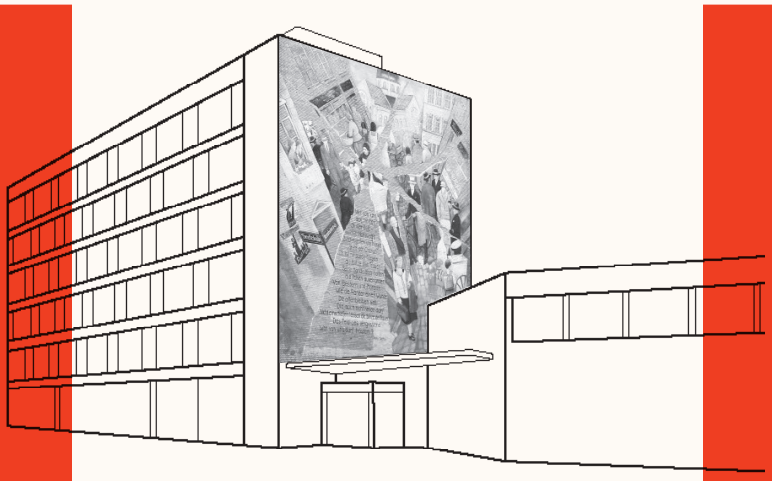

Antonia Fandrich

Sustainability and Investment Protection Law

A Study on the Meaning of the Term *Investment* within the ICSID Convention

Rechtswissenschaftliche
Beiträge der
Hamburger Sozialökonomie

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Impressum

Kai-Oliver Knops, Marita Körner, Karsten Nowrot (Hrsg.)
Rechtswissenschaftliche Beiträge der Hamburger Sozialökonomie

Heft 9, Dezember 2016

Bibliografische Information der Deutschen Bibliothek

Die Deutsche Bibliothek verzeichnet diese Publikations in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet unter http://dnb.dnb.de abrufbar.

ISSN 2366-0260 (print)
ISSN 2365-4112 (online)

Reihengestaltung: Ina Kwon
Produktion: UHH Druckerei, Hamburg
Schutzgebühr Euro 5

Die Hefte der Schriftenreihe „Rechtswissenschaftliche Beiträge der Hamburger Sozialökonomie“ finden sich zum Download auf der Website des Fachgebiets Rechtswissenschaft am Fachbereich Sozialökonomie unter der Adresse:

https://www.wiso.uni-hamburg.de/fachbereich-sozoek/professuren/koerner/fiwa/publikationsreihe.html

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A. Introduction

Sustainability means "to ensure that [humanity] meets the needs of the present without compromising the ability of future generations to meet their own needs"[1]. Highly controversial in this context is the relationship between investment protection and sustainable development, which are often said to be conflicting interests with investment protection rather constituting an obstacle for sustainable development.[2] While cross-border investments as well as arbitration tribunals[3] are subject to discussions and criticism,[4] especially in regard to the unfair and exploiting treatment of developing countries by powerful developed countries, some voices, e.g. *Schill,*[5] favour the understanding of investment protection as part of the international development law.

One institution that can be used by host states and investors to solve disputes regarding investments abroad is the Investment Centre for Settlement of Investment Disputes (ICSID), an international arbitration institution belonging to the World Bank Group. The ICSID's authority to deal with a certain case depends on whether or not the respective investment falls within the scope of the ICSID Convention. Unfortunately, the convention itself contains – unlike other agreements such as the NAFTA[6] (North American Free Trade Agreement) or the ECT (Energy Charter Treaty)[7] – no definition of the term *investment* and the respective literature has not found a consistent definition of what constitutes an investment.[8]

Considering the aforementioned circumstances, the scope of this article shall be to study the term *investment* within the ICSID Convention, thereby focussing especially on the question whether an investment according to the ICSID Convention also needs to meet sustainability aspects.

B. The ICSID

The ICSID is an independent international arbitration institution headquartered in Washington D.C. and one of five organisations belonging to the World Bank Group. Its convention became applicable on 14 October 1965. By October 2016, 153 countries were contracting states of the ICSID Convention and by today, over 550 cases have been admitted to the ICSID.[9] The ICSID's purpose is to ease dispute resolutions as well as arbitrations between international investors and states independent of national courts in order to promote the economic development[10]. That overriding goal is in line with the

1 *Hardtke/Prehn*, Perspektiven der Nachhaltigkeit, 58.
2 See *Schill*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 72 (2012), 261; *Johannsen*, Beiträge zum Transnationalen Wirtschaftsrecht 87 (2009), 5 (6).
3 In particular in regard of CETA and TTIP, the establishment of arbitration tribunals is strongly criticised by the European parties. Nevertheless, the European Commission made a proposal to replace the variety of arbitration tribunals by a single permanent arbitration court. For further detail see: *Jaeger*, Europarecht 51 (2016), 203 *et seq*.
4 See *Hardtke/Prehn,* Perspektiven der Nachhaltigkeit, 58*; Schill*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 72 (2012), 261 *et seq*.
5 See *Schill*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 72 (2012), 261 (262).
6 Article 139 NAFTA includes a list of covered investments.
7 Article 1 (6) ECT defines investments.
8 *Yannaca-Small*, in Yannaca-Small (ed.), Arbitration under international investment agreements, 243 with further references.
9 See https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/default.aspxA, a schedule of actual BITs is available at https://icsid.worldbank.org/apps/ICSIDWEB/resources/Pages/Bilateral-Investment-Treaties-Database.aspx, last visit: 30 October 2016.
10 See Preamble of the ICSID Convention.

