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DEFINITION OF INVESTMENT IN INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES: CRITERION OF THE CONTRIBUTION TO THE DEVELOPMENT OF THE HOST STATE

Master Thesis

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INTRODUCTION

In the sphere of the international investment law in order to protect the foreign investors' rights and by that to promote the economic development arising from an investment[1], the World Bank operates the International Centre for Settlement of Investment Disputes (thereafter – "ICSID"[2]. ICSID is designed to facilitate the resolution of disputes which arise over the investments governed by bilateral investment treaties and free trade agreements (thereafter – "BITs")[3] acting together with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (thereafter – "ICSID Convention")[4]. To fulfill its task, ICSID provides the institutional infrastructure and rules necessary for administering binding arbitration.

Article 25(1) of the ICSID Convention determines that the jurisdiction of ICSID applies to "*any legal dispute arising directly out of an investment between a Contracting State <...> and a national of another Contracting State* <…>".[5] However based on the fact that member states of ICSID convention can themselves determine the classes of disputes which they are willing to submit to ICSID, the convention leaves the term "investment" undefined.[6] Against this background the Tribunals of ICSID are entrusted with the role to determine on the case-by-case bases the compatibility of a disputed asset or activity with the concept of the term "investment" of Article 25(1) of the ICSID Convention.

In the April of the year 2009 with a time difference of only one day two ICSID Tribunals came up with completely divergent decisions.[7] When deciding whether the asset being considered

[1] See Preamble of Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966), 575 UNTS 159 (ICSID) (Thereafter – ICSID convention)

[2] See Article 2 of the ICSID convention establishing that World Bank administers ICSID through the International Bank for Reconstruction and Development

[3] While there are other multilateral treaties which include the sets of legal guarantees as the ones established in bilateral investment treaties, this article will for the purpose of convenience will simply cover all these treaties under the abbreviation "BIT".

[4] See e.g. Agreement between the Government of the Republic of Lithuania and the Government of the United Kingdom of Great Britain and Northern Ireland for the promotion and protection of investments (signed 17 May 1993, entered into force 21 September 1993), established in "Valstybės žinios" 1994 Nr.31, (Lithuania – United Kingdom). Article 8(2(a)) establishing the jurisdiction of ICSID for the investment disputes between the foreign investor and the host country of invetment.

[5] ICSID Convention, Article 25(1).

[6] See The Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States. (International Bank for Reconstruction and Development) 18 March 1965, para. 27. (Thereafter - The Report of the Executive Directors) It suggests that due to the existence of requirement of consent of both state parties relating to the dispute the definition of the term "investment" unnecessary.

[7] See cases: Phoenix Action Ltd v. Czech Republic, ICSID Case No. ARB/06/5, Award, (15 April 2009) (Thereafter – Pheonix v. Czech Republic) and Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment (16 April 2009) (Thereafter – Malaysian Historical Salvors v. Malaysia, Decision on the Application for Annulment)

in the case was an investment one of the Tribunals required that this asset complied with the mandatory test composing of the six cumulative requirements of investment.[8] The other one, however, considered the same requirements not to be "*fixed or mandatory as a matter of law"*[9] and suggested to open jurisdiction of ICISD upon the existing agreement to arbitrate the disputes of a state and foreign investor in ICSID.[10] The divergence of these decisions is an accurate illustration of the overall confusion in the matter of determination of existence of investment entrusted to ICSID Tribunals.[11]

The jurisprudence of ICSID is, sadly, full of different and even divergent approaches determining the content of the core of the entire ICSID regime term "investment". Many Tribunals have their own definitions of investment consisting of various criteria. However, among many potential criteria of investment there is one standing out as a most controversial.[12] It is the criterion of the contribution to the economic development of the host state. None other criterion of any chosen definition of investment has drawn such diversity in views of appreciation of it.[13] And it is because of exactly this reason this Master Thesis will research the horizons of the possibilities of both – application and non-application – of the criterion of the contribution to the economic development of the host state.

