



NOTION OF DIRECT INVESTMENT IN NON-ICSID INVESTMENT TREATY ARBITRATION

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ABSTRACT

In recent times, the importance of foreign investments becomes vital in the world's economy. The mutual cooperation between developed and developing countries by signing the bilateral and multilateral treaties with its own dispute settlement mechanisms is growing significantly. Due to the fact mentioned above, the framework gives the possibilities for both - investors and host states to protect their rights in the international forum.

The present research is related to the importance of the notion of "Investment" in International Investment Arbitration, its implications, and the current trends on the definition itself. This issue is very important, as it is a threshold jurisdictional question for the International Investment Tribunal's jurisdiction.

The paper discusses the Bilateral Investment Treaties, their legal nature, and the expediency of their conclusion. The issue of Notion of direct investment in bilateral investment treaties will also be detailed in the paper, moreover, there will be an overview of different types of BIT definitions on the example of different countries' BIT practice. A very comprehensive discussion will be followed on the best practices established by the International Investment Tribunals regarding the definition of "investment". In the end, the author will analyze whether or not there is a common/universal notion of investment in Investor-State disputes.

KEYWORDS: International Arbitration, International Investment Arbitration, ICSID, UNCITRAL, BIT

INTRODUCTION

In many cases, the choice of non-ICSID arbitration is due to the circumstance that one of the States involved is not a party to the ICSID Convention. However, there are cases where either the investor or the State has chosen a method of arbitration other than the ICSID Convention, although the latter was available to it.

The inquiry into the reasons for investors' choice cannot but be based on the review of the essential features of each method of arbitration and the respective pros and cons. To this end, the dispute settlement methods provided by investment treaties may be conveniently grouped in two categories, ICSID and

non-ICSID, the former consisting of the ICSID Convention, the latter of all others (including ICSID Additional Facilities Rules).¹

"In order for tribunals to determine whether an investment can be the subject of international investment arbitration, two steps have to be followed. First, a tribunal must try to define an investment. Then a tribunal must analyse whether all investments are protected investments".²

1 Piero Bernardini, 'ICSID versus non-ICSID Investment Treaty Arbitration', (Amicorum Bernardo Cremades, 2009), p. 3-4.

2 Brigitte Stern, 'Are There New Limits on Access to International Arbitration?' (ICSID Review, 2010) 25(1), p. 26-36.

This paper will be mainly devoted to the notion of direct 'investment' in non-ICSID treaty arbitration. First of all, paper will discuss the importance of definition of 'investment, in substantive rights documents, followed by a discussion on article 25 of the ICSID Convention and its characterisations. The second part will look at the definition of 'investment' in bilateral investment treaties and the different types of BIT definitions. The last part of the paper will mainly concentrate on arbitration awards rendered by non-ICSID arbitral tribunals and its interpretations on definition of 'investment'; in order for a comparison, the paper will also discuss several ICSID awards in relation to the key topic of this thesis.

After understanding, reviewing and analysing the issues mentioned above the present author will then conclude whether or not there is a common notion of investment in Investor-State disputes.

1. NOTION OF INVESTMENT AS A JURISDICTIONAL REQUIREMENT

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.³ Thus, questions relating to the existence or scope of an investment are fundamental to each phase of an investment treaty dispute. The attribution of jurisdiction to the tribunal is contingent upon the claimant having made an investment in the host state, and thus satisfying the *quid pro quo* for the host state's consent to investment treaty arbitration. The nexus between the claims and the investment shapes the boundaries of the tribunal's *ratione materiae* jurisdiction.⁴

The starting point for understanding the scope of an International Investment Agreement is the definition of the terms that activate the protection afforded under the agreement. Specifically, such protection usually extends to the 'Investor' or their 'Investment'.⁵

Investment regimes need to define their scope *ratione materiae*. Contemporary treaties do not reflect the classical formula 'property, rights and interests', which is found in traditional treaties, FCN treaties, to settle claims after hostilities, and in human rights documents. Instead, they are built upon the narrower term 'investment'. This usage is now fully accepted even though the phrase 'property, rights and interests' had to a considerable extent acquired a legal meaning and the term 'investment' has its origin in economic terminology and needed to be understood and defined as a legal concept when first used in investment agreements.

The economic debate often assumes that a direct investment involves (a) the transfer of funds, (b) a longer-term project, (c) the purpose of regular income, (d) the participation of the project, and (e) a business risk. These elements distinguish foreign direct investment from a portfolio investment (no element of personal management), from an ordinary transaction for purposes of a sale of a good or a service (no management, no continuous flow of income), and from a short-term financial transaction.⁶

The notion of investment and its definitions are inherently vague, and the meanings of the term 'investment' in economics and investment protection instruments do not necessarily coincide. These instruments set forth definitions of investment that are quite broad and unhelpful; the listed categories of things that constitute investment under these instruments illustrate assets that tribunals would normally find within the scope of protection even without the help of explicit language.

Determining whether a particular economic activity constitutes investment under the definitions of investment protection instruments is one of the prerequisites for jurisdiction of an arbitral tribunal.⁷ In this chapter, the definition of the term investment will be examined according to the different types of investment treaties, in national investment legislations and etc.

3 Jean-Pierre Harb, 'Definition of Investments Protected by International Treaties: An On-Going Hot Debate', (Mealey's International Arbitration Report, Vol. 26, #8, 2011), p. 1.

4 Zachary Douglas, *The International Law of INVESTMENT CLAIMS*, (Cambridge University Press, 2012), p. 165.

5 Engela C Schlemmer, 'Investment, Investor, Nationality,

and Shareholders', *The Oxford Handbook of International Investment Law*, (Oxford University Press, 2008), chapter 2, p. 50.

6 Rudolf Dolzer, Christoph Schreuer, 'Principles of International Investment Law' (Oxford University Press, 2008), p. 60.

7 Christopher Dugan, Don Wallace Jr, Noah D. Rubins, Borzu Sabahi, *Investor-State Arbitration*, (Oxford University Press 2008), p. 247.

1.1. Ratione Materiae Requirements in Substantive Right Documents (National Legislation; Bilateral and Other Investment Protection Treaties; Multilateral Investment Treaties – e.g. ECT)

Since the interpretation of definition of ‘investment’ is the important jurisdictional requirement for all investment treaty arbitration, we will look how it can be interpreted in investment protection instruments, such as: international investment treaties (Bilateral Investment Treaties, Multilateral Investment Treaties) and national legislation.