goals of the World Bank, to end extreme poverty and promote shared prosperity.[11] Investment disputes commonly arise when the interests of an investor and the political interests of its host state's government are falling apart.[12] Because investors are not infrequently planning with an amortisation period of 30 to 40 years, it is not uncommon that the political situation in regard to an investment changes during that period. That's the reason for the existence of bi- and multilateral investment protection treaties. Their purpose is to guarantee the investors protection regardless of the host state's actual political situation and hereby increase the willingness of foreign investors to invest.

C. The *investment* according to Art. 25 (1) ICSID Convention

Article 25 (1) ICSID Convention defines the jurisdiction of the Centre. During the foundation process of the ICSID Convention it was considered to define the term *investment* more closely.[13] Accordingly, its first draft described the term *investment* in Article 30 (1) as "any contribution of money or other assets of economic value of an indefinite period or, if the period be not defined, for not less than five years." Particularly noticeable is the limit of five years.

The World Bank also made a proposal which was driven by the same notion: "The term 'investment' means the acquisition of (i) property rights or contractual rights (including rights under a concession) for an establishment or in the conduct of an industrial, commercial, agricultural, financial, or service enterprise; (ii) participation or shares in any such enterprise; or (iii) financial obligations of a public or private entity other than obligations rising out of short-term banking or credit facilities."[14] So, short-term banking or credit onus are excluded. As a consequence, those capital exporting countries like the USA, Germany, Great Britain and Japan, as well as some developing countries voted against a strict definition and therefore against such a limitation regarding investments.

Eventually the term *investment* remained undefined and Art. 25 (1) of the final version of the ICSID Convention reads as follows:

"The jurisdiction of the Centre shall extend to ***any legal dispute arising directly out of an investment****, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre."*

Subsequently two general views evolved to define what the term investment means. One is based on the definitions in investment treaties and therefore argues in favour of a subjective definition of this term, while the other endorses an objective definition based on the understanding of *investment* in the economic literature.[15]

11 See *World Bank,* http://www.worldbank.org/en/about (17.07.2016).
12 *Shihata*, Außenwirtschaft 41 (1986), 105 *et seq.*
13 *Johannsen*, Beiträge zum Transnationalen Wirtschaftsrecht 87 (2009), 5.
14 *International Centre for Settlement of Investment Disputes,* History of the ICSID Convention, Vol. II-2, 844.
15 See *Dolzer/Schreuer*, Principles of International Investment Law, 61.

I. Subjective interpretation

Those academic voices that argue in favour of a kind of subjective interpretation of the term *investment* are opting for a determination by a consensus of the parties. In general they quote three arguments for their opinion.

The first argument refers to the wide formulation of Article 25 ICSID Convention and concludes from this that only the concrete arbitration treaty, investment treaty, state contract or relevant investment law of the host state are binding in regard to the definition of an *investment.*[16] However, the lack of a legal definition was the result of the inability of the participating states to agree on a definition of the term *investment* during the editorial proceedings, so this argument cannot be used for a subjective interpretation.[17]

As a second argument for a subjective interpretation of the term *investment* it is mentioned that, according to Article 25 (4) ICSID Convention, states may notify the ICSID of the class or classes of disputes which they would or would not consider submitting to the jurisdiction of the Centre.[18] But others object to that argument. They state that Article 25 (4) ICSID Convention could not be used as authorisation for an inter-governmental definition of the term of an *investment* in bilateral investment treaties. Moreover, it could rather be seen as a counter-argument because the option to restrict the jurisdiction of the arbitration tribunals would have no practical relevance if the parties themselves could already determine or restrict the term *investment.*[19] Thus, from a systematic view, the existence of Article 25 (4) ICSID Convention contains a separate opportunity – apart from the definition of the term *investment* – for the member states to limit the disputes that the ICSID arbitration tribunals have the authority to solve.

The third argument, first mentioned in the year 1968, is that in some cases, the investor might be unprotected, if the term *investment* was defined in a narrower, objective way.[20] But since the creation of the Additional Facility Process[21] in 1978, this argument has lost its strength. The Additional Facility Process has a quite wide scope and therefore also includes those kinds of disputes which do not arise directly from an investment.[22] Consequently, investors are not as defenceless as argued.

