The Notion of Investment: New Controversies

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1. What is an investment? This question has been at the heart of numerous investor-State disputes for more than a decade. During the past four years in ICSID cases alone, at least sixteen awards or decisions have discussed this issue that was at the root of the disputes presented to arbitrators[2]. In 2004, in the midst of various questions and controversies raised by the cases that were in the news at the time[3], a trend seemed to appear. This trend was formalised by the arbitral Tribunal that ruled in *Salini Costruttori SpA & Italstrade SpA v. Kingdom of Morocco* (ARB/00/4):

– If an arbitral Tribunal is seized under an ICSID arbitration clause included in a Bilateral Treaty relative to investments (BIT), *"its jurisdiction depends upon the existence of an investment under the meaning of the Bilateral Treaty as well as that of the Washington Convention"*[4];

– In order to abide by the Washington Convention, *"an investment supposes contributions, a certain duration of performance, a participation in the risks of the transaction – (to which one must add) the criterion of contribution to the economic development of the host State of the investment"*[5].

2. What observations can be made four years afterwards? Until the beginning of summer 2007, excluding the decision on jurisdiction rendered 4 June 2004 in *PSEG*

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This paper is an updated and supplemented version of a presentation delivered by the author at a conference held in Paris on 3 April 2008 entitled "La procédure arbitrale relative aux investissements internationaux : aspects récents". The author wishes to thank Monica Nepote Cit for her assistance with the English translation of the original French version of this paper.

This paper is dedicated to the Memory of Thomas Waelde which prompted me to publish in English and gave me valuable suggestions for this work last summer even if it did not share all my views on this question (so was Thomas).

[2] Thus excluded from this list, and from the analysis conducted in this study, are the cases that approach the question of knowing whether the transactions in question are indeed investments *"performed in conformity with the rules in force"*, the only category of investments covered by the applicable BITs. In this situation, the question at hand is not whether an investment exists, but rather if the transaction in question does in fact satisfy an additional requirement necessary for the application of a BIT (its realisation under specific norms). A negative answer to such a question does not mean *ipso facto* that the transaction analysed by the Tribunal is not an investment...

[3] For an accurate description of the current situation, see for instance F. Yala, "The notion of "investment" in ICSID Case Law : A Drifting Jurisdictional Requirement ? Some Un-Conventional Thoughts on Salini, SGS and Mihaly", *Journal of International Arbitration,* Vol. 22, N° 2, 2005.

[4] Decision on jurisdiction, 23 July 2001, para. 44.

[5] *Ibid.,* para. 52. As noted by F. Yala in his paper, these criteria are not entirely new and the *Fedax* and *CSOB* cases could be seen as precedents (F. Yala, "The notion of "investment" in ICSID Case Law : A Drifting Jurisdictional Requirement ? Some Un-Conventional Thoughts on Salini, SGS and Mihaly", *op. cit.,* footnote 3, p. 109). But, more developed and systematized, the *Salini* decision is generally considered as the leading one.

Global Inc. v. Turkey (ARB/02/5) in which the existence of an investment was deduced from the existence of a concession contract[6], the ICSID awards or decisions rendered on the matter were more or less aligned with the "Salini" jurisprudence, some of which explicitly referred to. In reality, harmony was only superficial since arguments and interpretations adopted by the arbitrators were sometimes quite different:

– Most decisions have implemented the "Salini test" made up of four criteria[7];

– Two decisions have considered that the fourth criterion (the contribution to the development of the host State) had to be ruled out because it was *"difficult to establish and implicitly covered by the three (other) elements adopted"*[8]*;*

– On the contrary, another decision has insisted on the importance of this criterion by annulling an award on the grounds that it did not establish in what way the foreign agent's activity had contributed to the economic development of the host State[9];

– Another award only seemed to categorize a transaction as an investment on the grounds of the contribution made and its remuneration[10];

– At last, one decision has adopted the approach proposed by professor Schreuer consisting in adding a fifth criterion to the "Salini criteria", i.e. the regularity of profit and return[11].

3. Since summer 2007, the discrepancies between these different approaches have turned to sheer chaos. Two decisions rendered in July and September 2007 have questioned the *Salini* jurisprudence by deciding that in the absence of a definition of the term "investment" in the Washington Convention, it was good enough for the transaction to be considered as such by the BIT in order to grant jurisdiction to an ICSID Tribunal[12]. And among the last four ICSID decisions dealing with this issue and rendered since March 2008, one is in the trend of the Salini jurisprudence (four criteria)[13], another has chosen the three criteria approach (removing the contribution to the

[6] For the Tribunal, the concession contract seemed to be the paradigm of an investment (para. 79 to 105 of the decision, especially para. 104).

[7] *Joy Mining Machinery Ltd v. Egypt* (ARB/03/11), Award for lack of jurisdiction, 4 August 2004, para. 55 to 57; *Bayindir v. Turkey* (ARB/03/29), Decision on jurisdiction, 14 November 2005, para. 130 to 137 ; *Jan de Nul N.V v. Egypt* (ARB/04/13), Decision on jurisdiction, 16 June 2006, para. 90 to 96 ; *Saipem Spa v. Bangladesh* (ARB/05/7), Decision on jurisdiction, 21 March 2007, para. 99 to 114 ; *Malaysian Historical Sailors and others, v. Malaysia* (ARB/05/10), Award for lack of jurisdiction, 17 May 2007, para. 43 to 46.

[8] *Consorzio Lesi-Dipenia v. Algeria* (ARB/03/8), Award for lack of jurisdiction, 10 January 2005, para. 13 ; *Lesi SpA and Astaldi SpA v. Algeria* (ARB/05/3), Decision on jurisdiction, 12 July 2006, para. 72.

[9] *Patrick Mitchell v. Congo* (ARB/99/7), Decision of the *ad hoc* committee setting aside the award, 1st November 2006, para. 39 and 40.

[10] *ADC affiliate Ltd and others v. Hungary* (ARB/03/16), Award, 2 October 2006, para. 159 and 160.

[11] *Helnan International Hotel A/S v. Egypt* (ARB/05/19), Decision on jurisdiction, 17 October 2006, para 77.

[12] *MCI Power Group LC and others, v. Ecuador* (ARB/03/16), Award, 31 July 2007, para. 159 and 160 ; *Parkerings-Compagniet AS v. Republic of Lithuania* (ARB/05/8), Award, 11 September 2007, para. 249 to 254.

[13] *Noble Energy Inc and others, v. Ecuador and Consejo Nacional de Electncidad* (ARB/05/12), Decision on jurisdiction, 5 March 2008, para 128 to 135.

development of the host State)[14], while a third has decided to take into account the features identified in Salini, but along with all circumstances of the case and in a very flexible and broad approach[15].

4. As they were published, the decisions rendered these past four years gave rise to much interrogation and perplexity amongst wise commentators: is or must the notion of investment be a restriction to ICSID jurisdiction[16]? Isn't the result a negative definition (what is not a commercial transaction is an investment)[17]? Is the notion of investment the cursed notion of the ICSID system[18]?

To answer these questions, insofar as they actually seek an answer, it is necessary to try and step back from the turmoil of the issue, and to take the "investment" debate into perspective. The first question that appropriately follows is whether one should really seek to define the notion of investment? (I). By giving a negative answer, the contradictions between these different decisions become obviously merely anecdotal, therefore worrying is useless. But if one has to answer positively to this preliminary question, as I believe must be the case, two other questions immediately arise. Since defining consists in characterising a notion by the criteria that are associated to it, what criteria should we retain to characterise the notion of investment? (II). Insofar as Doctrine and Tribunals have already made propositions, it seems logical to start by checking the relevance of the suggested criteria in order to validate or turn them down, perhaps to leave room for criteria not yet discovered. Since a definition is only an instrument necessary for qualifying, it would then be useful to consider the way in which the retained criteria are or should be applied (III). Such are the steps of the study we propose to undertake in the following developments.

I) SHOULD ONE SEEK TO DEFINE THE NOTION OF INVESTMENT?

A) *ARGUMENTS IN FAVOUR OF THE CURRENT STATUS QUO*

5. The problems encountered these past decades whenever the question of defining the notion of investment has come up are certainly at the basis of the dominant trend that is quite satisfied with the current situation. The foreseeable difficulties of this

[14] *Victor Pey Casado and foundation « President Allende » v. Chill* (ARB/98/2), Award, 8 May 2008, para 232.

[15] *Biwater Gauff (Tanzania) Ltd. v. Tanzania* (ARB/05/22), Award, 24 July 2008, para 310-318. In the latest decision known so far (*Ioan Micula and others v. Romania* (ARB/05/20), Award, 24 September 2008, para 119 to 128), the Respondent State did not contest that the investments made by the Claimants qualify as investments for the purpose of the ICSID Convention but only that investment incentives were not investment in themselves.

[16] I. Fadlallah, "La notion d'investissement : vers une restriction à la compétence du Cirdi?", *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner,* ICC Publishing, 2005, pp. 259 and following. See also E. Gaillard, observations on the *Patrick Mitchell v. Congo* decision, "Cirdi, chronique des sentences arbitrales", JDI 2007, p. 359 and following.