One basis for non-contractual ICSID arbitration is the national investment legislation of the host state, by which the latter unilaterally offers to submit investment disputes to ICSID jurisdiction. The consent becomes effective foreign investor accepts the State’s offer to arbitrate, at the latest when the foreign investor files its claim with ICSID.⁸

National legislation offering consent to ICSID’s jurisdiction often contains definitions or descriptions of investments to which it relates. Some of these definitions are quite tense.⁹ These investments laws sometimes contain their own definition of investment and very often also contain other requirements that a transaction must comply with in order to be considered as an investment or to be entitled to certain benefits or privileges. This issue was discussed in *Zhinvali Development Limited v Republic of Georgia* case. The consent to ICSID arbitration in *Zhinvali* was not recorded in an investment treaty but rather in the national investment law, the claimant sought compensation for its ‘pre-investment expenditures’ and the tribunal defined the issue as ‘whether the claimant’s purported expenditures qualify as an „investment” under the 1996 Georgian Investment Law, which supplied the operative definition of an ‘investment’ for the purposes of Article 25(1) of the ICSID Convention. The Tribunal didn’t confront squarely the issue as to whether; the claimant had acquired a property right within the relevant definition of an investment. Thus, in particular, the tribunal considered whether, pursuant to the Georgian Investment Law, the claimant had obtained ‘intellectual property’ by virtue of its expenditure on preparatory studies and feasibility reports in respect of a proposed project for the rehabilitation of a hydroelectric power plant and its tailrace tunnel. The tribunal as not satisfied that the claimant had acquired such a right. The tribunal went on

8 Lucy Reed, Jan Paulsson and Nigel Blackaby, *Guide to ICSID Arbitration* (Kluwer Law International, 2004), p. 36.

9 Christoph H. Shreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (Second edition 2009), p. 121.

to consider, whether the claimant’s ‘development costs’ independently qualified as an investment. The question posed by the tribunal was whether Georgia had consented to the treatment of ‘developing costs’ as an investment for the purposes of Article 25(1) of the ICSID Convention independently of the definition of an investment in the 1996 Investment Law. Unsurprisingly, the tribunal found no evidence of such consent on the record.¹⁰

Most investment arbitration cases in recent years are based on jurisdiction established through BIT’s. The basic mechanism is the same as in the case of national legislation: the state parties to the BIT offer consent to arbitration to investors who are the nationals of the other contracting party. The arbitration agreement is perfected through the acceptance of that offer by an eligible investor.¹¹

In order to fulfil *ratione materiae* requirements of ICSID Convention it is important for the tribunal to determine what constitutes an ‘investment’ under the specific BIT.

In recent years the vast majority of cases have been brought to ICSID under the provisions of investment treaties containing consent to jurisdiction. In most cases jurisdiction is based on a bilateral investment treaty (BIT). The treaty clauses providing for ICSID jurisdictions are drafted in general terms referring to future investment disputes.¹² For a qualifying investor to be able to rely on the substantive protections and procedural safeguards of a BIT, it must have made an investment protected by the treaty.¹³

In most modern BITs these definitions have similar features. They are usually introduced by a broad, general description followed by a non-exhaustive list of typical rights. The general description frequently refers to „every kind of asset“. The list of typical rights usually includes:

- Traditional property rights;
- Participation in companies;
- Money claims and rights to performance;
- Intellectual and industrial property rights;
- Concession or similar rights.¹⁴

10 Zachary Douglas, *The International Law of INVESTMENT CLAIMS*, (Cambridge University Prss, 2012), p. 189.

11 Rudolf Dolzer, Christoph Schreuer, ‘Principles of International Investment Law’ (Oxford University Press, 2008), p. 242.

12 Christoph H. Shreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (Second edition 2009), p. 122.

13 Lucy Reed, Jan Paulsson and Nigel Blackaby, *Guide to ICSID Arbitration* (Kluwer Law International, 2004), p. 44.

14 Christoph H. Shreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (Second edition 2009), p. 122-123.

For the purpose of our main topic it is relevant to discuss how definition of 'investment' are interpreted in multilateral investment treaties and how it is important for the *ratione materiae* requirements.

An investor wishing to avail herself of the offer of ICSID arbitration in an investment treaty will have to show that two distinct requirements *ratione materiae* are met: the transaction out of which the dispute arises must be an investment under the ICSID Convention. In addition, it must be an investment as defined by the applicable investment treaty.¹⁵

Most multilateral and bilateral investment treaties and trade agreements with investment chapters include a broad definition of investment. They usually refer to 'every kind of asset' followed by an illustrative but usually non-exhaustive list of covered assets. Most of these definitions are open-ended and cover both direct and portfolio investment. Their approach is to give the term 'investment' a broad, non-exclusive definition, recognizing that investment forms are constantly evolving. However, there are some agreements, which provide a different approach to defining investment, setting forth a broad but exhaustive list of covered economic activities.

For instance, Article 1(6) of the Energy Charter Treaty defines investment as 'every kind of asset' and refers to any investment associated with an economic activity in the energy sector.

NAFTA, in its Article 1139 provides for a broad business activity related, exhaustive list of assets, with specific exclusions. Investments under the NAFTA include FDI, portfolio investment (equity securities), partnership and other interests and tangible and intangible property acquired „in the expectation [...] of economic benefit.”¹⁶

1.2. Definition of Investment under Article 25 of ICSID Convention

The first sentence of Article 25, of the ICSID Convention provides the following provision concerning the jurisdiction of the centre and ICSID Tribunals:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdi-

vision 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.

Article 25 of the ICSID Convention limits the jurisdiction of the ICSID Centre to legal disputes arising 'directly out of an investment'. However, as we have mentioned above, the ICSID Convention does not define the term 'investment'. The rationale was „the essential requirements of consent by the parties, and the mechanisms through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre”.¹⁷ Therefore, in effect, the parameters of what constitutes an investment fall to be supplied by the parties' consent and ultimately by tribunals.

It follows from Article 25 of the ICSID Convention that one of the prerequisites for jurisdiction of the ICSID Centre is that the legal dispute arises directly out of an 'investment'. The meaning of the term 'investment' is therefore essential to establish jurisdiction *ratione materiae* of the Centre and key in defining the types of disputes that can be settled by ICSID tribunals.

The jurisdiction *ratione materiae*, or subject-matter jurisdiction, of the centre under Article 25(1) is thus defined as 'any legal dispute arising directly out of an investment.' Therefore, ICSID's subject-matter jurisdiction, as defined in Article 25(1), has three components:

- (a) The requirement of a legal dispute;
- (b) The requirement that the legal dispute arise directly out of the underlying transaction; and
- (c) That such underlying transaction qualifies as an investment.¹⁸

Each of these elements, the existence of dispute, the legal nature of the dispute, the directness of the dispute, and the existence of an investment may raise jurisdictional questions.¹⁹ We have to look all these prerequisites in turn.

The existence of a dispute is a basic premise for the jurisdiction of any international judicial or arbitral institution. A dispute requires a minimum of communi-

15 UNCTAD, 'Requirements Ratione Materiae', p. 16.

16 OECD (2008), "Definition of Investor and Investment in International Investment Agreements", in OECD, *International Investment Law: Understanding Concepts and Tracking Innovations: A Companion Volume to International Investment Perspectives*, OECD Publishing, pp. 43-44.

