by the investor. That was the views of the Tribunal in *Parkerings v. Lithuania* when considering the relationship between business risk and investment protection standard.[64]

In short, all economic activity entails a certain degree of risk, such as the risk of non-performance. However, pure commercial risk, counterparty risk or the risk of doing business generally is not an element to be considered for distinguishing an investment from a mere commercial transaction.

iv. Contribution Of The Investor

According to *Fedax v. Venezuela*, an investment requires a commitment of the investor.[65] In this respect ICSID tribunals have considered that this commitment can be financial but can also consist in the investor's know-how.[66] Such interpretation is consistent with several BITs' definition of an investment.[67]

The existence of a commitment/contribution of the investor does not depend on the amount of the expenditures exposed by the investor. Indeed, in *Mihaly v. Sri Lanka*, the arbitral tribunal considered that: "*the question whether an expenditure constitutes an investment or not is hardly to be governed by whether or not the expenditure is large or small.*"[68] Some arbitral tribunals even considered that there was no need that expenditures been made by the investor. As the arbitral tribunal summarized it in *RSM v. Grenada*, "*there would be no need for actual expenses to have been incurred by the private party, the relevant criterion being the commitment to bring its resources toward the performance of such exploration*."[69] Likewise, the *Malicorp* tribunal held that *"[i]t is true that Malicorp does not appear to have performed many services in connection with it (the Contract]. Nonetheless, the fact of being bound by that Contract implied an obligation to make major contributions in the future. That commitment constitutes the investment*."[70] Consequently, the commitment criterion requires an analysis *in concreto* of the reality of the obligation or the investor's promises without taking into account the quantum of its expenditures.

Furthermore, it has been held that unilateral commitments are not sufficient under both the ICSID Convention and the applicable BIT. In *Mihaly v. Sri Lanka*, the arbitral tribunal rejected indeed the existence of an investment under Article 25.1 of the ICSID Convention considering that the three letters of intent between the investor and the host state did not contain "*any binding obligations*" and highlighted that no consent of the host state had been given to the implementation of the project. The arbitral tribunal concluded that *"[T]he Tribunal is consequently unable to accept as a valid denomination of "investment", the unilateral or internal characterization of certain expenditures by the Claimant in preparation for a project of investment."*[71] It is commonly held that no investment could exist where the host state has not bound itself towards the investor.[72]

v. Economic Development Of The Host State

The reference to the contribution to the economic development of the host state is found in the Preamble of the ICISD Convention and in most BITs. The Preamble to the ICSID Convention reads: "*Considering the need for international cooperation for economic development...*" Alike most BITs, reference is made to the "*need for international cooperation for economic development.*"[73] The *CSOB v. Slovakia* tribunal found that such wording permits to infer that the transaction which contributes to the economic development of the host State may be an investment.[74] Likewise, the tribunal in *Malaysian Historical Salvors* ruled that "*the term 'investment' should be interpreted as an activity which promotes some form of positive economic development for the host State.*"[75] The *ad hoc* committee in *Patrick Mitchell* held that the "*contribution to the economic development of the host* State" hallmark is "*an essential - although not sufficient - characteristic or unquestionable criterion of the* investment."[76] Such contribution must be significant.[77] Applying this criterion, the *Joy Mining* tribunal held implicitly that bank guarantees for the amount of GBP 9,605,228 were not a significant contribution to the Egyptian economy and that no investment had therefore been made. This conclusion was confirmed by the tribunal in *Malaysian Historical Salvors*.[78]

2. The Hallmarks of the *Salini Test* Have Not Been Unanimously Adopted

While numerous tribunals have applied the *Salini test*, its reliability was heavily criticized. Some tribunals distanced themselves from the hallmarks, while others applied some but not all of these hallmarks and without sometimes referring to the *Salini test*.

The sole arbitrator in *Malaysian Historical Salvors Sdn, Bhd v. Malaysia*, before concluding that there is no investment under the BIT, stated: "*the classical Salini hallmarks are not a punch list of items which, if completely checked off, will automatically lead to a conclusion that* *there is an "investment." If any of these hallmarks are absent, the tribunal will hesitate (and probably decline) to make a finding of "investment." However, even if they are all present, a tribunal will still examine the nature and degree of their presence in order to determine whether, on a holistic assessment, it is satisfied that there is an ICSID "investment."*[79]

It has been suggested that the elements contained in the *Salini test*, while they tend as a rule to be present in most investments, are not a formal prerequisite for the finding that a transaction constitutes an investment.[80]