The object of the Master Thesis is the term "investment" embedded in the Article 25(1) of the ICSID Convention and the decisions of ICSID Tribunals providing their interpretation of this term.

The problem of the Master Thesis is the divergence in the appreciation of the criterion of contribution to the economic development of the host state as a part of the definition of the term "investment" of Article 25(1) of the ICSID Convention. This problem, however, has multiple layers. It was discovered during the writing of this Master Thesis that the appreciation of the criterion of the contribution to the economic development of the host state is intrinsically linked with the approach toward the interpretation of the term "investment". Different approaches to the

[8] Pheonix v. Czech Republic, para. 114.
[9] Malaysian Historical Salvors v. Malaysia, Decision on the Application for Annulment, para. 79.
[10] Malaysian Historical Salvors v. Malaysia, Decision on the Application for Annulment, paras. 62, 80.
[11] Cole, T. and Vaksha, A. K. Power-Conferring Treaties: The Meaning of 'Investment' in the ICSID Convention. *Leiden Journal of International Law*. 2011, Volume 24, Issue 02, p. 307: "*The meaning of 'investment' in Article 25(1) has, as a result, become a primary area of dispute within ICSID arbitration, with arbitral tribunals reaching conflicting interpretations of the term, based on differing conceptions of the rationale for the term's inclusion"*; see also: Levesque, C. Abaclat and Others v Argentine Republic, The Definition of Investment. *ICSID Review*. 2012, Volume 27, No. 2, p. 247
[12] See e.g.: Schreuer, C. H. The ICSID Convention: a Commentary, Second Edition, Cambridge, 2009, p. 131; Bechky, P. S. Microinvestment Disputes. Vanderbilt Journal of Transnational Law. 2012, No. 45-4, p. 1047
[13] See e.g. Levesque, C, *supra* note 11, p. 247-248

interpretation of this term have different effects and provide different results on the application of the criterion of the contribution to the economic development of the host state. Therefore the two layers of the problem of this Master Thesis is first identifying the divergent approaches to the interpretation of the term "investment" of Article 25(1) of the ICSID Convention and only then researching the effects the particular approach has on the criterion of the contribution to the economic development of the host state.

It is noteworthy that the problem of the Master Thesis is not merely a theoretical puzzle. There are quite a few cases in the jurisprudence of ICSID showing the decisive impact of the choices of both: the approach to interpretation of the term "investment" and the application of the criterion of the contribution to the economic development of the host state.[14] Even the latest jurisprudence of ICSID from the years 2012-2013 demonstrates that the understanding of the interrelationship between these two objects is a complex matter having the ability of being crucial when determining the jurisdiction of ICSID.

Furthermore, while the analysis of the term "investment" of Article 25(1) of the ICSID Convention is quite a frequent guest in the scholarly works of the legal analysts, what is surprising is that the criterion of the contribution to the economic development of the host state only very rarely gets the spotlight for the in-depth analysis. Usually, there are only a few paragraphs or, in the best case scenario, a couple of pages of text from the general analysis of term "investment" dedicated to this criterion. The author of this Master Thesis was able to find only two articles, which devotes the more considerable analysis to the criterion of the contribution to the economic development of the host state. These are the Pierre-Emmanuel Dupont's article *The Notion of ICSID Investment: Ongoing 'Confusion' or 'Emerging Synthesis'?* and the Perry S. Bechky's article *Microinvestment Disputes*. However the focus of these articles is directed to the earlier periods of the ICSID's jurisprudence – respectively the years of 2008-2010 and the years of 2006-2010. Against this background, the present Master Thesis, which includes the analysis of the field up to year 2014, comes also as an update for the information established in these articles, in addition to the more through-out analysis on all matters concerning the application of the criterion of the contribution to the economic development of the host state.

[14] See cases e.g. Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2004) (Thereafter - Joy Mining Machinery v. Egypt); Mr. Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award (1 November 2006) (Thereafter - Patrick Mitchell v. Republic of the Congo); Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction (17 May 2007) (Thereafter - Malaysian Historical Salvors v. Malaysia, Award on Jurisdiction).