17 World Bank, 'Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965', (1 ICSID Rep 23, 28).

18 UNCTAD, 'Requirements Ratione Materiae', p. 7.

19 Rudolf Dolzer, Christoph Schreuer, „Principles of International Investment Law” (Oxford University Press, 2008), p. 230.

cation between the parties. This communication must have revealed a disagreement on a point of law or fact. A failure to respond to demands by the other side may also signify a dispute. In addition, a disagreement between the parties should have some practical relevance and should not be merely theoretical.

The requirement that there is a legal dispute is an absolute requirement for ICSID's jurisdiction. It is independent of the chosen method of dispute settlement under the Convention and applies even if a tribunal is authorized to decide on the basis of equity rather than law. Therefore, the requirement that there is a legal dispute needs to be met irrespective of whether the parties have agreed to submit a dispute to arbitration or to conciliation, and even if they have agreed under Article 42(3) that the dispute may be decided *ex aequo et bono*.²⁰

The directness of the dispute in relation to the investment is also important during the discussions of Article 25(1) of the ICSID Convention. The element of directness applies to the dispute in relation to the investment. It does not relate to the investment as such.

One of the main reasons for resisting a definition of investment in the Convention was the fear that it could give rise to lengthy jurisdictional discussions even if the parties' consent to submit a dispute to ICSID was well established. The concerns did not necessarily involve the notion of investment itself, but rather what kind of investment would be a suitable subject matter for the ICSID system. Proposals were made for minimum amounts, or for the exclusion of investment that pre-dated the Convention. In fact, a number of attempts were made in the preparation of the Convention to include a definition of „investment” but they all failed.

Therefore, the approach adopted in the Convention gives potential parties to ICSID arbitration wide discretion to describe a particular transaction, or a category of transactions, as investment. Ultimately, however, the requirement of an investment is an objective one. The parties' discretion results from the fact that the notion of investment is broad and that its contours are not entirely clear. But the parties do not have unlimited freedom in determining what constitutes an investment. Any such determination, while important, is not conclusive for a tribunal deciding on its competence. Under Article 41 of the Convention, a tribunal may examine on its own motion whether the requirements of jurisdiction are met.²¹ We can assume that convention itself gives the parties wide discretion to define term

‘investment’ as they deem appropriate. With such a record in Article 25 of the ICSID Convention restricts the parties to submit just any legal dispute to ICSID.

In order to further determine above issue, we should definitely discuss the so-called ‘double test’ which is used by the ICSID tribunals for determination its *ratione materiae* jurisdiction. As we have seen from the above analysis, the notion of ‘investment’ has a crucial role in investment treaty arbitration submitted to the ICSID. In the light of the ICSID's *ratione materiae* jurisdiction, it is important to discuss differences between ICSID and non-ICSID assessments about notion of ‘investment’, how the different tribunals determined it. In the context of qualifying an investment as a protected investment, the most obvious distinction between an ICSID and non-ICSID assessment is that only ICSID requires close connection to Article 25(1) of the ICSID Convention.²²

In examining whether the requirements for an ‘investment’ have been met, most tribunals apply a dual test: whether the activity in question is covered by the parties consent and whether it meets the Convention's requirements. If jurisdiction is to be based on a treaty containing an offer of consent, the treaty's definition of ‘investment’ will be relevant. In addition, the tribunal will have to establish that the activity is an investment in the sense of the Convention. This dual test has at times been referred to as ‘double keyhole’ approach or as a ‘double barrelled’ test.²³

According to the ICSID convention, a claim must satisfy above-mentioned double test. Firstly, claimant's claim must be satisfied with the article 25 of ICSID Convention. Secondly, claimant's claim must fulfil the *ratione materiae* requirements according to the substantive rights documents, i.e. bilateral investment treaty, State contract, national investment law in order for the arbitral tribunal to have jurisdiction. Non-ICSID investment arbitrations skip the first test of the double test and only require claimants to qualify the second test.

One approach to the interpretation of „investment” in Article 25 will orient itself solely to the definitions in investment treaties. The other approach will also consider the economic definition of the notion of investment – so-called ‘Salini test’. There have been repeated attempts to define the concept of investment in general terms. All attempts to reach an agreement on

20 UNCTAD, ‘Requirements Ratione Materiae’, p. 9.

21 UNCTAD, ‘Requirements Ratione Materiae’, p. 14.

22 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 14 October 1966, Article 25(1).

23 Christoph H. Shreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (Second edition 2009), p. 117.

a definition to be inserted into the Convention failed. In *Salini v Morocco*, the Respondent contended that the contract for the construction of a road did not constitute an investment in the sense of the Convention. The Tribunal noted that the existence of an investment under the Convention was an objective condition of jurisdiction in addition to consent.

In *Salini v Morocco*,²⁴ the arbitral tribunal established four criteria for the definition of „investment”, which is known as a Salini test. According to this test, the notion of investment implies if these following four criteria will be met:

- Must involve a substantial contribution/commitment from the investor;
- Must have a certain duration;
- Must contain an element of risk for the investor;
- And must contribute to the economic development of the host State.

These four criteria were substantial for understanding of an ‘investment’ within the meaning of Article 25 of ICSID Convention and it considered the first part of the double test.

Significance of the notion of ‘investment’ as it is explained above, is crucial in order to ICSID have jurisdiction over the case. If tribunal will determine that claimant’s claim does not satisfies the requirements *ratione materiae* jurisdiction of ICSID, the tribunal will not have jurisdiction and case will be out of the scope of ICSID Convention. Thus, the current debates about notion of ‘investment’ and its interpretation under the BIT’s, host states national law or multilateral investment treaties becomes very important issue in investor-state related disputes.

2. NOTION OF DIRECT INVESTMENT IN BILATERAL INVESTMENT TREATIES

The scope of an investment treaty’s application has at least two important legal ramifications. First, a contracting state owes obligations under the treaty only to those investors and investments that fall within the treaty’s scope of application or treaty definitions. Second, the treaty’s definitions and scope of application affect the jurisdiction of any international arbitral tribunal adjudicating a dispute brought under its provisions. Therefore, whether a company or person constitutes an ‘investor’ or whether an asset or transaction constitutes an „investment under the applicable

24 *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco*, ICSID Case No.ARB/00/4, Decision on Jurisdiction, 23 July 2001.

treaty are important jurisdictional questions in investment treaty arbitration and must be answered at the threshold of a case.²⁵

Bilateral investment treaties, or BITs, are a more focused continuation of the practice of concluding bilateral treaties governing ‘friendship, commerce and navigation.’ BITs are intended to promote, encourage and protect investments by nationals of one of the contracting States in the territory of the other contracting State. The first BIT was signed between Germany and Pakistan in 1959. Other Western European governments soon began concluding BITs with selected developing States. Since 1990, however, an explosive growth in the number of BITs worldwide has revolutionized the protection of foreign investments. In addition to the BIT programs established by Western States, developing and transition economy States have embraced BITs in order to encourage foreign investments, both from industrialized States and among themselves. Today, around 3,000 BITs have been signed, covering countries in practically every region of the world.²⁶ The significance of BITs is growing and it is vital how BITs can legitimately protect the rights and interests of investors and on the other hand the rights of host state. Therefore, it is remarkable to review the issue how a claim can be established according to the BITs in Investor-State treaty arbitration. Out of the 290 investment treaty arbitration cases, 182 were filed with ICSID, including ICSID Additional Facility Rules (62%), 80 under the UNCITRAL Rules (28%), 14 under the SCC Rules (5%), 5 under the ICC Rules (2%) and 5 under ad hoc arbitration (2%) and few others in unknown fora (1%).