Several tribunals went further and expressly or impliedly criticized the strict application of the *Salini test*.[81] Those criticizing *Salini* have vehemently rejected that it could be applied as a mandatory definition to investments while the ICSID Convention purportedly chose not to impose any. The arbitral tribunal in *Alpha Projektholding GmbH v. Ukraine* refused to strictly apply the *Salini test* as though it were a "*universal definition*" of an investment under the ICSID Convention: *"however, the elements of the so-called Salini test, which some tribunals have applied mandatorily and cumulatively (i.e., if one feature is missing, a claimed investment will be ruled out of ICSID jurisdiction), are not found in Article 25(1) of the ICSID Convention. In applying the criteria in this manner, these tribunals have sought to apply a universal definition of "investment" under the ICSID Convention, despite the fact that the drafters and signatories of the Convention decided that it should not have one."*[82] In *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, the arbitral tribunal rejected the *Salini* test considering that it is inappropriate to impose such a definition while signatories of the ICSID Convention chose not to specify one.[83]

Other tribunals have partially applied the *Salini test* considering that an investment must fulfil the following three conditions:

1. the contracting party has made a contribution in the country in question;

2. this contribution must extend over a certain period of time;

3. it must entail some risk for the contracting party.[84]

The tribunal in *Romak v. Uzbekistan* considered for example that the term "investments" has an inherent meaning in the BIT entailing a contribution that extends over a certain period of time and that involves some risk.[85]

Regarding the criterion of the contribution to the economic development of the host state, the tribunals in *LESI-Dipenta v. Algeria* and in *Pey Casado v. Chile*, considered that it is not necessary to establish that the contract addresses economic development, such condition being implicitly implied by the three above conditions. The arbitral tribunal in *Saba Fakes v. Republic of Turkey* went even further since it clearly rejected this condition: *"The present Tribunal observes that while the preamble* [of the ICSID convention] *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."*[86]

The two major trends in the interpretation of the notion of investment remain either the so-called "objective" approach with the strict application of the *Salini test*, or the so-called "subjective"/"deferential" approach which defines an investment pursuant to the definition of the applicable BIT.

The major differences between these approaches have unfortunately led to contradictory solutions on the characteristics that an asset must meet in order to constitute an "investment" protected by both an investment treaty and the ICSID Convention. Luckily, several arbitral tribunals have tried to conciliate the two main trends, more particularly by scrutinizing the definition provided by the BIT and/or the contract applicable to the case, in order to temper the strict application of the *Salini test*.

During a conference on investment arbitration held in 2010, Oscar Garibaldi perfectly summarized the limits of the *Salini test*: *"one could describe a tiger as 'orange with black stripes'; but if that description is taken as a definition, it would exclude the most sought-after tiger of all: the Bengal tiger."*[87] Arbitral tribunals seem indeed to increasingly rally the criticism of the doctrine and to understand the features of the *Salini test* not "*as jurisdictional requirements but merely as typical characteristics of investments under the Convention.*"[88]

E. The "Double Barrelled" Test: An Alternative to the *Salini Test*?

The ambiguity of the notion of investment is emphasized by the fact that noticeable differences exist between the definitions provided by BITs, but also because no unanimous 'objective' criteria of investment under Article 25 of the ICSID Convention could emerge from decisions of arbitral tribunals.

Besides, confusion increased when it was suggested in some cases that the definition of "investment" may vary depending on the investor's choice between ICSID arbitration and other institutional or ad hoc arbitration where "investment" is defined only by the underlying BIT.[89] Fortunately, the most recent opinions seem to reject this approach. In the *Romak v. Uzbekistan* case, the tribunal dismissed Romak's contention that the definition of investment in UNCITRAL proceedings is wider than in ICSID arbitration. The tribunal considered that the view implying that the substantive protection offered by the BIT would be narrowed or widened, depending on the choice between dispute resolution mechanisms offered in the treaty, would be "*absurd and unreasonable*", and leads to unreasonable results.[90] The term *investment* should therefore be subject to similar requirements under both ICSID arbitration and other institutional or ad hoc arbitration.