The aim of the Master Thesis is to provide a full map of possibilities of application and non-application of the potential component of investment – the criterion of the contribution to the economic development of the host state. Practical applicability is the underlying principle of this Master Thesis. Having the current situation of uncertainty, where the ICSID Tribunals apply the varying and divergent interpretations of investment and the criterion of the contribution to the economic development of the host state, the aim of this Master Thesis is to be a guide for a legal practitioner on how to direct his arguments in the desirable direction.

The methods of analysis of the Master Thesis are the historical method, the analytical method, the logical method and the case-analysis method. Due to the significance of the principle of the practical applicability of the Master Thesis, the leading method of analysis of this Master Thesis will be the case-analysis method. Therefore the passages of this Master Thesis, where possible, will provide the authentic excerpts of the Tribunals' decisions in order to provide the most practically precise content.

The structure of the Master Thesis is based on the variation of the definition of the term "investment" of Article 25(1) of the ICSID Convention. As it will be shown there are two main approaches to the definition of the term "investment" – the subjective definition of investment and an autonomous definition of investment. Furthermore, the latter approach also splits into two the separate smaller approaches – the autonomous objective definition of investment and autonomous intuitive definition of investment. Therefore the structure of this Master Thesis is based on these variations of the approaches to the term "investment". The Master Thesis is divided into the following chapters:

1. Chapter one – The history of the term "investment" of Article 25(1) of the ICSID
2. Chapter two – The negation of the criterion of the criterion of the contribution to the economic development of the host state under the subjective definition of investment
3. Chapter three – The crossroads of the autonomous meaning of the term "investment" of Article 25(1) of ICSID convention.
4. Chapter four – The criterion of the contribution to the economic development of the host state under the autonomous objective definition of the term investment
5. Chapter five – The criterion of the contribution to the economic development of the host state under the autonomous intuitive definition of the term investment

The tasks of the Master Thesis are interconnected with the structure of the thesis. The tasks of the chapters two, four and five of the Master Thesis are to provide the complete step-by-

step guidance on how to apply or discharge from application the criterion of the contribution to the economic development of the host state under the different approaches to the term "investment" of Article 25(1) of the ICSID Convention. These tasks, as the problem and the aim of the Master Thesis suggest, are the main tasks of this thesis. The task dedicated to the chapters one and three of the Master Thesis is to provide the necessary background information of the divergent interpretation of the term "investment" of Article 25(1) of the ICSID Convention. This information is crucial to the all-around understanding of the elaborations of the remaining foundational chapters of this Master Thesis.

The hypothesis of the Master Thesis is that the criterion of the contribution to the economic development of the host state should constitute a part of the definition of the term "investment" of Article 25(1) of the ICSID Convention under any content-wise autonomous definition of this term. The later elaboration of the approaches to the definition of the term "investment" of Article 25(1) of the ICSID Convention will provide that the hypothesis of the Master Thesis splits into the two separate propositions:

1. The criterion of the contribution to the economic development of the host state should constitute a part of the autonomous objective definition of the term "investment" of Article 25(1) of the ICSID Convention.
2. The criterion of the contribution to the economic development of the host state should constitute a part of the autonomous intuitive definition of the term "investment" of Article 25(1) of the ICSID Convention.

The hypothesis of the Master Thesis is based on the Tribunals' findings and the scholarly writings.