In many cases, the choice of non-ICSID arbitration is due to the circumstance that one of the States involved is not a party to the ICSID Convention. However, there are cases where either the investor or the State has chosen a method of arbitration other than the ICSID Convention, although the latter was available to it.

The inquiry into the reasons for investors’ choice cannot but be based on the review of the essential features of each method of arbitration and the respective pros and cons. To this end, the dispute settlement methods provided by investment treaties may be conveniently grouped in two categories, ICSID and non-ICSID, the former consisting of the ICSID Con-

25 Jeswald W. Salacuse, *The Law of Investment Treaties*, (Oxford University Press, 2010), p. 158.

26 ‘Investment Treaty Arbitration: A Primer’, (Latham & Watkins International Arbitration Practice Number 1563, 2013), p. 1.

vention, the latter of all others (including ICSID Additional Facilities Rules).²⁷

The purpose of this chapter is to review how much weight does the notion of 'investment' in bilateral investment treaties carry in order to establish the jurisdiction international arbitral tribunals.

Definitions serve many purposes. In international agreements, they raise difficult policy issues and are often the subject of hard bargaining between the negotiating parties. Accordingly, they should be seen not as objective formulations of the meaning of terms, but as part of an agreement's normative content, since they determine the extent and the manner in which the other provisions are to be applied. Thus, the decision on a definition of terms will be made on a case-by-case basis, taking into account the purpose and circumstances of the negotiations at stake. In addition, the Vienna Convention on the Law of Treaties requires that tribunals look first to the ordinary meaning of the terms of the treaty as the best manifestation of negotiators intent, and that, as a rule, the specific, substantive provisions of a treaty are given priority over generalized principles such as those contained in preambles. Therefore, negotiators need to make their intentions manifest in the specific provisions, including definitions.²⁸

With the exception of a few of the earlier treaties, almost all BITs contain a definition article and a cursory glance shows that many of the BITs in force defined the term „investment” in very similar ways. This similarity does not, however, mean that there exists a universally binding concept of investment for all purposes. Rather, accepting that the concept has no absolute meaning and many changes in the future, most treaties, as noted above, have adopted a broad, open-ended definition that ensures a certain amount of flexibility in the treaty's application.

The issue of whether a BIT should apply to investments made before the conclusion of the treaty was previously often the cause of disagreement during the negotiations. On the other hand, host States would typically see little reason to provide incentives to investments that had already been made. Furthermore, such investments had not been subjected to the approval procedure of the BIT (or current domestic legislation) and would therefore not fall into the category of investments to which the host state would wish to extend preferential treatment. The home State, on the other hand, would

27 Piero Bernardini, 'ICSID versus non-ICSID Investment Treaty Arbitration', (Amicorum Bernardo Cremades, 2009), p. 3-4.

28 UNCTAD, *Scope and Definitions*, (2011), p. 21.

normally endeavour to seek as wide protection as possible.²⁹

The substantive provisions of the BIT typically apply to assets that fall within the definition of investment and that are located within the territory of one of the BIT parties. Thus, the term „investment” is critical to defining the scope of application of a BIT and a definition of the term virtually always appears in a BIT.

Numerous tribunals acting under both the ICSID and UNCITRAL arbitration rules have applied this principle. In the words of the UNCITRAL Tribunal in *Saluka v. Czech Republic*: 'as 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.' 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 analysed as a breach of the BIT – need only be established prima facie.

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.³⁰

2.1. The Broad Asset-based Definition of Investment

The purpose of definitions in legal instruments is to determine the object to which an instrument's rules apply and the scope of these rules' applicability. Hence, they form part of the normative content of the instrument. The scope of application of an IIA depends on the definition of certain terms, principally 'investment'. This definition determines which investments are covered by its provisions or are excluded from the coverage of the agreement.³¹

29 Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties*, (Martinus Nijhoff Publishers, The Hague/Boston/London, 1995), pp. 25-26.

30 Jean-Pierre Harb, 'Definition of Investments Protected by International Treaties: An On-Going Hot Debate', (Mealey's International Arbitration Report, Vol. 26, #8, 2011), p. 1-2.

31 UNCTAD, 'International Investment Agreements: Flexibility for Development', (2000), p. 70.

Clear benchmarks as to what is an investment must be developed so as to assess whether a given asset or transaction is an investment or some other kind of uncovered commercial transaction. These benchmarks will form the basis of treaty text that may subsequently be interpreted on a case-by-case basis in an arbitral award. Where it is clear that the IIA in question sets limits as to what can be regarded as an investment under the terms of the agreement, a tribunal must respect those limitations.³²

The term 'investment' in ordinary parlance can refer to the process or transaction by which an investment is made or to the asset acquired as a result of that process or transaction. Generally speaking, investment treaties define an investment as an asset, rather than a process or transaction by which an asset is acquired. Thus, they tend to employ asset-based definitions of investments. Such definitions tend to be broad in scope. For example, Article I(g) of the Canada-Costa Rica BIT provides that "investment" means any kind of asset owned or controlled either directly ... or indirectly ... by an investor of one contracting party'. In order to come within this and similar asset-based, treaty definitions, an investment must first of all be an asset. An initial problem in applying this provision is that treaties, like the Canada-Costa Rica BIT, employing an asset-based definition of investment, rarely define the term 'asset'. One must therefore look to dictionaries to determine its ordinary meaning. The word 'asset' in most dictionaries is defined as 'anything of value' or a 'valuable item that is owned'. Thus, it can be seen that the concept of 'asset' is very broad indeed.³³

The continued domination of the traditional broad asset-based definition risks the possibility that transactions that were not thought to be investments at the time the agreement was entered into might nonetheless become covered as a result of an open-ended nature of the definition.³⁴

However, on the other hand, one can identify three different approaches to employing an asset-based definition in investment treaties: (1) a broad asset-based definition with a non-exhaustive list of investment forms; (2) a broad asset-based definition specifying substantive investment characteristics as well as investment forms; and (3) an asset-based definition with an exhaustive list of investment forms.