Some tribunals tried to adopt the interplay between Article 25 of the ICSID Convention and the definition of investment under an applicable BIT. In *C.O.B. v. Slovaquia*, the arbitral tribunal considered that "*an agreement of the parties describing their transaction as an investment is not, as such, conclusive in resolving the question whether the dispute involves an investment under Article 25(1) of the Convention. The concept of an investment as spelled out in that provision is objective in nature in that the parties may agree on a more precise or restrictive definition of their acceptance of the Centre's jurisdiction, but they may not choose to submit disputes to the Centre that are not related to an investment.*"[91]

The *GEA v. Ukraine* tribunal first determined that the naphtha fuel conversion contract is an investment in accordance with the definition of the BIT between Germany and Ukraine. It then held that said contract constitute an investment pursuant to Article 25 of the ICSID Convention adding that "*it also satisfies all the elements of the objective definition that are commonly applied under Article 25.*"[92]

This approach, the so called "double-barrelled test", has been applied by several arbitral tribunals.[93] Within the framework of ICSID arbitration and conforming to the double-barrelled test, the jurisdiction of the arbitral tribunal is contingent upon the fulfilment of the jurisdictional requirements of both the ICSID Convention and the relevant BIT. In other words, as explained in a recent ICSID case, *"this double test entails that the jurisdiction ratione materiae of the Tribunal rests on the intersection of the two definitions."*[94] Satisfying the definition of the BIT only, or the sole objective criterion of Article 25 of the ICSID Convention, would hence not be sufficient to establish the jurisdiction of the arbitral tribunal.[95]

Many arbitral tribunals still only look for the existence of an "objective" investment conforming to Article 25 of the Convention[96] and refer, explicitly or implicitly, to the *Salini test*, even though the criteria of the contribution of the economic development of the *Salini test* is more and more disregarded. However, a balance between the objective definition of the ICSID Convention and the subjective definition of the applicable BIT is obviously very hard to find. Therefore, only the combination of these two kinds of reasoning would enable to respect both the consent of the parties to arbitration but also the core meaning of the notion of investment.

Endnotes

1. C. Schreuer, *The ICSID Convention*, page 662, citing: *SOABI v. Senegal*, Case No. ARB/82/1, Award,

25 February 1988, 2 ICSID Reports 436 *et seq*; *AAPL v. Sri Lanka*, Case No. Case No. ARB/87/3, 27 June 1990, 4 ICSID Reports, 272; *Tradex v. Albania*, Case No. Case No. ARB/94/2, 29 April 1999, 14 ICSID Review-FILJ 197, 219, 221 (1999).

2. See cases cited by Schreuer, *supra*, and *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/07, 7 July 2004, § 58*; Saipem v. Bangladesh*, Case No. Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, § 83.

3. *Saluka Investments v. Czech Republic*, UNCITRAL Case, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004, § 34; *International Thunderbird Gaming v. Mexico*, UNCITRAL (NAFTA), 26 January 2006, § 94-95.

4. *Saluka Investments v. Czech Republic*, UNCITRAL Case, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004, § 34.

5. *Phoenix Action Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, 15 April 2009, § 61.

6. *Ibid.*, § 63.

7. On the *prima facie* test for purposes of jurisdiction, see among others: *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, § 85; *Impregilo v. Pakistan* ICSID Case No. ARB/03/3 -Decision on Jurisdiction, 22 April 2005, § 190-200. *UPS v. Canada*, Decision on Jurisdiction, 22 November 2002, UNCITRAL (NAFTA), § 33-37; *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No. ARB/02/8, § 180; *Plama v. Bulgaria* ICSID Case No. ARB/03/24 (ECT). Decision on Jurisdiction, 8 February 2005, § 118-120, 132; *Bayindir v. Pakistan* ICSID Case No. ARB/03/29. Decision on Jurisdiction, 14 November 2005, § 185-200; *El Paso v. Argentina*, Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, § 40-45, 109; *Jan de Nul v. Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, § 69-71; *Telenor v. Hungary*, Case No. ARB/04/15 Award, 13 September 2006, § 34, 53, 68, 80.

8. In 2006, an estimated 1,700 BITs have come into force, about 80% of which involving OECD countries.

9. P. Juillard, cited by Farouk Yala in "*The Notion of "Investment" in ICSID Case Law: A Drifting Jurisdictional Requirement?*", Journal of International Arbitration, (Kluwer Law International 2005 Volume 22 Issue 2) pp. 124.

10. Farouk Yala, *op. cit.*, p.124.

11. Footnote 1: "*Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.*"

Footnote 2: "*Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.*"

12. Footnote 3: "*The term "investment" does not include an order or judgment entered in a judicial or administrative action.*"

13. See for example the BITs between Peru and China, Canada and Costa Rica, the Czech Republic and Israel, the German Model BIT (2005), the Chinese Model BIT (2003); see other examples cited and analyzed by Ursula Kriebaum, Chapter V: *Investment Arbitration - Illegal Investments in Christian Klausegger*, Peter Klein, et al. (eds), Austrian Arbitration Yearbook 2010, (C.H. Beck, Stämpfli & Manz 2010) pp. 329-333.