In addition to the three aforementioned arguments, there were a number of different arbitration tribunals' awards and other decisions, which also follow a strictly subjective definition. The first of these arbitral decisions is from the year 1998. The arbitration tribunal emphasised the consensus of the parties with regard to Article 25 ICSID Convention as follows: "[…] the term 'investment' is not defined in the ICSID Convention, but it is defined in the […] Treaty, which sets the bounds within which we operate this case."[23] This way, the term *investment* in Article 25 ICSID Convention was made subject to the determination of the parties. Other cases followed this subjective approach.[24]

16 See *Sutherland*, International & Comparative Law Quarterly 28 (1979), 367 (387).
17 See *Belling*, Die Jurisdiktion rationae materiae der ICSID-Schiedsgerichte, 189 *et seq.*
18 See *Fischer*, Verfassung und Recht in Übersee 1 (1968), 262 (288).
19 See *Johannsen*, Beiträge zum Transnationalen Wirtschaftsrecht 87 (2009), 5 (7).
20 *Lauterpracht,* in: Faculté de Droit de l'Université de Genève (ed.), Recueil d'études de droit international en hommage á Paul Guggenheim, 642 (650).
21 Art. 2b ICSID Additional Facility Rules.
22 See *Fedax N. V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, July 11, 1997, ILM (1998), 1378 (1384), para. 28.
23 *Lano International v. Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision: Jurisdiction of the Arbitration Tribunal, December 8, 1998, ILM 40 (2001), 457 (470), para. 48.
24 See for example *Generation Ukraine v. Ukraine*, ICSID Case No. ARB/00/9, Award, September 16, 2003, which did not follow the argumentation in the case *Mihaly International Corporation v. Sri Lanka*.

II. Objective interpretations

Unlike the proponents of the subjective interpretation, those who favour an objective interpretation believe that the term *investment* has to be defined independently from the opinions of the respective parties, because Art. 25 ICSID Convention is meant to not only set the limits of the jurisdiction but also to ensure that the World Bank does not exceeding its powers because general disputes between states and foreign citizens by contrast would fall under the authority of the United Nations and not of the World Bank as one of its specialised agencies.[25] Further it is argued that, according to Art. 41 (1) in connection with Art. 44 ICSID Convention, arbitration tribunals may not only rule on questions of substantive law but also on questions of procedural law and thus can decide on questions regarding their own jurisdiction.[26]

In fact, the ICSID arbitration tribunals determine whether a case is belonging to their jurisdiction in their decision-making practise.[27] By doing so, the tribunals follow two different types of objective interpretations, the Hybrid Approach and the "Salini Test".

1. Extensive interpretation (Hybrid approach)

Some tribunals favour an extensive interpretation of the term *investment.* They assume that there is a deniable assumption in favour of the existence of an investment.[28]

This leads to a very broad understanding of what an *investment* is, with only very few restrictions. One restriction made to the parties is that they "could not validly define as investment in connection with the Convention something absurd or entirely incompatible with its object and purpose."[29] And another requirement, deduced from the preamble of the ICSID Convention, is, that the transaction in question has to serve the host state's economic development,[30] which can be seen as an element of sustainability.

Because of the extensive interpretation, restrictive agreements on the term *investment* are considered relevant.[31] That's why this approach can be denoted as "Hybrid approach", made of objective as well as subjective elements. However, agreements that go further than the objective limits of Article 25 (1) ICSID Conventions are not considered by the tribunals.[32] Therefore one could call it a "double barrelled test"[33] or a "double keyhole test"[34]. The ICSID tribunals have to consider in a first step whether an investment within the meaning of Article 25 (1)

25 See *International Centre for Settlement of Investment Disputes*, History of the ICSID Convention, Vol. II-1, 6; *Rubins*, in: Horn/Kröll (eds.), Arbitrating Foreign Investment Disputes, 283 (289).

26 *Pirrung*, Die Schiedsgerichtsbarkeit nach dem Weltbankübereinkommen für Investitionsstreitigkeiten, 60.

27 As the most obvious example can be mentioned: *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3, Decision on Jurisdiction, January 14, 2004, para. 38: "[…] this Article is designed to govern the applicable law in connection with the merits but not in respect of questions of jurisdiction."

28 See *Fedax N. V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on the Jurisdiction, July 11, 1997, ILM 37 (1998), 1378 (1385), para. 38; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Jurisdiction, January 14, 2004, paras. 42 and 44.

29 See *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, January 14, 2004, para. 42.

30 See *Ceskolovenska Obchoni Banka A.S. (CSOB) v. Slovac Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, May 24, 1999, para. 64.

31 Referred to as "subjective-objective approximation", see *Johannsen*, Beiträge zum Transnationalen Wirtschaftsrecht 87 (2009), 5 (11).

32 See *Ceskolovenska Obchoni Banka A.S. (CSOB) v. Slovak Republic*, ICSID Case No. ARB 97/4, Decision of the Tribunal on Objections to Jurisdiction, May 24, 1997, para. 68.

33 *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Award, May 17, 2007, para. 55.

34 *Dolzer/Schreuer*, Principles of International Investment Law, 61.