32 UNCTAD, *Scope and Definitions*, (2011), p. 9.

33 Jeswald W. Salacuse, *The Law of Investment Treaties*, (Oxford University Press, 2010), p. 160.

34 UNCTAD, *Scope and Definitions*, (2011), p. 9.

In addition, as will be seen, even if an investment meets the asset-based definition of a treaty, the treaty may nonetheless not cover that asset if it does not meet certain specific legal, geographical, temporal or other requirement.³⁵ The above-mentioned main asset-based definition of investment approaches with examples in different treaties will be outlined below.

Recent BITs have adopted a more elaborate formula, illustrated by a list of five groups of specific rights which usually include traditional property rights, rights in companies, monetary claims and titles to performance, copyrights and industrial property rights as well as concessions and similar rights. It is frequently stated that these illustrations are not exhaustive.

Moving on, the paper will discuss another approach of asset-based definition, which defines specifying substantive investment characteristics as well as investment forms. Such forms have certain substantive investment characteristics. Thus, they define investment as 'an asset that has the characteristics of an investment' and include a non-exhaustive list of the forms that such an investment may take.

The third approach of an asset-based definition is rather different from the above-discussed approaches; it is an asset-based definition with an exhaustive list of assets. This list is not simply illustrative; its purpose is to be precise and definitive.

Although such definitions limit the investments covered to only the listed forms, usually they are still broad enough to include all the major investment forms currently employed by investors. Meanwhile, its clarifications and exclusions ensure that any assets lacking the traditional characteristics required by the treaty parties will not be protected³⁶. As an example of this approach we can look in the Canada-Peru BIT's Article 1.³⁷

It is also possible for the parties to adopt a mixture of, for example, broad and narrow definitions or asset-based and transaction-based definitions in relation to the different purposes of an investment agreement. Thus, while some countries may wish to define 'investment' to include not every kind of asset, but only the specific categories included in a list, those same countries may wish to define 'investment' more broadly in an agreement that regulates foreign

35 Jeswald W. Salacuse, *The Law of Investment Treaties*, (Oxford University Press, 2010), p. 160.

36 Jeswald W. Salacuse, *The Law of Investment Treaties*, (Oxford University Press, 2010), pp. 165-166.

37 Canada-Peru BIT, Article 1, 2006.

2.2. Narrowing the Scope of the Term 'Investment'

The possibility of taking a wide approach to the definition of investment may be contrasted with developments in recent treaty practice that seek to narrow down the scope of this term.³⁸ Some IIAs will contain narrower definitions, for example those that focus only on a 'closed list' of investments.³⁹ A narrow approach was followed by earlier agreements, which were aiming at the gradual liberalization of capital movements and preferred to enumerate the transactions covered by these agreements.⁴⁰

Regardless of whether a treaty defines 'investment' broadly or narrowly, assets that fall within a treaty's definition nonetheless may have to meet additional qualifications or requirements in order to come within the treaty's scope of application and protection. Such additional qualifications may require that an investment be made (a) in accordance with the laws and regulations of the host state, (b) in the territory of a host state, (c) before and/or after the date of entry into force of the BIT, (d) in certain sectors of the economy, or (e) in projects classified as 'approved' by appropriate governmental authorities.⁴¹ Above-mentioned limiting conditions on the scope of application of the notion of 'investment' given in different BITs, will be reviewed thoroughly.

Some IIAs exclude assets of less than a certain value, perhaps because these investments are considered too small to justify the costs of treaty coverage or perhaps because of a desire to reserve to domestic investors those parts of the economy in which small investments are likely to be made.⁴²

The main reason of IIAs is to promote capital flow, which should be used for business purposes afterwards. It is the reason why some of the BITs exclude foreign owned assets for non-business use.

The practice of conditioning coverage of an investment on its compliance with local laws is an attempt to achieve a very important public purpose – ensuring that foreign investors observe host states' laws and regulations this requirement also corresponds to

the principle that no one should benefit from its own wrongdoing.⁴³

As we have seen the broad and open-ended definition of investment has remained more common in BITs, they are focus on investment protection. New agreements which are signed recently, using more narrow definitions of 'investment'.

3. DEFINITION OF INVESTMENT BY NON-ICSID ARBITRAL TRIBUNALS

In the present chapter, there will be a discussion on investment arbitration awards rendered outside the scope of the ICSID Convention in arbitrations conducted under the UNCITRAL Arbitration Rules, or the rules of other arbitral institutions such as the International Chamber of Commerce or the Stockholm Chamber of Commerce, specifically on 'non-ICSID awards. In order to assess whether there is, or there is no common notion of 'Investment', as a comparison to non-ICSID case law there will be a further discussion on ICSID tribunal's decisions as well.

I will start discussion of the cases from Romak v Uzbekistan⁴⁴ case. I will analyse how the international investment arbitration tribunal in above-mentioned case discussed the concept of definition of „investment“ outside ICSID. In the other words, we will look at the question how did the tribunal qualify the requisite *ratione materiae* jurisdictional component outside ICSID to determine if an investment was protected?

Romak commenced arbitration proceedings in PCA, against Republic of Uzbekistan.

The tribunal was required to decide whether Romak's claim contained a protected investment in the context of the Switzerland-Uzbekistan Bilateral Investment Treaty of 1993⁴⁵ ('SUBIT').

Romak executed a series of GAFTA contracts for the supply of grain with Uzkhleboproduct, Uzdon and Odil. Another agreement – Protocol of Intention on Mutual Cooperation, was concluded between Romak, Uzdon and Uzkhleboproduct.

After its unsuccessful attempts to recover sums due from Uzdon and Uzkhleboproduct, Romak initiated arbitration proceedings against Uzdon under the Romak Supply Agreement, ultimately resulting in an

38 UNCTAD, 'Scope and Definitions', (2011), p. 28.

39 Engela C Schlemmer, 'Investment, Investor, Nationality, and Shareholders', *The Oxford Handbook of International Investment Law*, (Oxford University Press, 2008), p. 56.

40 Catherine Yannaca-Small, Lahra Liberti, 'Definition of Investor and Investment in International Investment Agreements', (OECD 2008), p. 41.

41 Jeswald W. Salacuse, *The Law of Investment Treaties*, (Oxford University Press, 2010), p. 167.

42 UNCTAD, 'International Investment Agreements: Flexibility for Development', (2000), p. 75.

43 Jeswald W. Salacuse, *The Law of Investment Treaties*, (Oxford University Press, 2010), p.167.

44 ROMAK S.A. v Uzbekistan, PCA Case No: AA280, Award, 26 November 2009.

45 Promotion and the Reciprocal Protection of Investments, signed on 16 April 1993.

arbitral award in Romak's favour.⁴⁶ But finally, it was unable to enforce that award in several countries.

Having seen its enforcement efforts thwarted and the amounts owed for the wheat supplied remaining outstanding more than ten years after delivery, Romak brought its claim against Uzbekistan under UNCITRAL, on the basis that it had violated its Swiss-Uzbekistan BIT (SUBIT) obligations.