14. *Alasdair Ross Anderson and others v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3-Award, 19 May 2010, § 48-50.

15. *Ibid.*, § 51-61.

16. *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, ICSID Case No. ARB/03/25 - Award, 16 August 2007. § 344-345.

17. *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, § 126-127.

18. *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, § 114.

19. *Ibid.*, § 112.

20. *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010.

21. Noah Rubins, *The Notion of 'Investment' in International Investment Arbitration*, In *Studies in Transnational Economic Law*, Volume 19., ed. by N.Horn/Kröll, p. 286-287.

22. *Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3, Award, 9 March 1998.

23. *GEA v. Ukraine*, ICSID Case No. ARB/08/16, 31 March 2011, § 157.

24. *Malicorp Limited v. The Arabian Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, § 112-113.

25. See Schreuer, *op. cit.*, No. 175 et seq.

26. Noah Rubins, In *Studies in Transnational Economic Law*, Volume 19, ed. by N.Horn/Kröll, p.309; see also *Fedax N.V. v. Venezuela*, Decision on Jurisdiction of 11 July 1997, ICSID Case No. ARB/96/3, § 28.

27. I. Shihata and A. Parra, *The Experience of the International Centre for Settlement of Investment Disputes* (1999), 14 ICSID Rev-FILJ 2999, p.308.

28. Charles Oman, *Les Nouvelles Formes d'Investissement dans les Industries de Pays en Voie de Développement* 11 (OECD, 1989) as cited by Farouk Yala, *The Notion of Investment in ICSID Case Law: a Drifting Jurisdictional Requirement ? Some "Un-Conventional" Thoughts on Salini, SGS & Mihaly*, p. 8**.**

29. *Joy Mining Machinery v. Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction, 6 August 2004, § 58.

30. I. Shihata and A Parra, *The Experience of the International Centre for Settlement of Investment Disputes* (1999), 14 ICSID Rev-FILJ 299, p.308.

31. *Petrobart Limited v. The Kirgyz Republic*, 29 March 2005, p. 10, citing an unpublished decision.

32. *Romak S.A. v. The Republic of Uzbekistan*, UNCITRAL Case, Award dated 26 November 2009, http://www.pca-cpa.org/, § 205.

33. *Saipem v. Bangladesh*, § 113-114.

34. *Frontier Petroleum Services Ltd. v. Czech Republic*, Final Award, PCA-UNCITRAL Arbitration Rules [2010], IIC, 465.

35. *Romak S.A. v. The Republic of Uzbekistan*, UNCITRAL Case, Award dated 26 November 2009, http://www.pca-cpa.org/, § 187.

36. *Ibid.*, § 211.

37. *Petrobart Limited v. Kyrgyz Republic*, SCC Case No. 126/2003, at page 71.

38. *GEA v. Ukraine*, ICSID Case No. ARB/08/16, 31 March 2011, § 162.

39. Article 25(1) provides that: "*The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.*"

40. In *Joy Mining Machinery Limited v. Egypt*, ICSID Case No. ARB/03/11, at § 58, the arbitral tribunal clearly insisted on this distinction and rejected its

jurisdiction: "*the Tribunal is also mindful that if a distinction is not drawn between ordinary sales contracts, even if complex, and an investment, the result would be that any sales or procurement contract involving a State agency would qualify as an investment. . . Yet, those contracts are not investment contracts, except in exceptional circumstances, and are to be kept separate and distinct for the sake of a stable legal order.*"

41. *Fedax N.V. v. Venezuela*, Decision on Jurisdiction of 11 July 1997, ICSID Case No. ARB/96/3.

42. *Salini Construtorri S.p.A. and Italstrade S.p.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4 Decision on Jurisdiction dated July 23, 2001.

43. *Fedax N.V. v. Venezuela*, Decision on Jurisdiction of 11 July 1997, ICSID Case No. ARB/96/3, § 43.

44. *Salini Construtorri S.p.A. and Italstrade S.p.A. v. Morocco* ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001.

45. *Joy Mining Machinery v. Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction, 6 August 2004.

46. *Jan de Nul N.V. & Dredging International N.V. v. Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006.