ICSID Convention exists and in a second step if the relevant investment agreement contains relevant limitations of the term *investment.*[35]

However, it should be noted that some tribunals take the second step before the first one and, by doing so, are tending to a much more subjective interpretation of the term investment.[36]

2. Salini Test

The so-called "Salini Test" is the second objective approach and leads to a much more restrictive interpretation of the term *investment* than the hybrid approach. The test originally stems from the case *Salini Costrattori S.p.A. and Italstrade S.p.A. v. Morocco*[37]. It has become prevalent in the ICSID jurisdiction and even the claimants rarely questioned it. Due to this circumstances, the "Salini Test", described by some ICSID tribunals as "well known",[38] has an enormous normative impact in regard to the solution of the problem of defining an *investment.*

The original "Salini Test", following the eponymous ISCID case, contains the following criteria:[39]

(1) the amount invested is a substantial contribution;
(2) the performance of the contract must have a certain duration;
(3) the project contains an element of risk for the investor;[40] and
(4) the project must make a contribution to the economic development of the host state of the investment.[41]

Later on, the criterion that the project has to aim at regular profits and rate of return, was added to the "Salini Test".[42] This fifth criterion goes back on the decision of *Joy Mining v. Egypt*[43] and takes a special position in the "Salini Test" because it is not equivalent to the other four criteria. The arbitration tribunal in the case *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia* mentioned that this criterion is not relevant in every case, wherefore its absence can be regarded as insignificant.[44] That is the reason why the following examination of the single criteria of the "Salini Test" will focus on the original four criteria.

35 *Ceskolovenska Obchoni Banka A.S. (CSOB) v. Slovak Republic*, ICSID Case No. ARB 97/4, Decision of the Tribunal on Objections to Jurisdiction, May 24, 1997, para. 68.
36 See *Johannsen*, Beiträge zum Transnationalen Wirtschaftsrecht 87 (2009), 5 (12) with further references.
37 *Salini Costrattori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco,* ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23.07.2001, ILM 42 (2003), 609 (620 *et seq.*), paras. 44-58.
38 *Saipem S.p.A. v. Bangladesh,* ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21.03.2007, para. 99.
39 *Grabowski,* Chicago Journal of International Law 15 (2014), 287 (296).
40 *Salini Costrattori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco,* ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23.07.2001, ILM 42 (2003), 609 (620 *et seq.*), para. 52.
41 *Salini Costrattori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco,* ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23.07.2001, ILM 42 (2003), 609 (620 *et seq.*), para. 52; *Schreuer,* in: Schreuer/Malintoppi/Reinisch/Sinclair, The ICSID Convention, Art. 25 recital 153-174; *García-Bolívar,* Defining an ICSID Investment: Why Economic Development Should be the Core Element, without pages.
42 See *Schreuer,* in: Schreuer/Malintoppi/Reinisch/Sinclair, The ICSID Convention, Art. 25 recital 153, 157 with further references.
43 *Joy Mining Machinery Limited v. Arab Republic of Egypt,* ICSID Case No. ARB/03/11, para. 53.
44 See *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia,* ICSID Case No. ARB/05/10, 17.05.2007, para.108; *Johannsen,* Beiträge zum Transnationalen Wirtschaftsrecht 87 (2009), 5 (22) *et seq.*

a) Substantial contribution

The first criterion of the Salini Test demands that the amount invested has to be a substantial contribution. Examples of substantial contributions are amounts of money, equipment or suitably qualified staff, as well as expertise.[45] However, according to actual ICSID arbitral jurisdiction, the exclusive investment of money may constitute a substantial contribution within the meaning of the "Salini Test", wherefore nowadays the differentiation between portfolio investment and direct investment is losing of importance.[46]

b) Certain Duration

The requirement of a certain duration of the investment was already included in the first draft of the ICSID Convention, which provided a minimum duration of five years.[47] Since the ICSID Case *Salini Costrattori S.p.A. and Italstrade S.p.A. v. Morocco*, an investment is expected to at least last for two to five years,[48] but this minimal duration requirement is not rigid.[49]

Further, the tribunals distinguish between a quantitative and a qualitative part of this criterion.[50] They assume that the criterion is closely linked to the requirement that the investment contributes to the host state's economic development and that the longer a project lasts, the more the host state's economic development benefits from it.[51] Consequently, the tribunals are demanding that a project has to last longer the less it contributes in the short term to the host state's economic development.[52]

c) Risk for the investor

The concrete project has – as a third criterion – to pose a risk to the investor. The purpose of this criterion is to differentiate an investment from a conventional commercial contract, wherefore typical risks of business (e. g. nullity of the contract due to rescission or termination or notices of defects), are not sufficient to constitute a risk as defined by the "Salini Test".[53]

In the case *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia,* the tribunal distinguished between qualitative and quantitative elements of this criterion, as it has already done regarding the criterion of duration. Even normal economical risks should be quantitative risks, but the qualitative component is missing if there are only common and predictable economic risks for the investor, such as typical for the kind of contract in question.[54]