In the present case, there are two legal issues, which are important. The First question to look at would be how to define investment outside ICSID and under the Swiss – Uzbekistan BIT? Secondly, is the GAFTA arbitration an investment under the SUBIT? In legal terms, investment regimes need to define their scope *ratione materiae*.⁴⁷ Thus, the tribunal had to determine whether the contracts or GAFTA award qualified as a protected investment under the SUBIT.

Uzbekistan objected to the jurisdiction of the Tribunal on the basis that Claimant had no qualifying investment under the BIT. It argued that the activity envisaged under the Supply Contract was the sale of goods, which was to take place entirely outside the territory of Uzbekistan.⁴⁸ It also relied on a separate treaty between Switzerland and Uzbekistan entered into at the same time as the BIT on the sale of goods to demonstrate the contracting parties' intention to exclude such activity from the scope of the BIT.⁴⁹ It further argued that the GAFTA Award could not constitute an investment under the BIT, as the underlying transaction itself was not an investment. Uzbekistan also relied on the „Salini test”,⁵⁰ arguing that Romak's sale of goods exhibited no regularity of profit, duration, or sufficient risk and its impact on the economic development of Uzbekistan was negligible.

Romak argued that the definition of investment outside ICSID is not subject to the double test applicable in ICSID arbitrations. Therefore, as the Parties were in a UNCITRAL investment arbitration, it needed neither qualify Article 25 nor the Salini test, only SUBIT *ratione materiae* requirements. Romak proposed that even if the Salini test applied, its claim would fulfil the requirements. The contracts had duration of over 5 months and could have been extended by agreement.

46 ROMAK S.A. v Uzbekistan, PCA Case No: AA280, Award, 26 November 2009, para. 52.

47 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2012), p. 60.

48 ROMAK S.A. v Uzbekistan, PCA Case No: AA280, Award, 26 November 2009, pp. 98-99.

49 *Ibid.*, para. 100.

50 *Salini Construttori SpA and Italstrade SpA v Morocco*, Decision on Jurisdiction, ICSID Case No ARB/00/4, 23 July 2001, (2003) 42 ILM 609, paras. 52-58.

The profits were to finance further scientific cooperation as detailed in the parties' Protocol of Intention. Moreover, Romak assumed considerable risk, as the investment climate in Uzbekistan was not favourable, and involved non-directly compensable knowledge transfers. Finally, the contracts did contribute to Uzbekistan's development, as at the time, Uzbekistan desperately needed a cereal supply and such was vital to the Uzbek population and economy. Romak contended that its GAFTA award does qualify as a SUBIT protected investment via Article 1(2)(e) SUBIT according to which '...other rights given by law, by contract or by decision of the authority in accordance with the law' are investments.

Tribunal began its analysis that it was to be guided by the provisions of the Vienna Convention, and particularly by articles 31 and 32,⁵¹ and discussed the definition of 'investment' by looking at the 'ordinary meaning' of the term.

Finally, the tribunal held that 'the term 'investment' under the BIT has an inherent meaning entailing a contribution that extends over a certain period of time and that involves some risk.' Accordingly, despite the broad definition of investment in the applicable BIT ('every kind of assets and particularly...'), the tribunal found that the claimant did not own an investment within the meaning of Article 1 of the BIT as its rights were embodied in and arose out of a sales contract. The tribunal, thus, dismissed the investor's claims for lack of jurisdiction. However, this approach is not yet settled, and if a government wishes to make sure that a tribunal considers objective characteristics of an investment, it is well advised to include them in the definition.⁵²

The approach of defining an 'investment' which is used in Romak v. Uzbekistan case is followed by different tribunals, such as for example Alps Finance and Trade AG v. The Slovak Republic⁵³ case. The tribunal concluded that couldn't be ignored the most well-known principle for exclusion one-off sale transaction might qualify as an investment, and the tribunal assumed that Alps Finance and Trade AG did not invest in the Republic of Slovakia in the proper technical meaning, which confirms that it lacks jurisdiction over the case.⁵⁴

51 Vienna Convention on the Law of Treaties, 22 May 1969, Article 31: General rule of interpretation, Article 32: Supplementary means of interpretation.

52 UNCTAD, *Scope and Definitions*, (2011), p.42.

53 Alps Finance and Trade AG v. The Slovak Republic, (UNCITRAL Arbitration Rules 1976), Award of 5 March 2011.

54 Alps Finance and Trade AG v. The Slovak Republic,

The Romak and Alps Finance tribunals decided that this was not sufficient for purposes of establishing jurisdiction, since the term 'investment' had an inherent meaning, the elements of which were a contribution that extends over a certain period of time and involves some risk. According to the Romak tribunal, the wording of the treaty 'must have no room for doubt that the intention of the contracting States was accord to the term „investment” an extraordinary and counter-intuitive meaning'. The decisions are good examples of the 'objective' and 'subjective' conceptual approaches to the term 'investment'.⁵⁵

The other ICSID case, where Salini's criteria was considered, is a dispute between Caratube International Oil Company v the Republic of Kazakhstan.⁵⁶ Above-mentioned case concerns the alleged expropriation of Caratube's investments in the oil and gas industry in Kazakhstan. Caratube alleged that the authorities of Kazakhstan unlawfully terminated Caratube's contract. Caratube was claiming that with these measures Kazakhstan had violated the 1992 US/Kazakhstan BIT.

The tribunal held that the repetition of the word 'investment' in the definition meant that the parties intended to import into the definition the ordinary meaning of this concept, which includes such elements as contribution, duration and risk. The tribunal relied on domestic materials from the United States, which indicated that the intention was to extend protection only to such projects that constitute investments, as well as to the 2004 United States Model BIT, where repeated reference to 'investment' was replaced by a more explicit list of characteristics of a project.⁵⁷ Finally, the tribunal in its award held, that not every asset listed in a definition would necessarily constitute an investment except it has characteristics inherent to the corresponding economic contribution, and ruled that it does not have jurisdiction over the claimant's claim.

Different approach was determined in the UNCITRAL case *White v India*⁵⁸. To follow the case it is important to discuss factual backgrounds of the case. In

1989, White Industries, an Australian mining company, entered into a long-term contract with Coal India Limited (Coal India), a State-owned Indian company, for the supply of equipment to and the development of a coal mine near Piparwar in India's north eastern state of Bihar (the Mining Contract). Disputes relating to bonus and penalty payments as well as to the quality of the extracted coal arose between Coal India and White Industries, prompting the latter to commence arbitral proceedings under the ICC Arbitration Rules in 1999. In a majority decision, the ICC tribunal awarded A \$4.08 million to White Industries in May 2002 (the ICC Award).⁵⁹

Coal India tried to set aside the ICC award in Indian Courts, and White Industries applied to the New Delhi Courts to enforce the ICC Award, but both proceedings stayed pending in Indian Courts nearly 10 years.