47. *Malaysian Historical Salvors Sdn, Bhd v. Malaysia*, ICSID Case No. ARB/05/10, Award, 17 May 2007.

48. *L.E.S.I. - DIPENTA v. Algeria*, ICSID Case No. ARB/03/8, Award, 10 January 2005.

49. *Bayindir Insaat Turizm Ticaret ve Sanyai A.S. v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005.

50. *Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007.

51. Christoph H. Schreuer, *The ICSID Convention: A Commentary* (2001), at page 140.

52. *Fedax N.V. v. Venezuela*, Decision on Jurisdiction of 11 July 1997, ICSID Case No. ARB/96/3, Decision on Jurisdiction, § 43; *Salini Construtorri S.p.A. and Italstrade S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, § 52; *Joy Mining Machinery v. Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction, 6 August 2004, § 53); *Jan de Nul N.V. & Dredging International N.V. v. Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, § 91; *Malaysian Historical Salvors Sdn, Bhd v. Malaysia*, ICSID Case No. ARB/05/10, Award, 17 May 2007, contains a detailed analysis of the preamble to the convention and the criteria for an "investment" at paragraphs 43-146; *L.E.S.I. - DIPENTA v. Algeria*, ICSID Case No. ARB/03/8, Award, 10 January 2005, § 13; *Bayindir Insaat Turizm Ticaret ve Sanyai A.S. v. Pakistan* ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, at paragraph 130; *Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, § 116; Christoph H. Schreuer, *The ICSID Convention: A Commentary* (2001), at 140.

53. Noah Rubins, In *Studies in Transnational Economic Law*, Volume 19, ed. by N.Horn/Kröll, p.309.

54. *Salini Construtorri S.p.A. and Italstrade S.p.A.*, § 54.

55. *Malaysian Historical Salvors* § 110. The tribunal nevertheless declined to exercise its jurisdiction because it found that the contract did not satisfy the qualitative sense envisaged by ICSID case law because the duration was dependent, in part, on the element of fortuity and because the contract did not appear to promote the economy and development of the host State.

56. Christoph H. Schreuer, *The ICSID Convention: A Comm*entary (2001), at page 140.

57. *Joy Mining Machinery* at § 57-63.

58. *Tokios Tokeles v. Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction, 29 April 2004, § 75 and 78.

59. *Joy Mining Machinery v. Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction, 6 August 2004, § 57: "*The duration of the commitment is not particularly significant, as evidenced by the fact that the price was paid in its totality at an early stage. Neither is therefore the regularity of profit and return. Risk there might be indeed, but it is not different from that involved in any commercial contract, including the possibility of*

the termination of the Contract. 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, but it is only a small fraction of the Project. Certainly there is nothing here to be compared with the concept of "contrats de développement économique" or even contracts entailing the concession of public services."

60. *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, Final Award in UNCITRAL Arbitration Proceedings, 14 March 2003 Separate Opinion of Ian Brownlie at 34.

61. *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, § 27.

62. Mahfoud Bouhacene, *Droit International de la Coopération Industrielle*, 130 (Publisud, 1986).

63. *Joy Mining Machinery* at paragraph 57.

64. *Parkerings – Compagniet AS v Lithuania*, Award, ICSID Case No ARB/05/8, 11 September 2007, § 335-338:

"In 1998, at the time of the Agreement, the political environment in Lithuania was characteristic of a country in transition from its past being part of the Soviet Union to candidate for the European Union membership. Thus, legislative changes, far from being unpredictable, were in fact to be regarded as likely. As any businessman would, the Claimant was aware of the risk that changes of laws would probably occur after the conclusion of the Agreement. The circumstances surrounding the decision to invest in Lithuania were certainly not an indication of stability of the legal environment. Therefore, in such a situation, no expectation that the laws would remain unchanged was legitimate.

By deciding to invest notwithstanding this possible instability, the Claimant took the <u>business risk</u> to be faced with changes of laws possibly or even likely to be detrimental to its investment. The Claimant could (and with hindsight should) have sought to protect its legitimate expectations by introducing into the investment agreement a stabilisation clause or some other provision protecting it against unexpected and unwelcome changes.

The record does not show that the State acted unfairly, unreasonably or inequitably in the exercise of its legislative power. The Claimant has failed to demonstrate that the modifications of laws were made specifically to prejudice its investment.