[17] F. Horchani, "Le droit international des investissements à l'heure de la mondialisation", *JDI* 2004, p. 367 and following.

[18] W. Ben Hamida, "La notion d'investissement, notion maudite du système Cirdi?", in *Investissements internationaux et arbitrage,* chronique sous la direction de I. Fadlallah, Ch. Leben et E. Teynier, *Gazette du Palais,* Friday 14, Saturday 15 December 2007, pp. 33 and following.

attempt and the fact that pragmatism – which has led to the current situation – must prevail over the search for a definition[19] – seen as dogmatic behaviour – are put forth. More specifically, the current situation actually results from the expression of wills one should respect. The absence of a definition of the notion of investment in the Washington Convention is thus presented as the result of a choice, just as the presence in the near totality of international treaties on investments of these long non exhaustive lists, very similar to one another, of transactions considered as investments in view of these treaties' application. The current absence of a definition of the notion of investment would thus be preferable because desired.

6. Actually, if indeed there was a choice, this choice was at best one by default. The study of preparatory works to the Washington Convention shows in fact that several States wished to precisely define the notion of investment and that it is only through lack of agreement between the States regarding this matter that it was decided not to retain any[20]. The impossibility of arriving at a definition of the notion of investment was thus diplomatically presented as a choice in that famous excerpt from the Report of the World Bank Executive Directors that accompanies the Convention, *"No attempt was made to define the term 'investment' (…)"* cited at will in most ICSID decisions and by an approving Doctrine. But these same decisions and commentaries strangely silence another sentence of the same Report that states that *"the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto"*[21]. It is true that it is difficult to make coexist these two evidently contradictory sentences which reveal the harshness of the debate. But it is questionable to maintain only the first when one looks into the jurisdiction of an institution for the settling of disputes, the title of which reveals – just as the one of the international Convention that created it – that it was meant to be specialised in a certain type of disputes, by specifying *ratione materiae* its domain of application. And since there is no limit without defining one as such, it follows that the task of defining the notion of investment was thus implicitly left to the arbitrators in charge of ruling under the auspices of the institution of dispute settlement so created.

Concerning international treaties relative to investments, one must remember that capital-exporting countries where those who suggested, if not imposed[22] – their

[19] See, Ch. H. Schreuer, *The ICSID Convention: A Commentary,* Cambridge University Press, 2001; I. Fadlallah, "La notion d'investissement: vers une restriction de la compétence du Cirdi?", *op. cit.,* footnote 16, p. 267: the author insists on the formality of any definition; N. Rubins, "The notion of'investment' in International Investment Arbitration", in *Arbitrating Foreign Investment Disputes,* N. Horn (editor), Kluwer, 2004, p. 283 and following; the author highlights the following citation: *"Definitions are like belts. The shorter they are, the more elastic they need to be"*.

[20] For developments on this matter, see for example the author's book *"Investissements étrangers et arbitrage entre Etats et ressortissants d'autres Etats, Trente années d'activité du Cirdî,* Litec, 2004, pp. 44-46.

[21] *"While the consent of both parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto"* Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, ICSID Doc/2, para. 25.

[22] On the power struggle that generally governs the adoption of such bilateral treaties, as well as on their reciprocity which is more formal than real, see for example M. Salem, "Le développement de la protection conventionnelle des investissements étrangers", *JDI* 1986, pp. 579 and following, especially, pp. 598 and following.

content, including this enumerative approach to the notion of investment. The reason is clear: to cover by very protective rules of investment law the near totality of economic activities that their nationals are likely to undertake abroad[23]. The numerous contestations made these last years about this approach by capital-importing countries, although they have not yet driven to the modification of BITS[24], tend to prove that the retained enumerative approach no longer benefits from unanimous acceptance.

7. Even by default, a choice can reveal itself to be convenient. What situation are we dealing with exactly? It is clear that the absence of a definition benefits agents of international economic relations that are looking to have their transactions qualify as investments in order to have them benefit from very important material but also procedural commitments undertaken by States in favour of this particular category of transactions[25]. It is then easy to understand that the qualifying of an investment is desired and sought by international economic agents, as well as fought by States drawn to arbitration on the basis of this notion. If one only analysed this aspect of the question, mostly political considerations would help decide between partisans and adversaries of the current *status quo*.

8. The absence of a specific definition could also be desirable in that it would confer a certain flexibility and functionality to the notion of investment. While it is obvious that the different instruments relative to investments do not all seek to reach the same goal, the diversity of situations to be categorized could very well benefit from a specific definition, complemented by the necessary qualifiers. This is the case for the concept of "admissible" investments, which given its limited resources was the only category taken into account by the 1988 Seoul Convention that created the Multilateral Investment Guarantee Agency; it is the qualifier "admissible" that specifies the domain of application of the text and not a particular definition of the notion of investment. And the notion of investment is already associated to various qualifiers (direct or indirect investment, cross-border M&A or Greenfield foreign investments, etc.) that allow delimitation according to the transactions to be defined.

B) *THE ARGUMENTS FAVOURING THE ELABORATION OF A DEFINITION*

9. The absence of a definition of the notion of investment does not present an unquestionable advantage. Yet, it presents some undeniable disadvantages. How could

[23] *"In truth, BITs neither promote nor protect investments in a specific manner, but rather goods in a generic manner."* D. Carreau and P. Juillard, *Droit international économique,* fourth edition, Paris, LGDJ, 1998, para 1066; see also, J-P Laviec, *Protection et promotion des investissements,* Paris, PUF, 1985.

[24] One may observes in this respect that the adoption of most BITs currently in force but also of multilateral treaties including a section on investments (NAFTA, and the Treaty on the Energy Charter especially) precedes the growth of disputes concerning the notion of investment.

[25] The most important material commitments are as follows: commitment to ensure to the foreign investment and/or investor a fair, non discriminatory and equitable treatment, commitment to ensure to the foreign investment and/or investor full protection and security, strict framing of the direct or indirect expropriations, obligation to respect the personal commitments taken in favour of the foreign investor ("mirror effect" clauses contained in some BITs), guarantee of transfers present in all laws and treaties on investments, etc. The procedural commitment is the consent given by the State in advance and *erga omnes* to an alternative form of settling disputes.

one possibly apply Investment Law when we are incapable of determining its scope of application[26]?

The incontestable and uncontested existence of Investment Law requires a *ratione materiae* definition of its scope of application, and it is easy to note that the current application of its very favourable rules to the most diverse situations is directly at the basis of the disputes relative to the notion of investment, disputes that go beyond the ICSID frame[27]. More specifically on the topic of this institution, while the absence of a definition of an investment has undoubtedly served its growth, it could also cause its ruin[28]. It has already been observed that the refusal to qualify the transaction in question in *Joy Mining Machinery Ltd v. Egypt* (ARB/03/11) as an investment could have not occurred had the ICSID arbitral Tribunal been otherwise constituted[29]. This risk of incoherence could lead the foreign agents who doubt the qualification attributed to their transaction to turn away from ICSID arbitration (in spite of the advantages it presents) for the benefit of other available modes of dispute resolution, in order to discard the uncertainty concerning ICSID *ratione materiae* jurisdiction[30].

10. Defining the notion of investment is thus necessary, not only for academic reasons. Aside from the issue of ICSID's future, it is a question of legal security for foreign investors and capital-importing countries, i.e. all the States on the planet. And if a definition is necessary, it could not result from an enumerative method retained in the near totality of international treaties, if not because an enumeration, no matter how long, has never constituted a definition. In the more particular scope of the application of the Washington Convention, it also seems difficult to comprehend that the *ratione materiae* scope of this multilateral treaty varies case by case according to the litigants

[26] In this respect the absence of a definition of the notion cannot be compared with the silence of the 1980 Vienna Convention on Contracts for the international sale of goods concerning the notion of sale; the latter is the object of specific definitions concordant in domestic Law systems, which is far from being the case for the notion of investment.

[27] See for example *Petrobert Ltd v. Kirghstan,* Award rendered under the auspices of the Arbitration institute of the Stockholm chamber of commerce, in application of the Treaty on the Energy Charter, 29 March 2005, and its commentary by F. Yala, in *Investissements internationaux et arbitrage,* chronicle under the direction of I. Fadlallah, Ch. Leben and E. Teynier, *Gazette du Palais, Friday 14, Saturday 15 December 2005,* pp. 40 and following. See also *BG Group Plc. v. Argentina,* Award rendered under the aegis of the UNCITRAL arbitration rules, in application of the UK-Argentina BIT, 24 December 2007, para. 111 and following (available at http://ita.law.uvic.ca/'); *Nagel v. Czech Republic,* award under the aegis of the Arbitration institute of the Stockholm chamber of commerce in application of the UK-Republic Czech BIT, SCC Case 49/2002, (2004), 1 *Stockholm Arbitration Report,* pp. 145 and following) ; *S.D. Myers v. Canada,* Interim Award rendered under the auspices of the UNCITRAL arbitration rules by application of NAFTA Chapter 11, 13 November 2000 (available at www.naftalaw.org). For commentaries on these two last decisions, see Yves G.L. WOLTERS, « The Meaning of « Investment » in Treaty Disputes : Substantive or Jurisdictional ? Lessons from Nagel v. Czech Republic ans S.D. Myers v. Canada » 8 *J.W.I.T.* 1, February 2007, pp. 175 and following.