After 10 years of fruitless attempts to enforce ICC Award in Indian Courts, White Industries commenced UNCITRAL arbitration against India under the Australia-India BIT. The main jurisprudential hurdle for UNCITRAL tribunal was the issue whether mining contract was an investment and the ICC Award as a continuation of the original investment.

India argued in the BIT Arbitration that the Mining Contract at issue was „an ordinary commercial contract for the supply of goods and services,” and therefore did not constitute an investment under the India-Australia BIT. However, the tribunal held that White Industries' contractual rights fell squarely within the definition of investment in the India-Australia BIT, which included 'rights to money or to any performance having a financial value.' The tribunal clarified that the dispute was 'not subject to the ICSID Convention,' and stated that the so-called Salini test, which 'imposes a higher standard' for defining investment under the ICSID Convention was 'simply not applicable.' Nonetheless, the tribunal noted that White Industries' commitment under the Mining Contract 'extended far beyond the provision of equipment and technical services' because White Industries provided its own working capital, equipment and technical know-how, hired and trained local workers, and bore the financial risk of rising costs and penalties for inadequate performance under the eight-year contract. Thus, even though the dispute did not arise under the ICSID Convention, the tribunal considered that the investment would satisfy the Salini criteria.

59 Sandra Friedrich, 'White Industries v. India: Investment Arbitration as Last Resort to Overcome Hurdles in Enforcing Arbitral Awards', (Latham Watkins LLP, June 2012), p.1.

(UNCITRAL Arbitration Rules 1976), Award of 5 March 2011, pp. 1-90.

55 Chester Brown, *Commentaries on Selected Model Investment Treaties* (Oxford University Press, 2013), p. 663.

56 *Caratube International Oil Company v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12 (UNCITRAL Arbitration Rules), Award of 5 June 2012.

57 *Caratube International Oil Company v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12 (UNCITRAL Arbitration Rules), Award of 5 June 2012, paras. 1-116.

58 *White Industries Australia Limited v The Republic of India*, (UNCITRAL), Final Award, 30 November 2011.

It is important to discuss the Phoenix Action Ltd. v. The Czech Republic⁶⁰ case, where tribunal determined different approach for defining the notion of 'investment.' Phoenix is an Israeli company, which purchased two Czech companies, Benet Praha ("BP") and Benet Group ("BG"), in 2002 while these two companies were involved in ongoing legal disputes – BG with a private party, BP with the Czech fiscal authorities. The Czech Republic challenged the jurisdiction of the Tribunal on the basis that Phoenix was an ex post facto sham Israeli entity created by a Czech national in order to establish diversity of nationality. The Czech Republic specifically asked the Tribunal to decide whether a foreign entity could be created for the sole purpose of establishing diversity of nationality, thus triggering ICSID jurisdiction.

In its decision, the Tribunal revisited the often-cited „Salini test” which attempts to determine whether there is an investment for the purposes of Article 25 of the ICSID Convention. The Salini test sets out four criteria for an investment to qualify as such under the ICSID Convention, i.e. (a) a contribution of money or other assets of economic value, (b) a certain duration, (c) an element of risk, and (d) a contribution to the host State's development.⁶¹

The most extensive list of factors is found in the case of Phoenix Action v. Czech Republic:

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

- 1 – a contribution in money or other assets;
- 2 – a certain duration;
- 3 – an element of risk;
- 4 – an operation made in order to develop an economic activity in the host State;
- 5 – assets invested in accordance with the laws of the host State;
- 6 – assets invested bona fide.

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

In above case, the claimant alleged a number of breaches of the Czech Republic–Israel BIT (1997).

60 Phoenix Action Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award of April 15, 2009.

61 <http://kluwerarbitrationblog.com/blog/2009/07/08/phoenix-action-ltd-v-the-czech-republic-icsid-case-no-arb065-award-of-april-15-2009-%E2%80%93-concept-of-investment-under-the-icsid-convention-revisited/>

According to the Czech Republic, Phoenix's claims fell outside the jurisdiction of the tribunal because Phoenix was, 'nothing more than an ex post facto creation of a sham Israeli entity created by a Czech fugitive from justice, Vladimír Beno, to create diversity of nationality'. On the facts, the tribunal upheld this view, finding that the only purpose behind the creation of the claimant company was to gain access to ICSID procedures and not to make a bona fide investment.⁶² Accordingly, the transactions in the case fell outside the ICSID definition of an „investment” and amounted to no more than an abuse of process.

3.1. Is there a Common Notion of Investment in Investor-State Arbitration?

As we have seen above, the main topic of the thesis is very controversial, there is no concrete answer in investor-state arbitration about what constitutes an investment and thus different tribunal's determinations and adoptions are very important in order to conclude and say that in Investor-State arbitration there is a common notion of investment or not. Before moving to the answer of the main question of this paper, it is important to analyse the arbitration case law (mainly: non-ICSID, ICSID), concerning the definition of investment and see how the jurisprudence is developing from time to time concerning to this matter. In order to simplify our task, I will divide the Case Law into three categories and finally it will be concluded if a common notion of 'investment' in investor-state arbitration can be found.

1. The Salini test approach, cases following the Salini test;
2. Cases adopting a different formulation, such as six elements for an investment;
3. Cases, which slimmed down the Salini criteria, the three objective criteria test.

According to the Salini v. Morocco, the investment requirement must be respected as an 'objective condition' for jurisdiction. Four elements for defining the definition of 'investment' was determined by above tribunal:

1. A contribution;
2. A certain duration of performance of contract;
3. Participation in the risks of the transaction; and
4. Contribution to the economic development of the host state of the investment.

In Joy Mining v. Egypt the tribunal noted that the

62 UNCTAD, Scope and Definitions, (2011), pp. 59-60.

extent, to which each of the criteria of the Salini formulation is met, is specific to each particular case, as they will normally depend on the circumstances of each case. The same approach was used in the other famous cases, such as: *Saipem v. Bangladesh*; *Ulysseas v. Ecuador*; *Kardassopoulos v. Georgia*, etc. The approach adopted by the *Phoenix v. Czech Republic* tribunal, is different from Salini approach. The Tribunal found that there are six elements for definition of 'investment':

- 1 – a contribution in money or other assets;
- 2 – certain duration;
- 3 – an element of risk;
- 4 – an operation made in order to develop an economic activity in the host State;
- 5 – assets invested in accordance with the laws of the host State;
- 6 – assets invested *bona fide*.⁶³

We will look in turn non-ICSID and ICSID case law, in which tribunals slimmed down the Salini criteria and used only three objective criteria test. In this part of the paper, it also will be discussed in which cases tribunals considered that the three objective criteria test for defining an investment is not necessary for non-ICSID arbitration.