THE HISTORY OF THE TERM "INVESTMENT" OF ARTICLE 25(1) OF ICSID CONVENTION

The centre of this Master Thesis is the applicability of one of the potential parts of the term "investment" of Article 25(1) of ICSID convention - the criterion of the contribution to the development of the host state. However, as every story of a "part" begins with the introduction of the "whole", the analysis of the single criterion has to start with the introduction of the term. In the present paper then, the starting point of the entire research is the single term "investment" as it is established in the Article 25(1) of ICSID convention.[15]

The starting point of probably every article ever written on the meaning of the term "investment" on Article 25(1) of ICSID convention is the same – despite its existence in Article 25(1), the term "investment" is not in any way defined in the ICSID convention.[16] This naturally leads to questions like "what is the meaning of the term "investment"" and "does this term has any meaning at all"? There are two main opinions on these matters[17]:

1. First: the term "investment" has an autonomous meaning (which will be latter argued may include the criterion of the contribution to the development of the host state) and stands as a jurisdictional criterion when accessing ICSID arbitration.
2. Second: the term "investment" embedded in Article 25(1) of ICSID convention does not have an autonomous meaning – it is a mere reflection to the definition of investment established in a particular BIT.

This clash between these two completely divergent opinions has detrimental importance to the application of the criterion of the contribution to the development of the host state. After all, the very first step in considering the application of the criterion of the contribution to the development of the host state is depended on finding that the term "investment" is itself able of having an

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

[16] See e.g.: Given, J. P. Malaysia Historical Salvors Sdn., Bhd. v. Malaysia: An End to the Liberal Definition of Investment in ICSID Arbitrations. *Loyola of Los Angeles International and Comparative Law Review*. 2009, Vol. 31, No3, p. 474: "*Article 25(1) of the ICSID Convention states, in part, that the Centre's jurisdiction "shall extend to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State." But although "investment" is fundamental to ICSID jurisdiction, there is no definition or description of "investment" contained within the Convention itself*." (emphasis added), See also: Cole, T. and Vaksha, A. K., *supra* note 11, p. 307

[17] See e.g.: Harb, J.-P. Definition of Investments Protected by International Treaties: An On-Going Hot Debate. Mealey's International Arbitration Report. August 2011, 26-8 Mealey's Intl. Arb. Rep. 18, Volume 26, Issue No.8, p. 12.

autonomous content. However before rushing to the analysis of such separate pieces of the of the investment's puzzle, let us begin with the big picture.

In the history of ICSID arbitration when considering if a certain dispute submitted to the ICSID Tribunal was an investment dispute the Tribunals paid high respect to the host state's *ex-ante* will established in the document of agreement to the ICSID jurisdiction.[18] It was the position of the Tribunals, that due to the fact that term "investment" is not defined in the ICSID convention, the definition must come from the external legal source directly related to the dispute. Therefore if the agreement to the ICSID jurisdiction was established in the BIT, this BIT was the source of definition of investment.[19]

This approach where Tribunals look only to the consent document's (e.g. BIT) definition of investment and does not provide a separate meaning to the term "investment" of Article 25(1) of the ICSID convention is known as the "subjective approach"[20] or the "deferential approach"[21].

It is noteworthy that some tribunals preferring the historical subjective approach were not applying this approach radically. They have suggested that there might be situations where the case could be dismissed due to the dispute being not related to investment despite the fact that BIT's definition of "investment" covers the disputed asset or activity.[22] The example of such situation could be a simple sales contract composing of a single commercial transaction, such as the delivery of the single load of shoes. In such situations the investment protected by the BIT could have been denied jurisdiction in ICSID Tribunals employing the term investment of Article 25(1) of ICSID convention.

Nevertheless, such situations remained purely hypothetical and have never occurred in practice of ICSID Tribunals. Thus the Tribunals following the subjective approach to the term "investment" approved a considerably wide range of investments. These included (1) an unfinished office construction project mainly consisting of plans and regulatory approvals[23], (2) hotel

[18] Mortenson, J. D. The Meaning of 'Investment': ICSID's Travaux and the Domain of International Investment Law. Harvard International Law Journal. 2010, Vol. 51, No. 1, p. 269

[19] See e.x. Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award (11 September 2007), paras. 249-254

[20] See e.g.: Harb, J.-P. *supra* note 17, p. 12, Cole, T. and Vaksha, A. K., *supra* note 11, p. 315, Stern, B. Are There New Limits on Access to International Arbitration? *ICSID Review*. 2010, Volume 25, Issue 1, p. 27

[21] See e.g.: Harb, J.-P. *supra* note 17, p. 12: author shows merger of the approaches of both terms: "*The two major trends in the interpretation of the notion of investment remain either <...>, or the so-called ''subjective''/''deferential'' approach which defines an investment pursuant to the definition of the applicable BIT.*", See also: Mortenson, J. D. *supra* note 18, p. 259.