[28] In support of this, see also E. Gaillard, observations on the *Patrick Mitchell v. Congo* decision, "Cirdi, chronique des sentences arbitrates", *JDI* 2007, p. 368 and W. Ben Hamida, "La notion d'investissement, notion maudite du système Cirdi? " in *op. cit.,* footnote 18, p. 39.

[29] See I. Fadlallah, "La notion d'investissement: vers une restriction à la compétence du Cirdi ?", in *op. cit.,* footnote 16, p. 268.

[30] Contrary to the ICSID, the other international arbitration institutions (ICC, LCIA, Arbitration Institute of the Stockholm chamber of commerce, etc.) do not limit *ratione materiae* the jurisdiction of arbitral Tribunals ruling under them only to disputes relating to an investment.

will[31], or depends on bilateral instruments such as BITs that in comparison are mere texts of application[32]. It would consist in favouring the secondary text to the main text and denying the specificity of the latter, underlined by the ICSID *ad hoc* Committee constituted in *Patrick Mitchell v. Congo* (ARB/99/7)[33]. This reason explains that for four years now, Doctrine has almost unanimously, and ICSID decisions in the great majority, have favoured a differentiated qualification – also known as the "double test" procedure – that consists in checking that the transaction in question is indeed an investment within the meaning of the applicable BIT and then within the meaning of the ICSID Convention[34]. Thus, on this very point, the awards rendered in *MCI Power Group LC et al. v. Ecuador* (ARB/03/16) and *Parkerings-Compagniet AS v. Republic of Lithuania* (ARB/05/8)[35] are criticizable and in the minority.

C) *A DEFINITION SUPPOSES CRITERIA*

11. In order to really define the notion of investment, that is to discern the essential characteristics that set apart such a transaction and allow to distinguish it from others, one has to reason according to criteria. A criterion has to be discriminating in order to permit to make distinctions. A criterion susceptible of being verified in several very different transactions is quite simply not a criterion ...

And if several criteria are necessary to define, as seems to be the case for the notion of investment, the absence of one of them means that the analyzed transaction does not correspond to this definition. Nevertheless, such was not the opinion of the arbitral Tribunal constituted in *CSOB v. Slovakia* (ARB/97/4). Indeed, it considered that the elements of the definition suggested by the Respondent, although they had a tendency of being verified by most investment transactions, were not formal prerequisites in determining that a transaction constitutes an investment[36]. This conception was adopted in other decisions and by a part of the Doctrine[37]. The problem here is the switch to

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[31] In support of this, see *Jan de Nul N. V v. Egypt* (ARB/04/13), Decision on jurisdiction, 16 June 2006, para, 49 and 50.

[32] I. Fadlallah, "La notion d'investissement : vers une restriction de la compétence du Cirdi ?", *op. cit.,* footnote 16, p. 265.

[33] *"Indeed, such concept of investment should prevail over any other 'definition' of investment in the parties' agreement or in the BIT, as it is obvious that the special one/privileged arrangements established by the Washington Convention can be applied only to the type of investment which the Contracting States to that Convention envisaged"*. Decision of the *ad hoc* committee, 1st November 2006, para 25.

[34] On previous ICSID decisions on this issue, see the author's book *Investissements étrangers et arbitrage entre Etats et ressortissants d'autres Etats, Trente années du Cirdi,* Litec, 2004, pp. 61-62.

[35] Ruling that in the absence of a definition of the term 'investment' in the Washington Convention it was sufficient that the transaction be considered as such under the BIT in order to grant jurisdiction to an ICSID arbitral Tribunal (see, *supra,* para. 2).

[36] *"The Tribunal notes, however, that these elements of the suggested definition, – 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 as that concept is understood under the Convention."* Decision on jurisdiction, 24 May 1999, para. 90.

[37] See, for example, *Mitchell v. Congo* (ARB/99/7), Award, 9 February, 2004, para. 55. See also *Biwater Gauff (Tanzania) Ltd. v. Tanzania* (ARB/05/22), Award, 24 July 2008, para 312-318. In doctrine, see Ch. H. Schreuer *The ICSID Convention: A Commentary,* Cambridge University Press, 2001, p. 140 ; I. Fadlallah, "La notion d'investissement: vers une restriction à la compétence du Cirdi ?", *op. cit.,* footnote 16, p. 267.

reasoning in terms of clues which can not be used to establish a definition[38] and which are unsatisfactory in regards to a secure legal basis since it leaves ample room for the judge to interpret the meaning and scope of the clues gathered (even if in the exercise of his/her duties the judge is oriented by the recommendation to establish a web of clues or gather concordant evidences). When defining an investment, why should one be limited to circumstantial evidence, vague criteria, irrelevant factors, the non verification of which could sometimes have no effect, while it is considered normal to apply precise criteria when defining what constitutes a sale, a loan or a business contract? It must therefore not be in terms of clues but of criteria and essential elements that it is appropriate to reason, and since Doctrine and Tribunals have already suggested criteria to define the notion of investment, it is to these criteria and to their relevance relating to the requirement formulated above that it is appropriate to look at.

II) The Relevance of Criteria Suggested to Define the Notion of Investment

12. Since the notion of investment has been discussed before the ICSID and since criteria have been suggested in view of establishing a definition, it is apparent that one of the criteria suggested is unquestioned and seems to be consensual (this is the contribution criterion) while others are controversial.

A) *The Contribution Requirement, an Unquestioned Criterion*

13. When it is consented that the definition of an investment necessitates the establishing of criteria, the one consisting in making a contribution is unanimously adopted by jurisprudence and by Doctrine. It must be added that this criterion also appears in the background of the majority of international treaties relative to investments that reason in terms of assets[39], since the constituting of assets abroad can only result from contributions made to this end[40]. Specifically on contributions, it seems nevertheless that the harmonious unanimity on their issue is only possible thanks to the vagueness that reigns around this criterion. It is noteworthy that in most decisions

[38] Clues correspond to a series of known facts from which one can establish, thanks to inductive reasoning, the existence of an alleged/disputed fact, the proof of which is not directly possible. In French Law, clues are not used to define a legal act, such as an investment, but help to determine the existence of a fact; the absence of a clue is therefore not determining to this respect since others exist.

[39] On this matter, see *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking,* ITA/UNCTAD/2006/5; United Nations Publication, 2007, p. 8 and following.

[40] The link between investment and asset in Investment treaties has been underlined in *Nagel v. Czech Republic* (SCC Case 49/2002, (2004), I *Stockholm Arbitration Report,* pp. 145 and following). The transaction at stake was a cooperation agreement signed in 1993 by Mr Nagel and a Czech enterprise wholly owned by the Czech Republic with the undertaking to cooperate for the purpose of obtaining operating rights for a telecommunications business. The Tribunal noted that this agreement – which did not oblige the parties to make specific contributions to their project – was only of a prepatory nature and that the rights derived from it had no financial value. The tribunal thus concluded that Mr Nagel's right under the cooperation agreement were not such as to constitute an "asset", or an "investment" within the meaning of article 1 of the United Kingdom-Czech Republic BIT (*ibid.*, pp.164-165). On this case, see Yves G.L. WOLTERS, "the Meaning of "Investment" in Treaty Disputes : Substantive or Jurisdictional ? *Lessons from* Nagel v. Czech Republic *and* S.D. Myers v. Canada", 8 *JWIT*, n°l, February 2007, pp. 175-185.

stating that an investment supposes a contribution, the exact meaning of this term is not specified. Indeed, arbitrators directly proceed to analysing the resources deployed by the foreign agent for adopting or rejecting the existence of contributions.

1) THE TYPES OF CONTRIBUTION GRANTED BY ICSID TRIBUNALS

14. Yet the use of the term "contribution" which comes from Corporation Law is far from fortuitous. It illustrates the tight links between Investment Law and Corporation Law. A large majority of investment transactions take place through the intermediary of creating a company or acquiring part or all of an already existing company. In both instances, in consideration of its contribution, the investor will then acquire a participation in a company materialised through company shares granting a right to partake in the profits earned by this company. Several clarifications and observations must now be made.