The tribunal in *Romak v. Uzbekistan* (UNCITRAL) held that 'the term 'investment' under the BIT has an inherent meaning entailing a contribution that extends over a certain period of time and that involves some risk.' Accordingly, despite the broad definition of investment in the applicable BIT ('every kind of assets and particularly...'), the tribunal found that the claimant did not own an investment within the meaning of Article 1 of the BIT as its rights were embodied in and arose out of a sales contract.⁶⁴

Alps Finance v. The Slovak Republic, which was conducted by the UNCITRAL tribunal, finds that although the claim was not brought under the ICSID Convention, the Contracting States to the BIT must have considered the Convention's understanding of what constitutes an 'investment' because the BIT also contemplated ICSID arbitration; therefore a 'double check' approach should be taken to determine the existence of an alleged investment.

As for ICSID Awards, for instance, in *Saba Fakes v. Turkey* (ICSID) Tribunal used the same criterion as *Romak* Tribunal, and noted that, there are three elements for an investment: (i) contribution; (ii) certain duration; and (iii) element of risk. It rejected contribution to host state developments, because an investment

expected to be fruitful may turn out to be an economic disaster but such investments should not fall outside the ambit of an investment.

In *Caratube v Kazakhstan* the tribunal held that the repetition of the word 'investment' in the definition meant that the parties intended to import into the definition the ordinary meaning of this concept, which includes such elements as contribution, duration and risk.⁶⁵

The *KT Asia v. Kazakhstan* tribunal recognized that the claimant 'must show that it has made an 'investment' under the objective definition developed in the framework of the ICSID Convention in order to establish that the Tribunal has *ratione materiae* jurisdiction over the present dispute.' Citing earlier decisions, the tribunal noted that, (1) commitment of resources, (2) duration and (3) risk form part of the objective definition of the term 'investment'. Similar to the *Philip Morris* decision, however, the *KT Asia* tribunal rejected the relevance of the investment's contribution to the host State's economic development. The *KT Asia* tribunal noted that, 'while 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'.⁶⁶ Similarly, in the assessment of the tribunal in *Deutsche Bank v. Sri Lanka*, the development of ICSID arbitral practice suggested that only three criteria were relevant for the purpose of defining an investment, namely contribution, risk and duration. On the contrary, a contribution to the economic development of the host State and a regularity of profit and return should not be used as additional benchmarks. The tribunal also noted 'the existence of an investment must be assessed at its inception and not with hindsight'.⁶⁷

As it was mentioned above, different approach was determined in UNCITRAL case *White v. India*. Final Award finds that the 'double-check' approach of checking whether there is an „investment" under the ICSID Convention and the applicable BIT is not relevant to a non-ICSID claim brought under a BIT. Similarly, in *Guaracachi v. Bolivia Award* (UNCITRAL) considers, that it is not appropriate to import 'objective' definitions of investment created by doctrine and case law in order to interpret Article 25 of the ICSID Convention, when the proceeding is a non-ICSID arbitration.

According to the above-mentioned we can say that the issue is really controversial and it is very hard to

63 UNCTAD, *Scope and Definitions*, (2011), p.108.

64 *Ibid* above, p. 98.

65 *Ibid* above, p. 104.

66 UNCTAD, 'Recent Developments in Investor-State Dispute settlement (ISDS)', (April 2014), p.13.

67 UNCTAD, 'Recent Developments in Investor-State Dispute settlement (ISDS)', (May 2013), p. 8.

answer directly if there is a common notion of 'investment' in Investor-State arbitration. As we have seen, different tribunals defined the term 'investment' in a different way. After all discussions we had above, I am on the view that non-ICSID tribunals fairly used the three objective criteria test for defining 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.

If we will foresee that the newer adopted BITs try to precise the definition of 'investment' in BITs. This trend is likely to have been a reaction to those arbitral awards, which interpreted open-ended definitions in an over-extensive manner. In particular, some treaties started to use a closed-list definition instead of an open-ended one, introduce certain objective criteria or elements to determine when an asset can be considered an investment, explicitly exclude certain types of assets and employ other narrowing techniques.

In order to answer the main question, we should once again speak about Romak case and its influence on developing jurisprudence, because its approach was shared not only non-ICSID tribunals, but ICSID tribunals as well, tribunals successfully using this three objective criteria test, we have seen a lot of examples of case law, which are using the same criteria in order to define the term 'investment.'

The plausibility of the version of the Salini test that found favor with the Romak Tribunal is buttressed by a second recent decision that espoused a similar slimmed down three requirement test, albeit in this case in the context of Article 25(1) of the ICSID Convention. Perhaps these are the first signs of a jurisprudence *constante* finally beginning to form on the definition of investment applicable in international investment arbitration. In terms of its application of the definition to the facts, the Romak Tribunal appeared to be, interestingly, more concerned with the fulfillment of the applicable criteria *de facto* than *de jure*. Whatever the reasons for the Romak Tribunal's desire to remain outside the developing jurisprudence of international investment law, it will undoubtedly fail. The award is on the whole well-reasoned, persuasive and eloquent, making it prime material for citation in future cases, whether tribunals are looking for jurisprudence *constante*, or simply handy summaries of applicable reasoning.⁶⁸ According to the analysis above, we can say

68 Laura Halonen, „Bridging the Gap in the Notion of „Investment“ between ICSID and UNCITRAL Arbitrations: Note on an Award Rendered under the Bilateral Investment Treaty between Switzerland and Uzbekistan (Romak SA v Uzbekistan)”, (ASA Bulletin, Volume 29, No. 2, 2011, ISSN 1010-9153), p. 324-326.

that there is no clear answer about common notion of investment in investor treaty arbitration, although we cannot ignore the fact that there are a lot of attempts in order to form the common notion of investment as by the case law of the non-ICSID tribunals and by ICSID as well. Despite the fact that there are cases, which clearly opposes the idea that in non-ICSID cases there is no need to use objective test for defining the notion of 'investment' I think that a „double check" approach should be taken into account in order to determine the existence of an alleged investment.

CONCLUSION

The requirement of the definition of 'investment' as a protected investment is the main gateway in Investor-State arbitration. Therefore, there are a lot of controversies and debates among scholars and jurists about this vital jurisdictional requirement. Despite the fact that there are several approaches for defining the term 'investment', the parameters have considerably remained critical. The definitions of 'investment' that have been already adopted by the tribunal have the particular relevance for respondent States, who are always striving to persuade the tribunal to use the most restrictive interpretation.

It is undisputable that the definition of 'investment' is practically endless; therefore foreign investors always want broad definition as possible, whereas the States are willing to adopt the narrow definition. Thus, it is rather difficult for it to remain one static definition that will work as a common notion in Investor-State arbitration. As seen from the topic analysis above, even case law is controversial and do not agree on one – common interpretation for defining the notion of 'investment'.

Many arbitral tribunals still only look for the existence of an 'objective' investment conforming to Article 25 of the ICSID Convention 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 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'.⁶⁹

69 Jean-Pierre Harb, 'Definition of Investments Protected by International Treaties: An On-Going Hot Debate', (Mealey's International Arbitration Report, Vol. 26, #8, 2011). P. 13.

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