[22] See e.g. cases: Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction (14 January 2004), para. 44; Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction (29 April 2004), para. 39 (Thereafter - Tokios Tokelės v. Ukraine).

[23] Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award (16 September 2003).

construction and operation contract[24], (3) 2.3 million dollars portfolio investment in local securities[25] and (4) an advertising agency and a print shop[26].

However at the border of third millennium the situation concerning the interpretation of the term "investment" of Article 25(1) of ICSID convention has drastically changed. Two interrelated trends have emerged. First trend was the decision of ICSID Tribunals to provide an autonomous meaning to the term "investment" of Article 25(1) of ICSID convention. This trend could have been attributed to the exponentially growing body of cases being initiated under the umbrella of ICSID convention. It was because with more cases being submitted to ICSID there were more investment-borderline cases in which it was hard to discern the nature of asset or activity being concerned – whether it was an investment or just a simple sales transaction.[27]

The core idea of the trend of the autonomous meaning of the term "investment" was that the asset or activity, constituting the centre of the case, must fulfil the requirements of now two definitions of the term "investment" – one of the ICSID convention and the other one of the BIT. One of the first Tribunals to apply this trend –The tribunal in CSOB v. Slovak Republic case[28] – has accurately summarized on the matter:

> *"68. <...> The concept of an investment as spelled out in that provision* [Article 25(1) of the ICSD Convention] *is objective in nature in that the parties may agree on a more precise or restrictive definition of their acceptance of the Centre's jurisdiction, but they may not choose to submit disputes to the Centre that are not related to an investment. A two-fold test must therefore be applied in determining whether this Tribunal has the competence to consider the merits of the claim: whether the dispute arises out of an investment within the meaning of the Convention and, if so, whether the dispute relates to an investment as defined in the Parties' consent to ICSID*

[24] Holiday Inns S.A. and others v. Morocco (ICSID Case No. ARB/72/1), Settlement agreed by the parties and proceeding discontinued at their request (Order taking note of the discontinuance issued by the Tribunal) (17 October 1978).
[25] Philippe Gruslin v. Malaysia, ICSID Case No. ARB/99/3, Award (27 November 2000).
[26] Tokios Tokelės v. Ukraine.
[27] Cole, T. and Vaksha, A. K., *supra* note 11, p. 314: "*While early ICSID arbitrations concerned paradigmatic cases of international investment, such that the existence of an investment under Article 25(1) was not challenged, the enormous growth since the mid 1990s in the number of disputes brought to ICSID has resulted in a number of arbitrations in which the existence of an investment was less clear*."
[28] Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction (24 May 1999). (Thereafter – CSOB v. Slovak Republic)

arbitration, in their reference to the BIT and the pertinent definitions contained in Article 1 of the BIT."[29]

This approach to discern meanings of the term "investment" became known as a "double-barreled" test[30] sometimes referred as a "double-keyhole" test[31].