Consequently, in the case at hand, the Tribunal is not persuaded that the Claimant had any legitimate expectation that the Government of the Republic of Lithuania would not pass legislation and regulatory measures which could harm its investment. In that respect, the Tribunal considers that the Respondent did not violate Article III of the BIT.

65. *In Fedax v. Venezuela, the arbitral tribunal referred to a* "substantial commitment", whereas in *Salini v. Morroco*, the arbitral tribunal referred to "*contributions*."

66. Holiday Inns S.A. and others v. Morocco, (Case No, ARB/72/1), Decision on jurisdiction, May 12, 1974, cited in *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, § 27, footnote 7; *Amco Asia Corporation and others v. Republic of Indonesia* (Case No. ARB/81/1), Decision annulling the Award, May 16, 1986, 25 I.L.M. 1439 (1986), cited in *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, § 27, footnote 7; *Salini Construtorri S.p.A. and Italstrade S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, § 53.

67. See among others the BIT between the Netherlands and Venezuela.

68. *Mihaly International Corporation v. Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, § 51.

69. *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Award, 13 March 2009, § 243.

70. *Malicorp Limited v. The Arabian Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, § 113.

71. *Mihaly International Corporation v. Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, § 59-61.

72. See Schreuer, op. cit., Article 25, § 175 et seq.

73. The preamble to the Canada 2004 model BIT reads: *"...Recognizing that the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity, to the development of economic cooperation between them and to the promotion of sustainable development."*

74. *Ceskoslovenska Obchodni Banka v. Slovakia*, ICSID Case No. ARB/97/4, Decision on objection to jurisdiction, 24 May 1999, § 64.

75. *Malaysian Historical Salvors* § 68.

76. *Mitchell (Patrick) v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Annulment Decision, 1st November 2006, § 33.

77. *Joy Mining Machinery* at paragraphs 53, 57-58; *Malaysian Historical Salvors* § 132.

78. *Malaysian Historical Salvors* § 86.

79. *Malaysian Historical Salvors* § 106.

80. *CSOB v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, § 90.

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

82. *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award 8 November 2010, § 311.

83. *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, § 129.

84. *Consortium Groupement LESI-Dipenta v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/8, Award of January 10, 2005, § 13-15; *Victor Pey casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award of May 8, 2008, § 231 - 235; *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, § 99-111; *Romak S.A. v. The Republic of Uzbekistan*, UNCITRAL Case, Award dated 26 November 2009, § 207.

85. *Romak S.A. v. The Republic of Uzbekistan*, UNCITRAL Case, Award dated 26 November 2009, http://www.pca-cpa.org/, § 207.

86. *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20 - Award, 14 July 2010, § 111-112.

87. Oscar M. Garibaldi, cited in "*The definition of investment: as elusive as a Bengal tiger?*", K. Karadelis, in Global Arbitration Review, 14 May 2010.

88. C. Schreuer, *The ICSID Convention: A Commentary*, Cambridge: Cambridge University Press, 2001, § 122.

89. *Mytilineos Holdings S.A. v. The State Union of Serbia & Montenegro and Republic of Serbia*, Partial Award on Jurisdiction, 8 September 2006, § 111-125.

90. *Romak S.A. v. The Republic of Uzbekistan*, UNCITRAL Case, Award dated 26 November 2009, http://www.pca-cpa.org/, § 194.

91. *Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic*, ICSID Case No. ARB/97/4 - Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, § 68.; see also *Joy Mining Machinery Limited v. Egypt*, ICSID Case No. ARB/03/11 - Award on Jurisdiction, 6 August 2004, § 50: *"the parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention."*

92. *GEA v. Ukraine*, ICSID Case No. ARB/08/16, 31 March 2011, § 150-151.

93. *Malicorp Limited v. The Arabian Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, § 110.

94. *'Phoenix Action, Ltd (Israel) v. The Czech Republic, I*CSID Case No ARB/06/5, Award, April 15, 2009, § 74.

95. *Malaysian Historical Salvors Sdn, Bhd v. Malaysia, ICSID Case No. ARB/05/10, Award, May 28, 2007, § 55: "(u)nder the double-barrelled test, a finding that the Contract satisfied the definition of "investment" under the BIT would not be sufficient for this Tribunal to assume jurisdiction, if the Contract failed to satisfy the objective criterion of an "investment" within the meaning of Article 25."*

96. *Millicom International Operations B.V. and Sentel GSM SA v. The Republic of Senegal*, ICSID Case No. ARB/08/20, Decision on Jurisdiction of the Arbitral Tribunal, 16 July 2010, § 80. ■

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