15. In regards to the substance of contributions. Corporate Law teaches us that they can take on several forms, monetary (contribution of a sum of money), in kind (contribution of a good) or in industry (contribution of a service). Within the context of Investment Law, the financial contribution is often highlighted while the contribution of industry has long been excluded from conceivable contributions, without any explanation[41]. Yet the possibility that an investor put forth its activity, reputation and experience, appeared from the beginning, in the first case submitted to the ICSID. In *Holiday Inns v. Morocco* (ARB/72/1), the Holiday Inns group had indeed bound itself mainly to make the receiving State benefit from its fame and experience pertaining to creating then operating luxury hotels. And it is mainly due to the fact that the investor built its hotels in Morocco only through loans contracted locally and not through foreign financial contributions that a dispute arose[42]. More recently, the contribution of industry was established as a type of contribution susceptible of being at the base of an investment, in several decisions including the one that set aside the award granted in *Patrick Mitchell v. Congo* (ARB/99/7). The *ad hoc* Committee confirmed in fact that "*the first characteristic of investment is the commitment of the investor, which may be financial or through work; indeed, in several ICSID cases the investor's commitment mainly consisted in its know-how*."[43]

16. Now, while Corporate Law and Investment Law are tightly bound, they are nevertheless different and it would be simplistic to only identify an investment where transactions lead to the attribution of shares to a foreign agent. It is more than

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[41] On this matter, see especially, the author's book, "*Investissement étrangers et arbitrage entre Etats et ressortissants d'autres etats, Trente années d'acitivité du Cirdi,"* Litec, 2004, p. 67.

[42] Information gathered by the only existing source concerning this dispute, P. Lalive's article, *"The First World Bank Arbitration (Holiday Inns v. Morocco) – Some Legal Problems",* 51 Brit. Y. B. Int'l L. 1980, p. 123 and following.

[43] Decision of the *ad hoc* Committee, 1 November 2006, para. 27, setting aside the award rendered 30 November 2004,. See also *Malaysian Historical Salvors and others, v. Malaysia* (ARB/05/10), Award declining jurisdiction, para. 109, in which the Tribunal notes that, concerning the contribution, *"the Claimant has, like the Claimants in Salini, made contributions in money, in kind and in industry…".*

conceivable – and has previously been consented in past ICSID jurisprudence – that an investor receive benefits other than corporate in consideration of its activity, for example through a contract guaranteeing as returns a part of revenues or profit earned by the company to which it participates without being a shareholder[44]. This situation was recently illustrated by the contract signed between the Malaysian Historical Salvors Company and Malaysia, parties to *Malaysian Historical Salvors and others, v. Malaysia* (ARB/05/10), that provided for the foreign company specialised in discovery of ship wrecks to be paid only on the sale of objects discovered and brought to the surface; this type of "no finds-no pay" contract is quite similar to petroleum exploration contracts or to oil leases (when the phase of exploration is not disassociated from the phase of production) that represent the paradigm of an investment contract.

2) THE CONTRIBUTION CAN'T BE DISSOCIATED FROM ITS RETURN

17. The examples intentionally stated above also reveal that the contribution made may not in fact be disassociated from its remuneration, which is sometimes presented as another criterion of investment[45]. In our capitalist economies, contribution is never made gratuitously, but because the investor hopes to obtain returns[46]. Financial gain in view of which an investment is made does not distinguish this transaction from other transactions of international economic relations such as sale or loan. What distinguishes an investment from other transactions is the uncertain returns, subject to the future profitability of a project in which the investor participates. This characteristic was already put forth at least before one ICSID[47] arbitral Tribunal and has been underlined by another ICSID Tribunal as well as by Doctrine[48]. Postponed and uncertain, an investor's remuneration cannot then benefit from any legal mechanism used to secure other

[44] In *Amco Asia v. Indonesia* (ARB/81/1), the investor was granted a lease of 19 years along with an amortising share in profits earned by the hotel he/she was managing under the aforementioned lease.

[45] See, Ch. H. Schreuer *The ICSID Convention: A Commentary,* Cambridge University Press, 2001, p. 140.

[46] In this respect, see also P. Bernardini, "Investment Protection under Bilateral Investment Treaties and Investment Contracts", 2 J.W.I.T., N° 2, June 2001, p. 235 : *"An investment does not consist merely in the transfer into or creation of an asset in the economy of a given State. Such an asset is, in fact, only the instrument through which the private investor aims at obtaining, after a certain period of time, a return justifying the risk it has accepted to run. Thus, both the lapse of some time for the investment to become rooted in the economy of the host State and the assumption of the risk that no return (or a return lower than expected) will be forthcoming characterize all investments".*

[47] In *CSOB v. Slovakia* (ARB/97/4), The Respondent State put forth the following definition: "an investment consists *essentially in the acquisition of property or assets through the expenditure of resources by one party (the 'investor') in the territory of a foreign country (the 'host State'), which is expected to produce a benefit on both sides and to offer a return in the future, subject to the uncertainties of the risk involved."* (Decision on jurisdiction, 24 May 1999, para. 78, and see *supra* footnote 36 the Tribunal's answer).

[48] In *Ioan Micula and others v. Romania* (ARB/05/20), Award, 24 September 2008, para 128, the Tribunal held that *"investments do include income expectations and such income will of necessity be less if an investor is deprived of incentives".* In doctrine, see, Ch. A. Michelet, *"Les nouveaux cadres de la coopération industrielle"*, in *Les investissement français dans le Tiers Monde,* J. Bourrinet (dir.), Economica (1984), p. 59 and following, especially p. 68 : *"The adequate criterion is thus profit access. It is proportionate to the local added value of the project or enterprise. It varies according to the obtained results. This distinction is central and allows to avoid a transfer from the investment modality to a sale modality."* See, also, E. Gaillard, "Cirdi, chronique des sentences arbitrates", *JDI* 1988, p. 176-177. *Contra,* see, Ch. H. Schreuer, *The ICSID Convention: A Commentary,* Cambridge University Press, 2001, p. 140 who evokes *"a certain regularity of profits and earnings".* The regularity of expected return, even if rendered less precise by adding the expression "a certain", raises some difficulties. Does it mean that the irregularity of the amount of revenues received due to the acquisition of a majority interest in a company precludes qualifying this acquisition as an investment?

international economic transactions, such as documentary credit for international sale, the various securities that can accompany an international loan[49], the payment by instalments following the progress of works for an entrepreneur in construction and civil engineering (provisional system of reception). It is this specificity of the investment transaction that justifies the application of specific rules of investment Law.

18. But saying that in regards to an investment a contribution is inextricably linked to its remuneration, or that an investment supposes a contribution to a project in view of obtaining revenues, amounts to bringing in three other criteria usually presented along with the criterion of contribution. The question remains on whether these more controversial criteria are actually criteria.

B) *Controversial Criteria: Duration, Risk and Development of the Host State*

1) An investment supposes a certain duration of performance

19. The temporal dimension of an investment transaction follows directly from the requirement that a contribution be made to a project in view of obtaining revenues in order to have an investment. By definition, the hope of future revenues that explains the decision to invest supposes that a certain amount of time elapses before any revenues can be generated. It might be useful to highlight that during the preparatory work to the Washington Convention, duration indeed appeared as a criterion allowing the definition of the notion of investment since article 30(1) was suggested:

"For the purpose of the present chapter, 'investment' will designate all monetary or other economically valuable property contributions made for an indeterminate time period or, if the period is specified, for at least five years"[50].

20. This definition proposal quickly disappeared and the criterion of duration did not surface in the definition proposals that followed. The reason is clear: to retain the criterion of duration requires that a minimal one is fixed, which can raise a problem in regards to transactions verifying the other criteria of the investment definition except for duration, short of a mere few months or weeks.

Well aware of this problem, some arbitrators have not instated a minimal duration and diminished the power of this requirement by associating this duration to conditions of economic commitments and contribution to the development of the host State, all the while avoiding the establishment of a ratio[51]. But is such a vague and relative condition of duration still a condition? Such a question is quite appropriate.

[49] For a more ample discussion on the distinction between loan and investment, see the author's book *Investissements étrangers et arbitrage entre Etats et ressortissants d'autres Etats, Trente années d'activité du Cirdi,* Litec, 2004, p. 76.

[50] *ICSID, Analysis of documents relative to the origin and elaboration of the Convention,* Washington D.C,, 1970, vol. l.p. 116.

[51] See, *Consorzio Lesi-Dipenta v. Algeria* (ARB/03/8), Award for lack of jurisdiction, 10 January 2005, para. 14(ii), as well as *LesiSpA v. Algeria* (ARB/05/3), Decision on jurisdiction, 12 July 2006 para. 73 (iii).

21. In *Salini Costruttori SpA & Italstrade SpA v. Morocco* (ARB/00/4), the arbitral Tribunal found that the transaction in question of 32 months duration, prolonged to 36 months, satisfied *"the minimal duration observed by Doctrine, which is of 2 to 5 years"*[52]. Several ICSID arbitral Tribunals later ruled following this proposal and chose to adopt – curiously enough – the shortest end of the proposal[53].

Once fixed, whether short or long, the minimal duration raises some problems when it comes to appreciating the transaction in question on a case by case basis. What duration to adopt? The one initially provided or the one effectively noted? In the event of a transaction quickly put to an end, due to State intervention for example, it is tempting to favour the duration initially provided. But if the latter is a bit short, even in regards to the brief period of two years that was eventually retained, the noted duration will be favoured in order to gain a few weeks or months necessary to reach the fixed limit. The decision dated 16 June, 2006 in *Jan de Nul N. V v. Egypt* (ARB/04/13) reveals this approach; the parties agreeing to say that the minimal duration of an investment should be two years, the Respondent highlighted that between the beginning of the dredging operations of the Suez Canal on 29 July 1992 and the final certificate of 29 June 1994, less than two years had passed[54]. The Claimant argued that for a foreign agent an investment starts when it participates in the call for tenders (given on 19 March 1991 in this case) and goes beyond the final certificate, until the repatriation of equipment which occurred in autumn 1994 with the return of the two dredging barges to Europe. The Tribunal favoured this second interpretation by maintaining that the *"duration of the operation was sufficient for it to qualify as an investment within the meaning of article 25 of the ICSID Convention, even starting from the execution of the Contract on 29 July, 1992"*[55].