45 See *Johannsen*, Beiträge zum Transnationalen Wirtschaftsrecht 87 (2009), 5 (18) with further references.
46 See *Dugan/Wallace/Rubins/Sabahi*, Investor-State Arbitration, 249 with further references.
47 See *Johannsen*, Beiträge zum Transnationalen Wirtschaftsrecht 87 (2009), 5 (15).
48 See *Salini Costrattori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, July 23, 2001, ILM 42 (2003), 609 (622 *et seq.*), para. 54; *Saipem S.p.A. v. Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, March 21, 2007, para. 101.
49 See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt,* ICSID Case No. ARB/04/13, Decision on Jurisdiction 16.06.2006, paras. 94 *et seq.*, where a duration of barely 23 month were found sufficient.
50 See *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, May 17, 2007, para. 110 *et seq.*
51 See *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, May 17, 2007, para. 111.
52 See *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, May 17, 2007, para. 111.
53 See *Joy Mining v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, August 6, 2004, paras. 57 *et seq.*
54 See *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10,

d) Contribution to the host state's economic development

Highly and controversially discussed is the requirement of significance for the host state's economic development.[55] This criterion can be taken directly out of the preamble of the ICSID Convention[56] and is also be used as an element of restriction within the extensive interpretation of the term *investment.*[57]

Undoubtedly in compliance with this requirement are only those kinds of projects which can be regarded as being in the public interest – e. g. because they are part of the public infrastructure –[58] as well as those which support the tourism industry of the host state.[59] In regard to other kinds of investments, the existence of a benefit to the economic development is controversial. One aspect which is considered by the tribunals is the contribution of know-how to the host state,[60] at least if the know-how is not just offered to but in fact also utilized by the host state.[61] But the main problem is that the determination of the economic benefit also requires an analysis of the economic effects of the project in question.[62]

In view of that problem, the ICSID tribunals in the cases *Consortio Groupement L.E.S.I.-DIPENTA v. People's Democratic Republic of Algeria*[63] and *L.E.S.I. S.p.A. et ASTRALDI S.p.A. v. People's Democratic Republic of Algeria*[64] rejected this criterion, because they deemed it non-transparent.[65] According to the tribunal's opinion, only the criteria of certain duration, risk, and substantial contribution are determinable enough to be admissible. If these criteria are complied with, this would also implicit the existence of a contribution to the host state's economy. These decisions are of particular interest, because *Emmanuel Gaillard* was a member of the tribunal who represented the tribunal's approach in an article in 1999[66] and was cited by the tribunal in the *Salini* decision. Obviously, as shown by the *L.E.S.I.* decisions, *Gaillard* does not agree with the amendment of the approach by way of introducing an additional fourth criterion.

However, the criticism raised by the *L.E.S.I.* decisions does not generally affect recourse to the "Salini Test" by ICSID tribunals. The tribunal in the case *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia,* for example, stated that a contribution to the host state's economy can be supposed when the other three criteria are complied. It only has to be considered separately when the other three criteria are merely met superficially.[67]

May 17, 2007, para. 112.

55 See *Schill*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 72 (2012), 261 (285).

56 See i. a. *Bayindir v. Pakistan,* ICSID Case No. ARB/03/29, Decision on Jurisdiction, November 14, 2005, para. 137.

57 See *Ceskolovenska Obchoni Banka A.S. (CSOB) v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, May 24, 1999, para. 64.

58 See *Johannsen,* Beiträge zum Transnationalen Wirtschaftsrecht 87 (2009), 5 (19) with further references.

59 See *Helnan International Hotels A/S v. The Arab Republic of Egypt,* ICSID Case No. ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction, 17.10.2016, para. 77; *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia,* ICSID Case No. ARB/05/10, 17.05.2007, para. 44.

60 See *Salini Costrattori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco,* ISCID Case No. ARB/00/4, Decision on Juristriction, 23.07.2001, ILM 42 (2003), 609 (623), para. 57.

61 See *Mr. Patrick Mitchell v. The Democtatic Republic of Congo,* ICSID Case No. ARB/99/7, Decision on Application for the Annulment of the Award, 1.11.2006, para. 39.

62 See *Johannsen,* Beiträge zum Transnationalen Wirtschaftsrecht 87 (2009), 5 (20).

63 *Consortio Groupement L.E.S.I.-DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03.08, Award, 10.01.2005.

64 *L.E.S.I. S.p.A. et ASTRALDI S.p.A. v. People's Democratic Republic of Algeria,* ICSID Case No. ARB/05/3, Decision, 12.07.2006.

65 *Consortio Groupement L.E.S.I.-DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03.08, Award, 10.01.2005, para. 13; *L.E.S.I. S.p.A. et ASTRALDI S.p.A. v. People's Democratic Republic of Algeria,* ICSID Case No. ARB/05/3, Decision, 12.07.2006, para. 72.