The decision rendered by the arbitral Tribunal constituted in *Saipem Spa v. Bangladesh* (ARB/05/7) may also be cited. In this case, the dispute arose from the construction of a pipeline scheduled to last over a year or so. Because of the population's opposition to the project, work was significantly delayed and the initial date of 30 April, 1991 was pushed back by a year by an amendment to the contract[56]. Opposing itself to the investment qualification, the defending State argued that the periods of effective work on the project amounted to less than a year. The arbitral Tribunal noted that Bangladesh did not put forth any reason for only effective work being taken into account and decided that it would be appropriate to consider the time when work had been interrupted[57].

But can one seriously submit the investment qualification to external events that might occur, such as local protests against what has been planned, bad weather or natural disasters (an earthquake for example)? The answer is obviously no.

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[52] Decision on jurisdiction, 23 July 2001, para. 53.

[53] *Jan de Nul N.Y v. Egypt* (ARB/04/13), Decision on jurisdiction 16 June 2006, para. 93; *Malaysian Historical Salvors and others v. Malaysia* (ARB/05/10), Award for lack of jurisdiction rendered 17 May 2007, para. 110.

[54] Para. 94.

[55] *Ibid,* para. 95.

[56] Decision on jurisdiction, 21 March 2007, para. 7 to 12.

[57] *Ibid.,* para. 102.

22. Moreover, as stated before, a criterion must discriminate. Yet a certain duration of performance is common with many transactions in international economic relations, for example loans, supply agreements (often constituted by a frame contract plus several performance contracts), sales regardless of their object as long as the deliveries and/or payments are divided out in time, etc. Since it cannot isolate the specific investment transaction, time must not be considered as a constitutive criterion but rather as a characteristic from the principal criterion, a contribution to a project in order to obtain revenues later on. The same remark can then be made about the participation to the risks of a transaction that an investment entails.

2) AN INVESTMENT WOULD ENTAIL PARTICIPATION IN THE RISKS OF A TRANSACTION

23. The risk accompanying any investment transaction is a unanimously accepted criterion, as much by Doctrine as by arbitrators. The problem is that this criterion gives way to very diverse interpretations that show that there is no agreement on the appropriate meaning to attribute to this term.

The first papers dealing with the legal meaning of the notion of investment, which preceded by far the appearance of disputes concerning this notion, reveal that in an investment, the risk taken is mainly economic, the absence of earning capacity of a project to which an investor participates: *"An investment can be defined as the creation or acquisition of assets from which revenues may be expected to come in the future. Decisions to invest demonstrate the anticipations of investors relative to the events to come and are thus uncertain; an investment includes a risk"*[58]. This risk, apparently forgotten or even misunderstood[59] when reading recent awards, is incumbent upon the foreign agent such as certain legislation relative to foreign[60] investments recalls. It is noteworthy that the economic risk contained in an investment is double: on the one hand, an intrinsic risk to the transaction can occur in the event of a bad choice, whether commercial, technological, geographical, etc., and on the other hand, the risk of the economic situation can arise if an investor undertakes the investment during a recession phase (leading to the diminishing or disappearance of the projected profits). States are not responsible for this last risk, unless it is proven that they are at the source of the economic recession affecting the investment due to manifestly inadequate choices that may be qualified as such in the period when they were made[61].

[58] Ch. Oman, *Les nouvelles formes d'investissement dans les pays en voie de développement, Etudes du Centre de développement de l'OCDE,* 1984, p. 11. See also, D. Carreau and P. Juillard, *Droit international économique,* fourth edition, Paris, LGDJ, 1998, para 1083: *"The investment transaction necessarily entails that the investor be associated to the risks of the enterprise".*

[59] The sole arbitrator ruling in *Malaysian Historical Sailors and others v. Malaysia* (ARB/05/10) decided that the risks assumed under the Contract were no more than ordinary commercial risks and that mere commercial risk did not satisfy the risk criterion set forth by the Salini jurisprudence (Award declining jurisdiction, 17 May 2007, para. 112).

[60] Thus article 4 of the Mauritanian Law dated 16 October 1976 relative to investments provided for an authorisation procedure and added in section 2: *"Authorisation cannot include the commitment to protect an investor against losses, foregone profit or expenses resulting from the evolution of production techniques, economic trend or the investor's management."* (Unofficial translation).

[61] On this question, see the author's presentation *"La compatibilité des mesures d'urgences économiques avec les obligations Internationales des Etats découlant des TBI"* delivered at a conference held in Paris on 17 and 18 October 2007 entitled *L 'avenir du droit des investissements en Amérique Latine* (to be published).

24. The economic risk sustained by the investor is lined with political risk – while waiting, the foreign investor exposes the contribution made in the host State to a series of events (political changes, internal turmoil, conflicts, etc.) that can diminish the profitability of the project or even destroy it, together with the initial contribution. The political risk is intricately linked to the temporal aspect of the investment and to its location in foreign territory[62].

It is nevertheless possible to object that the political risk is actually sustained by any transaction taking place abroad and in a certain amount of time, such as the carrying out of any civil engineering project. This is true, but one must recall on this issue that the investment transaction distinguishes itself from others in that there is no judicial mechanism exclusive to this transaction (such as payment in installments generally adopted in the construction and civil engineering industry) susceptible of protecting the investor from political uncertainty[63]. No payment mechanism or guarantee is indeed conceivable given the uncertainty that affects the existence of profit and its amount. It is this specific risk that justifies the existence of Investment Law rules that are so binding for Host-States: the commitment of treatment (especially fair and equitable treatment), the commitment of full protection and security and the framing of the right to expropriate. The existence of this specific risk also explains the creation of national and international mechanisms peculiar to investment insurance[64].

25. A third type of risk was maintained in *Fedax NV v. Venezuela* (ARB/96/3)[65]: the State's failure to perform one of the obligations contracted in favour of the foreign agent. At the time, the decision had been vigorously and rightly criticised by Doctrine on the grounds that the risk of failure to perform, present in any legal relation and thus not discriminatory, leads to qualifying any transaction as an investment[66]. This is probably at the origin of a small evolution leading ICSID arbitral Tribunals to adopt a multifaceted approach to the risk criterion. Nevertheless, it still leaves plenty of room to the risk of failure to perform, as it appears in the award declining jurisdiction rendered on 10 January 2005 in *Consorzio Lesi-Dipenta v. Algeria* (ARB/03/8): *"In the present case, the contract implies risk and uncertainties, some of – which, according to the Claimant, materialized upon cancellation of the contract"*[67].

[62] The localisation of the investment in foreign territory is important since it gives the investment its international character and justifies the application of rules relative to foreign investments. This explains that the arbitral Tribunal constituted in *Bayview v. Mexico* declared that it lacked jurisdiction by an award dated 19 June, 2007 after having noted that the American Claimants could not prove to have made any investments in the Mexican territory, within the meaning of NAFTA article 1101(l)(b). But one could recall that the territoriality criterion set forth by the BIT are sometimes very loosely interpreted, such as in *SGS v. Pakistan and SGS v. Philippines*. On this issue, see F. Yala, "The notion of "investment" in ICSID Case Law : A Drifting Jurisdictional Requirement ? Some Un-Conventional Thoughts on Salini, SGS and Mihaly", *op. cit.*, footnote 3, especially pp. 117-120.

[63] See, supra, para. 17.

[64] Creation of the Overseas Private Investment Corporation in the United States, development of investment insurance (parallel to exportation insurance) by the COFACE in France, creation of the Multilateral Investment Guarantee Agency, etc.

[65] *"Nor can the Tribunal accept the argument that, unlike the case of an investment, there is no risk involved in this transaction: the very existence of a dispute as to the payment of the principal and interests evidences the risk that the holder of the notes has taken."* Decision on jurisdiction, 11 July 1997, para. 40.

[66] E. Gaillard, observations on the same decision, *JDI 1999*, pp. 290 and following, especially p. 293.

[67] Para. 14 (iii). See also *Bayindir v. Turkey* (ARB/03/29), Decision on jurisdiction, 14 November 2005 para. 134 to 136; *Saipem Spa v. Bangladesh* (ARB/05/7), Decision on jurisdiction, 21 March 2007, para. 109.

Besides the risk of failure to perform, the foreign agent's exposure and uncertainty linked to the amount of its profit margin are therefore also now presented as constituting a risk in more recent decisions[68]. This illustrates the interdependency between the risk criterion, the temporal aspect of the transaction and the expected profit. But a careful reading of these decisions shows that they carry a new interpretation of the uncertainty criterion which deserves further analysis[69]. In any case, putting aside the element of failure to perform which may not be retained for the reasons given earlier, it clearly appears that the risk run by a foreign investor is only a version of the requirement of contribution, the remuneration of which differed in time; in addition of being poorly discriminatory[70], the risk criterion does not constitute an autonomous criterion of an investment transaction.