66 See *Gaillard,* Journal du Droit International 126 (1999), 273 (290 *et seq.*)

67 *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia,* ICSID Case No. ARB/05/10,

Martin Endicott follows a different approach. He is of the opinion that the requirement of a contribution to the host state's economic development is the price to be paid by the foreign investor to the host state for the state's waiver of sovereignty due to the investment protection.[68] According to him, the presence of this requirement leads to the existence of an *investment.* This requires increases in real income as well as a contribution comparable to the contribution from public goods. The latter exclude transactions that have negative impacts on internationally accepted social and environmental standards.[69] Certainly, as *Endicott* had to admit, his proposal faces practical difficulties in proving the economical contribution and referred to the possibility of a probability statement by the tribunal.[70]

Eventually there are also those voices in the literature that argue in favour of a prima facie evidence with regard to the existence of a contribution.[71] They argue that the term investment primarily focuses on public projects, realised by the public sector, despite the fact that private investments and especially portfolio investments[72] also have a positive effect on the economic growth.[73] As a further argument, the proponents of a prima facie evidence emphasize that the ICSID Convention's requirements in regard to the qualification of the arbitrators are primarily of legal nature.[74] Thus the tribunals would have to obtain expert opinions in every case, due to their lack of economical knowledge. This is deemed as impractical.[75]

17.05.2007, paras. 113-116, 124; see also, *Bayindir Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14.11.2015, para. 137; *Schlemmer*, in: Muchlinski/Ortino/Schreuer (eds.), The Oxford Handbook of International Investment Law, 49 (68 *et seq.*).

68 *Endicott*, in: Gehring/Cordonier Segger (eds.), Sustainable Development in World Trade Law, 379 (386 *et seq.*, 409 *et seq.*); see also *Rubins*, in: Horn/Kröll (eds.), Arbitrating Foreign Investment Disputes, 283 (286).

69 See *Endicott*, in: Gehring/Cordonier Segger (eds.), Sustainable Development in World Trade Law, 379 (388 *et seq.*, 410).

70 See *Endicott*, in: Gehring/Cordonier Segger (eds.), Sustainable Development in World Trade Law, 379 (391).

71 *Todaro/Smith*, Economic Development, 617 *et seq.*; *Herdegen*, Internationales Wirtschaftsrecht, § 21 recital 1 *et seq.*; *Johannsen,* Beiträge zum Transnationalen Wirtschaftsrecht 87 (2009), 5 (20, 22).

72 See *Todaro/Smith*, Economic Development, 617 *et seq.*; *Herdegen*, Internationales Wirtschaftsrecht, § 21 recital 1 *et seq.; Johannsen,* Beiträge zum Transnationalen Wirtschaftsrecht 87 (2009), 1 (20).

73 See *Johannsen,* Beiträge zum Transnationalen Wirtschaftsrecht 87 (2009), 5 (20) with further references.

74 See Art. 14 (1) ICSID Convention.

75 See *Johannsen,* Beiträge zum Transnationalen Wirtschaftsrecht 87 (2009), 5 (20) with further references.

D. Own approach: Requirement and possibility of an amendment of the ICSID Convention

As demonstrated in the previous sections, the opinions on what is an investment according to Art. 25 (1) ICSID Convention differ widely in arbitral practice and scholarly literature. While some would leave the decision to the states and the bilateral investment treaties (BITs), other voices prefer an independent interpretation of the term *investment*. The most sophisticated approach to determine what investment means is the "Salini Test". The discussion regarding the criteria of the "Salini Test" and especially regarding the criterion "contribution to the host state's economic development" shows that increasingly not only aspects of investor protection are taken into account but also the effect of the investment on the host state.

Taking up this development, this section intends to present an own and advanced approach to these challenges. Inspired by the ongoing development of public international law in general as well as of international investment law in particular, the present author is convinced that an *investment* has to comprise also elements of sustainability to fall within the scope of Art. 25 (1) ICSID Convention.

This interpretation is based on the rules regarding the interpretation of treaties, codified in Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT), which are – since they are reflecting customary international law – also applicable to the interpretation of the ICSID Convention.[76] These rules provide i. a. that the interpretation must be undertaken "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"[77] and that also "any relevant rules of international law applicable in the relations between the parties"[78] must be taken into account.

The first point that indicates the requirement of a sustainable *investment* is that the preamble of the ICSID Convention stresses "the need for international cooperation for economic development" as one of the overarching purposes of this agreement. This is of relevance because Art. 31 (2) VCLT states that the interpretation of a treaty should i. a. comprise "the text, including its preamble",[79] so that there is no doubt that the preamble is more than just a political statement.

When dealing with this requirement as stipulated in the preamble, one must consider that economic development needs a long-term perspective and thus it strongly needs to be sustainable. Further, it has to be taken into account that ICSID forms part of the World Bank Group and that the World Bank itself aims for the reduction of poverty and shared prosperity by fostering income growth.[80] These goals can hardly be reached if the economic development does not consider aspects of sustainability e. g. social and environmental standards as well as the respect of the human rights of the people in the host state.