3) AN INVESTMENT SHOULD CONTRIBUTE TO THE ECONOMIC DEVELOPMENT OF THE HOST STATE

26. Presented as the only criterion proceeding directly from the Preamble of the Washington Convention and from the goal pursued by the latter[71], the contribution of an investment to the development of the host State was later elevated in 2001 by the Tribunal that ruled in *Salini Costruttori SpA & Italstrade SpA v. Kingdom of Morocco* (ARB/00/4)[72], to the level of a criterion constitutive of the notion of investment.

In 2005 and 2006, an award and two decisions turned down the criterion of contribution to the development of the host State on the grounds that it was *"difficult to ascertain and that is implicitly covered by the other three criteria"*[73], *"already included in the three classical conditions set out in the 'Salini test'"*[74].

Since then, this criterion has been rehabilitated to deny jurisdiction to the Centre in *Malaysian Historical Salvors and others v. Malaysi*a (ARB/05/10) and to annul the award rendered in *Patrick Mitchell v. Congo* (ARB/99/7).

27. The origin of *Malaysian Historical Salvors and others v. Malaysia* (ARB/05/10) was a transaction consisting in the search of a shipwreck, the recovery of its cargo meant partly to enrich Malaysian museums, partly to be sold for the profit of the State and for the foreign company as its remuneration. The sole arbitrator held that despite the

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[68] See especially *Lesi SpA and Astaldi SpA v. Algeria* (ARB/05/3), Decision on jurisdiction, 12 July 2006 para. 73 (iii).

[69] See *infra*. 111.

[70] See *supra,* preceding paragraph.

[71] *"The only possible indication of an objective meaning that can be gleaned from the Convention is contained in the Preamble's first sentence, which speaks of "the need for international cooperation for economic development and the role of private international investment therein". Therefore, it may be argued that the Convention's object and purpose indicate that there should be some positive impact on development"*. Ch. H. Schreuer The ICSID Convention: A Commentary, Cambridge University Press, 2001, p. 140.

[72] See *supra,* para. 1.

[73] *Consorzio Lesi-Dipenta v. Algeria* (ARB/03/8), Award for lack of jurisdiction, 10 January 2005, para. 13 ; *Lesi SpA and Astaldi SpA v. Algeria* (ARB/05/3), Decision on jurisdiction, 12 July 2006, para. 72.

[74] *Bayindir v. Turkey* (ARB/03/29), Decision on jurisdiction, 14 November 2005, para. 137

transaction's success, *"the benefits which the Contract brought to the Respondent are largely cultural and historical. These benefits, and any other direct financial benefits to the Respondent, have not been shown to have led to significant contributions to the Respondent's economy in the sense envisaged in ICSID jurisprudence"*[75].

In *Patrick Mitchell v. Congo* (ARB/99/7), the *ad hoc* Committee constituted to rule on the request for annulment filed by the host State set aside the award on the grounds that *"as a legal consulting firm is somewhat uncommon operation from the standpoint of the concept of investment, in the opinion of the ad hoc Committee it is necessary for the contribution to the economic development or at least the interests of the State, in this case the DRC, to be somehow present in the operation. If this were the case, qualifying the Claimant as an investor and his services as an investment would be possible; furthermore, it would be necessary for the Award to indicate that, through his know-how, the Claimant had concretely assisted DRC, for example by providing it with legal services in a regular manner or by specifically bringing investors"*[76].

28. Both decisions have provoked hostility from Doctrine[77]. The arbitrator and members of the *ad hoc* Committee were criticized for having push aside social and cultural aspects of development, concentrating on economic development exclusively, all the while adopting a particular interpretation of the latter. The decision rendered by the *ad hoc* Committee in *Patrick Mitchell* does seem to account only for investment transactions made for the direct benefit of the host State while most foreign investments are not destined to satisfy the direct needs of the host State, but contribute indirectly to its development by creating, maintaining or increasing an activity that participates to weave the economic fabric of a country by creating jobs, tax revenues, derived activities, etc. By adopting the expression of *"significant contribution to the economy"* of the host State, the award for lack of jurisdiction rendered in *MHS* seems to want to set a quantitative threshold it nevertheless fails to specify. In addition to the fact that the setting of any limit in this matter would be arbitrary – a critique which was addressed to the duration criterion – the decision to qualify as an investment only those transactions reaching a certain threshold belongs to an outdated conception of development, long surpassed by the preparatory works to the Convention[78]. Harmonious and sustainable development can not be only founded on great projects. Indeed, it requires irrigation of the whole economic fabric with various investments, domestic or foreign, diverse even in size.

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[75] Decision on jurisdiction, 17 May 2007, para. 132.

[76] Decision of the *ad hoc* committee, 1 November 2006, para. 39.

[77] See especially W. Ben Hamida, "La notion d'investissement, notion maudite du système Cirdi?" in *op. cit,* footnote 18, pp. 33 to 38, and E. Gaillard, "Cirdi, chronique des sentences arbitrales", *JDI 2007,* p. 367.

[78] In the explanations accompanying the Preliminary Draft of the ICSID Convention, it was already stated that if considerations had been given to fixing a lower limit for the value of the subject-matter of a dispute, this idea has been dropped quickly, both for theorical reasons ("The subject-matter of a dispute might be of insignificant pecuniary value, but might involve important questions of principle") and practical reasons (in some instance, the pecuniary value of a dispute might not be readily ascertainable). See *Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Documents concerning the origin and the Formulation of the Convention,* Washington DC, 1968, Vol II., Part. 1 pp. 184 and following, especially p. 204. And there are obvious and mechanical links between the value of the subject-matter of a dispute and the amount of the investment made on the one hand and between this amount and the contribution of the investment to the economic development of the host State on the other hand...

29. Beyond the criticisms (to which I subscribe) addressed to these two decisions and the interpretations that they adopt on "the development of the host State" criterion, there is a more fundamental one; the development of the host State criterion is not relevant because it does not allow differentiating transactions that are investments from those that are not. In fact, all foreign investments do not participate in the development of a host State, and all transactions that participate in the development of the host State are not necessarily investments.

The first statement is often verified in cases of Mergers & Acquisitions that constitute, according to the annual UNCTAD World Investment Report, more than half of the annual flow of direct international investments. In the case of an acquisition especially, an investment made by a foreign agent often coincides with another's disinvestment. If foreign company "A" buys from foreign company "B" the shares that the latter held in companies situated in State "C", there is indeed a foreign investment made by "A" in State "C" but not necessarily development of the latter. This is why the UNCTAD carefully differentiate mergers & acquisitions from Greenfield investments on the grounds of their opposite consequences, especially on employment and activity level.

The fact that a foreign investment does not always participate in the development of the host State is also verified in cases where the project quickly fails despite the host State spending large amounts of money, especially on infrastructure, in order to attract this investment[79]. If revenues generated by the few months of activity turn out to be inferior to the host State's now useless expenditures, will this investment transaction no longer be considered as an investment since it has impoverished the host State?

The second statement is verified in all opportune acquisition of equipment goods that concur to the development of a host State through modernising an airport, port, railway network, etc. Even in the event of payment by instalments, will one consider that the foreign seller of these equipment goods is an investor? Obviously, no. The development of the host State criterion, which is very tricky to use, must therefore be turned down because it does not constitute a discriminating criterion from a legal perspective.

30. From the preceding analyses, it follows that only the criterion of a contribution made by a foreign investor for the purpose of obtaining future revenue contains the desired characteristics of differentiation. An investment may only be defined vis-à-vis a foreign economic agent and denotes a contribution to an enterprise, the remuneration of which will be proportionate to the success of the aforesaid enterprise. This conclusion is not surprising if one is willing to recall that the notion of investment is originally economic, and that in this branch of social sciences the term investment defines the use

[79] For example in *Klöckner v. United Republic of Cameroon* (ARB/81/2), the origin of which lies in the acquisition by Cameroon, through a public company, of a fertiliser factory which never functioned satisfactorily before being shut down for lack of profitability. We may otherwise note that qualifying as an investment this transaction consisting mainly in the turn key sale of a factory is more than debatable.

that an economic agent makes of its resources[80]. An investment is thus a unilateral concept since it relies on the behaviour of one person only, contrary to other transactions of international economic relations whose definitions are bilateral because founded on the essential reciprocal obligations of the parties to these various contracts[81]. These observations being made, and since defining is not a purpose in itself but the preamble to the act of qualifying, it is appropriate to examine how the arbitrators interpret and apply the adopted criteria.

III) The Interpretation of the Adopted Criteria

31. Examining more closely the way in which arbitrators interpret investment criteria is not justified for the duration, risk, and development of the host State criteria, which have been set aside because they are controversial and above all, because they are not at all – or not characteristic enough – of the notion of investment. What is left is the examining of the contribution criterion which in fact is a double criterion since the contribution is inseparable from its returns. Nevertheless, for the purposes of this analysis, contribution and its remuneration will be differentiated even though they provide the essential characteristic of an investment transaction together.

A) *The Interpretation of the Contribution Criterion*

32. On examining ICSID jurisprudence, it appears that arbitrators have a tendency to conclude to the presence of contributions whenever an economic agent has made expenditures and/or used its financial or human resources to carry out what it had committed itself to. This is particularly true in several cases relative to construction contracts in which arbitrators, following the Salini decision, have retained the fact that, in the State in question, a foreign agent deployed equipment, human resources, and sometimes has had to mobilise financial resources prior to the first payments[82]. There is indeed in this case the allocation of all or part of a foreign agent's resources to a project to be carried out abroad, but is it an investment? In his presentation to the conference entitled *"contentieux arbitral transnational relatifa I'investissement",* Farouk Yala puts forth a gripping parallel; when a mason goes to an individual's home to build a wall and

[80] For further analysis on this issue, see the author's book *Investissements étrangers et arbitrage entre Etats et ressortissants d'autres Etats, Trente années d'activité du Cirdi,* Litec, 2004, pp. 80 and following.

[81] Thus a sale is a contract by which one of the parties, the seller, conveys the property of a good and commits to delivering it, the buyer binds himself or herself by paying its price. A loan is the convention according to which the lender remits a good to the borrower in order for him/her to use it, with an obligation to return it. A contract for services is a contract through which a person (the entrepreneur) binds himself or herself to another (the client or developer) to produce a work (construction, repair, etc.) by providing his/her work, industry, and sometimes material. These definitions are certainly of domestic Law (G. Cornu (under the direction of), *Vocabulaire juridique,* PUF, 7th edition, 1994) but can be applied to international economic relations by adding the criterion of internationality.

[82] *Salini Costruttori SpA & Italstrade SpA v. Morocco* (ARB/00/4), Decision on jurisdiction, 23 July 2001, para. 53; *Consorzio Lesi-Dipenta v. Algeria* (ARB/03/8), Award for lack of jurisdiction, 10 January 2005, para. 14(i); *Bayindir v. Turkey* (ARB/03/29), Decision on jurisdiction, 14 November 2005 para. 115 and following ; *Lesi SpA v. Algeria* (ARB/05/3), Decision on jurisdiction, 12 July 2006, para. 73 (i); *Saipem Spa v. Bangladesh* (ARB/05/7), Decision on jurisdiction, 21 March 2007, para. 101.

provides his own equipment, using his tools, and receives remuneration in consideration of his work, has he made a contribution in kind in the individual's home? Has this mason invested in the individual's home?[83] Simple common sense leads us to answer in the negative to such questions.

33. The distinction between a contribution and the allocation of resources to a task does not proceed from the analysis of allocated resources (financial, in kind, industry) and most imperfectly from the analysis of the allocation's legal modalities since, if the contribution in property and in possession are discriminatory, such is not the case for the contribution of industry that does not entail any appropriation. The distinction between an allocation of resources to a task and a contribution essentially resides in the rights conferred by the latter. These rights, as has been noted, cannot only be corporate rights because the similarity between investment law and corporate law must not be taken too far and it would be simplistic to only see an investment in transactions leading up to the attributing of corporate rights to a foreign agent. The fundamental distinction resides in that the rights conferred to a foreign investor are the direct consideration of contributions made, while the right to remuneration of an entrepreneur is not subordinate to the resources it puts forth (that mostly remain in its entire discretion), but to the accomplishment of a task for which it has been hired. Here is the distinction between a contribution and an allocation of resources for the accomplishment of a task. A similar distinction may also be made concerning remuneration.

B) *The Interpretation of the Remuneration Criterion*

34. Other than the existence of a contribution in a strict sense, it is the uncertain remuneration of this contribution that distinguishes an investment from other transactions of international economic relations. As the remuneration has to be uncertain, there is therefore no basis to impose a minimal rate of return, a conclusion rightly drawn by the Tribunal in *Biwater Gauff (Tanzania) Ltd. v. Tanzania* (ARB/05/22)[84]. The Tribunal adds, still rightly in our view, that *"if a party has ulterior motives for undertaking a project, and perhaps anticipates only a possible long term and indirect benefit (e.g. other profitable opportunities), it does not thereby disqualify its project from the ICSID regime"*[85], as an investment.

35. But, in order to show that this criterion was met, several ICSID arbitral Tribunals, following the *Salini* decision, have noted in disputes relative to construction contracts that remuneration of the entrepreneur was precisely uncertain since it was likely to vary with the modifications requested by the developer, the arising of

[83] See .F. Yala, "La notion d'investissement dans la jurisprudence du Cirdi: actualité d'un critère de compétence controversé (les affaires Salini, SGS et Mihaly)", *in Le contentieux arbitral transnational relatif à l'investissement,* under the direction of Ch. Leben, Anthemis, 2006, p. 288.

[84] Award, 24 July 2008, para 319.

[85] *Ibid.,* para 321.

geological or meteorological difficulties, the increased cost of labour, raw materials, etc[86]. It is now necessary to make two remarks.

First, uncertainties linked to these different events may sometimes be provided for in the contract and adequate clauses committed to; additional delays of performance, variation clauses or price adjustment clauses, etc. The presence or absence of these clauses only proceeds from the bargaining powers of the developer and the entrepreneur. It is up to the latter to know whether or not to accept the tender offer or accept the contract under the conditions set by the developer. Arbitrators readily recognise this state of fact when they hold that it is unimportant in this respect whether the foreign agent freely accepted to ignore a certain number of non covered potential risks[87]. In this case, uncertainty relative to remuneration is not inherent to the type of transaction but depends on the will of the parties. Such is not the case for an investment transaction.

36. Second, it is appropriate to note that, when speaking of the uncertainty linked to the compensation's amount, and to the risk run by the entrepreneurs relative to the latter, arbitrators slightly transfer meaning. In reality, uncertainty does not weigh on the entrepreneur's returns but on the cost of work incumbent upon it, and therefore on profit generated by this transaction[88]. One may object that in certain contracts, there are clauses that provide for additional payments for the entrepreneur, for example if it finishes work ahead of schedule. But once again, this is not an inherent characteristic to a type of transaction but a conventional and punctual adjustment of a business contract. One may ask if making such a transfer in meaning is appropriate, as several ICSID awards and decisions have done. The answer is evidently negative since uncertainty concerning final profit is the common characteristic to most international commercial transactions. The sale of equipment goods previously cited generally supposes a delay between the signing of a contract and the delivery of goods that often still have to be manufactured. And between the signing of the contract and delivery of what is sold, or its payment, the seller may also be confronted to an increase in costs of labour, raw materials, depreciation of currency used for payment in comparison to the one the seller pays his workers and suppliers in, etc. Does the existence of such risks, which can always be anticipated by adequate clauses, transform this sale into an investment?

37. In the outcome of these analyses, it appears that an investment should be defined as a contribution made by an economic agent in the hope of future revenue. It

[86] *Salini Costruttori SpA & Italstrade SpA v. Morocco* (ARB/00/4), Decision on jurisdiction, 23 July 2001, para. 55; *Bayindir v. Turkey* (ARB/03/29), Decision on jurisdiction, 14 November 2005 para. 135; *Lesi SpA v. Algeria* (ARB/05/3), Decision on jurisdiction, 12 July 2006, para. 73 (iii) which contains this additional analysis, compare to the corresponding paragraph in the award declining jurisdiction rendered in *Consorzio Lesi-Dipenta v. Algeria* (ARB/03/8); *Saipem Spa v. Bangladesh* (ARB/05/7), Decision on jurisdiction, 21 March 2007, para. 109, in a more dispersed manner.

[87] *Salini Costruttori SpA & Italstrade SpA v. Morocco* (ARB/00/4), Decision on jurisdiction, 23 July 2001, para. 56.

[88] The benefit resulting from the existence of a positive difference between the expected remuneration and the production cost.

becomes international if it is made by an agent foreign to the State the territory of which the contribution has been made in. Taken separately, two of the other criteria usually suggested (duration and risk) turn out to be very tricky to handle, and are, most of all, insufficient characteristics of what makes an investment. Nevertheless, they appear as components of the adopted definition: future remuneration of the contribution introduces the temporal aspect of all investment transactions and the uncertainty of this remuneration in the hope of which a contribution is tied up in the host State is constitutive of a double economic and political risk for the foreign investor[89]. As for the contribution to the development of the host State, to quote an authors' great phrasing, it is a political requirement and it is useless to make it out to be a legal one[90].

38. Defining is limiting, and a normally rigorous applying of the adopted definition to transactions that are the subject of this study verifies this. All transactions in the construction and civil engineering industry considered in this study which have been qualified as investments do not constitute an investment according to our definition[91], except for the transactions in *PSEG Global Inc. v. Turkey* (ARB/02/5) and *ADC affiliate Ltd et al. v. Hungary* (ARB/03/16). In the first case, the transaction took the form of a BOT contract and, in the second, of a complex contract providing for the construction of an airport terminal but also for the creation of a subsidiary in charge of the operation of part of the airport.