Another argument is that according to Art. 25 (1) ICSID Convention, the consent of the affected state is required to start an arbitration, but nowadays most investment treaties include a general consent of the host state to the initiation of arbitration proceedings by the respective foreign investors. Thus, it is simply up to the investor to start the arbitration process.[81]

76 See *Nowrot,* Beiträge zum transnationalen Wirtschaftsrecht, 122 (2012), 5 (21) with further references.
77 Art. 31 (1) VCLT.
78 Art. 31 (3) (c) VCLT.
79 See also *Sinclair,* The Vienna Convention on the Law of Treaties, 127; *Stein/von Buttlar,* Völkerrecht, 24; *Johannsen,* Beiträge zum Transnationalen Wirtschaftsrecht 87 (2009), 5 (25).
80 See http://www.worldbank.org/en/about/what-we-do (25.09.2016).
81 See *Nowrot,* Beiträge zum Transnationalen Wirtschaftsrecht, 122 (2012), 5 (14) with further references.

Regardless of whether one may conclude that this would qualify investors as (partial[82]) subjects of public international law[83] or not, one cannot deny the fact that the development of international investment protection law during the last 25 years has clearly resulted in a strengthening of the position of foreign investors. In light of this enhanced status, it seems only fair to also increase and specify the requirements for an investment under the ICSID Convention. Vice versa, the sustainable economic contribution to its development can be seen as the compensation for the host state for its waiver of sovereignty.[84] This is all the more justified as public international law is facing a change of paradigms as it is shifting from a law of intergovernmental relations shaped by interests of several states towards a "comprehensive blueprint of social life"[85].[86]

This argumentation is supported by several other concepts which aim to incorporate certain elements of sustainability (e. g. human rights or social standards) into the normative structures of international investment law. For example, the "IISD-Model International Agreement on Investment for Sustainable Development"[87], or the "Investment Policy Framework for Sustainable Development", developed by the UNCTAD, which includes a table of all previously known policy options for substantive, as well as procedural terms within the World Investment Report of 2012 "Towards a new generation of investment policies"[88]. The latter offers a good selection of different terms regarding the conflicting interests of investment protection on the one and welfare and sustainability on the other side.[89] Furthermore, some BITs are recently lowering the investment protection and offer more room for a public welfare policy in the host state. In regard to this, the Model-BITs should be mentioned, published by the USA and the Southern Africa Development Community in 2012, which also refer to ecological and social aspects,[90] as well as the "UN Guiding Principles on Economy and Human Rights", which claim that "States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts"[91].

82 See *Hobe,* Praxis des internationalen Privat und Verfassungsrechts 22 (2002), 249 (251); *Tietje,* in: Tietje (ed.), International Investment Protection and Arbitration, 17 (32); *Schwartmann,* Private im Wirtschaftsvölkerrecht, 95.

83 See *Plama Consortium Ltd. v. Bulgaria,* ICSID Case No. ARB/03/24, Decision on Jurisdiction, 08.02.2015, para. 141; *Gutto,* in Snyder/Sahirathai (eds.), Third World Attitudes Towards International Law, 275 (285); *Tietje,* Grundstrukturen und aktuelle Entwicklungen des Rechts der Beilegung internationaler Investitionsstreitigkeiten, Arbeitspapiere aus dem Institut für Wirtschaftsrecht No. 10 (January 2003), 5 (16); *Tietje,* The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States, Arbeitspapiere aus dem Institut für Wirtschaftsrecht No. 78 (September 2008), 5 (13); *Tietje,* Kölner Schrift zum Wirtschaftsrecht 2 (2011), 128 (135); *Tietje,* in: Giegerich (ed.): Internationales Wirtschafts- und Finanzrecht in der Krise, 11 (32); *Schwartmann,* Private im Wirtschaftsvölkerrecht, 98; *Happ,* Schiedsverfahren zwischen Staaten und Investoren nach Art. 26 Energiechartavertrag, 138 *et seq.*.; *Braun,* Ausprägungen der Globalisierung: Der Investor als partielles Subjekt im Internationalen Investitionsrecht, 162 *et seq.*; *Nowrot,* Beiträge zum Transnationalen Wirtschaftsrecht, 122 (2012), 5 (14 *et seq.*).

84 See *Rubins*, in: Horn/Kröll, Arbitrating Foreign Investment Disputes, 283 (286); *Johannsen,* Beiträge zum Transnationalen Wirtschaftsrecht 87 (2009), 5 (21).

85 *Tomuschat,* Recueil des Cours 281 (1999), 9 (63).

86 *Nowrot,* Beiträge zum Transnationalen Wirtschaftsrecht, 122 (2012), 5 (6).

87 Developed by the *International Institute for Sustainable Development,* available on the internet: http://www.iisd.org/investment/capacity/model.aspx (25.09.2016).

88 *United Nations Conference of Trade Development,* World Investment Report 2012, p. 144-150, available on the internet: http://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf (25.09.2016).

89 See *Diaby-Pentzlin,* Wismar Discussion Papers 5/2015, 2 (73).

90 See *Diaby-Pentzlin,* Wismar Discussion Papers 5/2015, 2 (72) with further references.

91 *United Nations,* Guiding Principles on Business and Human Rights, 11.

But why interpret the ICSID Convention in the described manner, which is only containing rules regarding the arbitration process instead of claiming from the states to implement the sustainability requirement in their investment treaties which contain the substantive law? And wouldn't a sustainability requirement lead countries to quit their membership of the ISCID or to agree to subject themselves to the authority of other arbitration tribunals? And finally, isn't the requirement, that the investment has to be sustainable, too indeterminate and would lead to legal uncertainty?

Indeed, the ICSID Convention is merely a tool to reconcile conflicts arising directly out of an investment whose legal frames are as of today mostly defined within (bilateral) investment treaties, which does not impose substantive duties on the parties. But a sustainability requirement would demand investors to conduct their investments in a sustainable manner, if they were to be able to bring a case up before an ICSID tribunal. The alternative would be, if there were no possibility to invoke another tribunal, to ask for diplomatic protection or litigate at a court of the host state. Both options hold little attractiveness for investors. Because the granting of diplomatic protection is up to the domestic state's government, it is subject to diplomatic as well as political considerations and hence uncertain. And by bringing a case before a court of the host state, the investor would submit to the applicable law of the host state, which he might deem discriminatory. Furthermore, it has to be taken into consideration that in some countries the courts are not really independent and neutral. Thus it can be assumed that it would be more attractive to investors to conduct their investment in a manner in which the requirements of Art. 25 (1) ICSID Convention are met, even if this would mean they have to comply with some sustainability aspects. In addition, the supplement of an element of sustainability as a precondition for the jurisdiction of an arbitrational centre as important as the ICSID, belonging to the influential World Bank Group, could positively impact other international investment treaties.

Obviously, states could agree on other arbitration tribunals to solve conflicts arising out of investments under an investment treaty or even quit their membership of the ICSID. However, a look at the recent development in regard to investment treaties shows that there is only little cause for concern – in fact, a sustainability requirement could even strengthen the position of the ICSID as an arbitration centre. Concerning BITs, a reduction of investment protection can be observed.[92] States increasingly feel uncomfortable with the constraint of their sovereignty and while states with strong institutions and economies like China or Brazil could enforce attractive investment rules from the start,[93] other states decided to quit their BITs (e.g. Ecuador and Venezuela)[94] and in some cases also their membership of the ICSID (e. g. Bolivia and Ecuador).[95] South Africa, for example, is of the opinion that its legislation aiming for the strengthening of historically discriminated groups was in danger and therefore has started terminating several BITs since 2012.[96]

92 See *Diaby-Pentzlin*, Wismar Discussion Papers 5/2015, 2 (71 *et seq.*).
93 See *Diaby-Pentzlin*, Wismar Discussion Papers 5/2015, 2 (71 *et seq.*).
94 See *Diaby-Pentzlin*, Wismar Discussion Papers 5/2015, 2 (72).
95 See *Diaby-Pentzlin*, Wismar Discussion Papers 5/2015, 2 (72).
96 See *Diaby-Pentzlin*, Wismar Discussion Papers 5/2015, 2 (72).

Finally, I am of the opinion that nowadays it should not be a problem for an investor beforehand or a tribunal in retrospect to determine whether an investment is sustainable or not. The terms "sustainable" or "sustainability" are used in their current meaning since the early 1980s and sustainability was and is the object of several scientific studies and discussions. This would allow the tribunals to work with prima facie evidence of an investment, based on certain circumstances. If the sum of the effects of the circumstances recognised as promoting sustainable development and potential adverse impacts is positive, a project can be considered sustainable as a whole.

The arbitrators of the ICSID tribunals will, due to their occupation, usually be familiar with questions of sustainability and thus be able to make the aforementioned weighting. However, if a tribunal has problems to determine whether a project is sustainable or not – because, for example, the arbitrators are inexperienced or due to certain difficulties of the individual case – it has the option to ask for an expert opinion. International investors, however, would either be big companies or groups that would either possess the necessary know-how or would in advance consult business consultants or law firms that are familiar with the requirements for an investment.

Thus, the general requirements for a sustainable investment are determinable by a tribunal as well as by an investor when considering and realising its investment. Consequently, there is no legal uncertainty arising from the sustainability requirement.

E. Concluding remarks

The ICSID Convention does not stipulate an independent definition of the term *investment*. The decision-making practice of the ICSID tribunals and the academic literature are discussing different approaches to determine what an investment is. These approaches range from a strict subjective interpretation to the objective "Salini Test" with its minimum of three criteria. The latter is dealing with some sustainable elements (certain duration, substantial contribution) but only in regard to an economic development of the host state.

This contribution was able to show – especially based on a change in the perspective of the respective international law and due to the role and the goals of the Word Bank – that there is a need to implement an element of sustainability as a (further) requirement for the jurisdiction of the ICSID and that this element can indeed also be effective and manageable in practice.

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ISSN 2366-0260 (print)
ISSN 2365-4112 (online)

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