Concerning the sale of equipment goods in *Joy Mining Machinery Ltd v. Egypt* (ARB/03/11), it does not either qualify as an investment according to the suggested definition.

Nevertheless we hold that because even a small contribution is identifiable and because revenues expected from it were proportionate to the success of the endeavour, the transactions in *Patrick Mitchell v. Congo* (ARB/99/7) and *Malaysian Historical Salvors et al. v. Malaysia* (ARB/05/10) qualify as investments.

39. Applying the adopted definition leads to a refusal to qualify as an investment more often than is actually the case in the ICSID's framework, even if in some cases it leads to qualify as an investment transactions for the which this qualification have been refused[92]. The latter is absolutely not the product of a dogmatic will but the simple application of the retained criteria in an interpretation that is neither liberal nor restrictive. Actually, one may note that applying these criteria leads to qualifying an investment as a construction contract only if the entrepreneur's remuneration depends

[89] In this respect, see also P. Bernardini, "Investment Protection under Bilateral Investment Treaties and Investment Contracts", *2 J.W.I.T.,* N° 2, June 2001, p. 235.

[90] See I. Fadlallah, "La notion d'Investissement: vers une restriction de la compétence du Cirdi?", in *op. cit.,* footnote 16.

[91] *Salini Costruttori SpA & Italstrade SpA v. Morocco* (ARB/00/4); *Consorzio Lesi-Dipenta v. Algeria* (ARB/03/8); *Bayindir v. Turkey* (ARB/03/29); *Lesi SpA and Astaldi SpA v. Algeria* (ARB/05/3) and *Saipem Spa v. Bangladesh* (ARB/05/7).

[92] The award for lack of jurisdiction rendered in *Malaysian Historical Salvors and others v. Malaysia* (ARB/05/10) is currently in annulment proceedings.

at least in part on the operating of the constructed ensemble before it is ceded back to the developer : such as in BOT or concession contracts. The same observation can be made concerning a sale contract. A sale can originate an international investment with the presence of an acquisition of participation or elements of assets abroad. It can even constitute an investment if part of the seller's compensation results from the production achieved and commercialised through the delivered equipment.

40. It also appears that the qualification of 'investment' is secondary because it superimposes to the main qualification (partnership agreement, sale or business contract) as long as one can identify a contribution made for the purpose of obtaining future revenue within the transaction in question. This conclusion is not surprising since the unilateral nature of the definition of an investment allows identifying an investment in a legal relation that, analysed on a bilateral level, belongs to another qualification. This type of atypical situation in law certainly explains the difficulties of apprehending legally the notion of investment, even if the latter obviously requires an accurate definition.

41. A last question remains. Do the definition previously presented and the retained interpretation have a chance of being adopted? A step forward has been made with the Central America-Dominican Republic-United States Free Trade Agreement. Chapter 10 of this Treaty deals with (rules) Investment Protection and the transactions covered under Chapter 10 are defined broadly by article 10.28 with the usual enumerative list. But this article adds that, in order to be define as an investment, a transaction taking one of the contemplated form must have *"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"*[93].

However, given the importance of the stakes at hand, especially for transnational companies and their Home-States, one may fear that the current vague and uncertain situation will last, to the detriment of the search for a secure legal basis nonetheless vital to all. There can be a great gap between Law as it is, as it should be or as we wish it to be, but this conclusion is not peculiar to the question of investments.

[93] On this Treaty, see, for example, David A. Gantz, "Settlement of Disputes Under the Central America-Dominican Republic-United States Free Trade Agreement", *30 Boston College International & Comparative Law Review* (2007), pp. 331 and following.

ANNEX

List of ICSID decisions or awards dealing with the question of the existence of an investment from June 2004 to end of September 2008

- *PSEG Global Inc. v. Turkey* (ARB/02/5), Decision on jurisdiction, 4 June 2004[94]
- *Joy Mining Machinery Ltd v. Egypt* (ARB/03/11), Award for lack of jurisdiction, 4 August 2004[95]
- *Consorsio Lesi-Dipenta v. Algeria* (ARB/03/8), Award for lack of jurisdiction, 10 January 2005[96]
- *Bayindir v. Turkey* (ARB/03/29), Decision on jurisdiction, 14 November 2005[97]
- *Jan de Nul N. V v. Egypt* (ARB/04/13), Decision on jurisdiction, 16 June 2006[98]
- *Lesi SpA and Astaldi SpA v. Algeria* (ARB/05/3), Decision on jurisdiction, 12 July 2006[99]
- *ADC affiliate Ltd and others v. Hungary* (ARB/03/16), Award, 2 October 2006[100]
- *Patrick Mitchell v. Congo* (ARB/99/7), Annulment decision, 1 November 2006[101]
- *Saipem Spa v. Bangladesh* (ARB/05/7), Decision on jurisdiction, 21 March 2007[102]
- *Malaysian Historical Salvors and others v. Malaysia* (ARB/05/10), Award for lack of jurisdiction, 17 May 2007[103]
- *MCI Power Group LC and others, v. Ecuador* (ARB/03/6), Award, 31 July 2007[104]

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[94] The existence of an investment can be inferred from the existence of a concession contract, which constitutes an easily identifiable investment (para. 79 to 105, especially 80 to 104).

[95] A procurement contract of mining equipment is an ordinary contract of sales that cannot be construed as an investment under the meaning of the ICSID Convention because it does not satisfy the criteria of duration, risk, projected profit, and contribution to the development of the host State, (para. 55 to 57).

[96] A construction contract may constitute an investment if 3 criteria are satisfied: contributions to the host State, a certain duration of these contributions that entail a risk for the agent. The transaction's contribution to the economic development of the State is not to be taken into account because it is difficult to evaluate and implicitly covered by the other criteria (para. 13 and 14).

[97] Application of the "*Salini* test" (with doubt concerning the fourth criterion) to a construction contract. (para. 130 to 137).

[98] Application of the "*Salini* test" (with farther discussion of the duration criterion) to a service contract. (para. 90 to 96).

[99] Identical reasoning to the one followed in *Lesi-Dipenta,* with additional developments on the risk criterion.

[100] The Tribunal mainly rests on the financial contribution and its compensation in order to qualify the transaction (construction of an airport terminal and providing of management services) as an investment.

[101] In the absence of a *"contribution to the economic development of the host State",* a transaction may not be qualified as an investment under the Washington Convention.

[102] Application of the "Salini test" to a construction contract (para. 99 to 111). The rights following from an ICC arbitral award concerning the failure to perform a construction contract are included in the general understanding of an investment transaction (para. 112 to 114).

[103] Contract for the recovery of a sunken ship's cargo on the basis of compensation relative to the sale of objects brought back to the surface. Detailed analysis of precedents and retained methods by ICSID arbitral Tribunals. Application of the "Salini test" leading to the refusal to qualify the contract as an investment (para. 43 to 146).

[104] Construction and operating contract of two electric power plants. In the absence of a definition in the Washington Convention of what constitutes an investment, it is good enough for the transaction to be considered as an investment according to the BIT in order to grant jurisdiction to an ICSID arbitral Tribunal (para. 159 and 160).

– *Parkerings-Compagniet AS v. Republic of Lithuania* (ARB/05/8), Award, 11 September 2007[105]

– *Noble Energy Inc and others, v. Ecuador and Consejo Nacional de Electricidad* (ARB/05/12), Decision on jurisdiction, 5 March 2008[106]

– *Victor Pey Casado and foundation « President Allende » v. Chili* (ARB/98/2), Award, 8 May 2008[107]

– *Biwater Gauff (Tanzania) Ltd. v. Tanzania* (ARB/05/22), Award, 24 July 2008[108]

– *Ioan Micula and others v. Romania* (ARB/05/20), Award, 24 September 2008[109]

[105] In the absence of a definition in the Washington Convention of what constitutes an investment, it is good enough for the transaction to be considered as an investment according to the BIT in order to grant jurisdiction to an ICSID Tribunal (para. 249 to 254).

[106] Construction and operating contract of an electric power plant. Application of the "Salini test" (para 128 to 135).

[107] Shares in a press company may constitute an investment if 3 criteria are satisfied: contributions to the host State, a certain duration of these contributions that entails a risk for the agent. The transaction's contribution to the economic development of the State is not to be taken into account because it is difficult to evaluate and implicitly covered by the other criteria (para 231 to 235).

[108] Management and operation of the Dar es Salaam water and sewerage infrastructure under a concession agreement and through the constitution of a local company. Flexible and pragmatic approach to the meaning of "investment" which takes into account the features identified in Salini, but along with all the circumstances of the cases. Even if the Respondent could demonstrate that any, or all, of the Salini criteria are not satisfied in this case, this would not necessarily be sufficient – in and or itself – to deny jurisdiction.

[109] Creation and operation of agribusiness. the Respondent State did not contest that the investments made by the Claimants qualify as investments for the purpose of the ICSID Convention but only that investment incentives (withdrawn due to Romania joining the European Union) were not investment in themselves.