The second major shift in the interpretation of the term "investment" of Article 25(1) of ICSID convention was that after giving this term an autonomous content Tribunals also provided it with the objective definition. This approach is known as an "objective approach"[32] and speaking in the words of professor Tony Cole and his assistant Kumar Vaksha[33] it means that "*the term 'investment' in Article 25(1) has a solid and discernible meaning, often described in accordance with the Salini criteria*[34]*, that serves as an absolute constraint on the jurisdiction of an ICSID tribunal*."[35]

And so it happened that there are currently two trends of interpretation of the term "investment" of Article 25(1) of ICSID convention – the subjective approach to the term "investment" and the autonomous approach to the term "investment". These two trends have solidly established themselves in the jurisprudence of ICSID. However as it is self-evident even at the moment these trends of approaching the term "investment" are very different in the content they represent – they diverge in providing autonomous meaning to the term "investment" of Article 25(1) of ICSID convention. Thus the most sensible option to analyze these approaches is to deal with them separately. That will be done starting with the historically earlier subjective approach, which, interestingly, has recently experienced the burst of new energy in its application.[36]

[29] CSOB v. Slovak Republic, para 68.
[30] See e.g.: Malaysian Historical Salvors v. Malaysia, Award on Jurisdiction, para 55, see also Dupont, P.-E. The Notion of ICSID Investment: Ongoing 'Confusion' or 'Emerging Synthesis'? The Journal of World Investment & Trade. 2011, Volume 12, Issue 2, p. 251.
[31] See e.g.: Dupont, P.-E. *supra* note 30, p. 251.
[32] See e.g.: Harb, J.-P. *supra* note 17, p. 12
[33] Professor Tony Cole is a Senior Lecturer in Brunel Law School (London) and Kumar Vaksha are co-authors of article "Power-Conferring Treaties: The Meaning of 'Investment' in the ICSID Convention"
[34] See the elaboration on the Salini test p. 33 of the Master Thesis.
[35] Cole, T. and Vaksha, A. K., *supra* note 11, p. 315.
[36] See the elaboration in p. 14 of the Master Thesis.

THE NEGATION OF THE CRITERION OF THE CONTRIBUTION TO THE DEVELOPMENT OF THE HOST STATE UNDER THE SUBJECTIVE DEFINITION OF INVESTMENT

Having in mind that the center of this Master Thesis is the criterion of the contribution to the development of the host state, at the beginning of the analysis of the subjective approach to the term "investment" of Article 25(1) of ICSID convention let us first address the elephant in the room – under the application of the pure subjective approach to the definition of investment this criterion is mainly irrelevant. However, the analysis of the subjective approach to the term "investment" is the very opposite of that. This is because of at least couple of reasons.

First, it is because the controlling principle of practical applicability of this Master Thesis dictates that the ways of non-application of the criterion of the contribution to the development of the host state are as important as the ways to apply it. After all, it is not enough for a legal practitioner to know only how to apply a legal rule if the position which he represents asks for a contrary proposal.

Furthermore, as it will be demonstrated later in the chapters III and V of this Master Thesis, there are certain variations of the autonomous meaning of the term "investment", which includes the application of the criterion of the contribution to the development of the host state, and are often applied together with the subjective approach to investment. Not being properly introduced with the subjective approach to the term "investment" then would result in not being able to fully grasp the ideas of the collaboration of the two approaches.

Taking these two reasons into consideration this second chapter of the Master Thesis will be devoted to the analysis of the subjective approach to the term "investment". The analysis will be provided in the following order: part 1 of this chapter will review the motivation to refrain from giving autonomous content to the term "investment" of Article 25(1) of ICSID convention; then part 2 of this chapter will cover contrary arguments, identifying the reasons why the term "investment" should have an autonomous meaning; finally the part 3 of this chapter will provide the conclusion on the applicability of the subjective approach to the term "investment" of Article 25(1) of ICSID convention.

Arguments opposing the application of the autonomous meaning of the term "investment"

Double-barreled test, which established the idea that the term "investment" of Article 25(1) of ICSID convention has an autonomous meaning, has rooted strongly in the jurisprudence of

ICSID Tribunals in the first decade of new 21st century.[37] However this test has not reigned unopposed. After smooth application of it for nearly a decade the opposition to it has risen in both scholarly works and in jurisprudence of ICSID Tribunals.

The most notice worthy Tribunals presenting arguments opposing the entrenching of the autonomous meaning of the term "investment" from the in the jurisprudence of ICSID were the Tribunals in Biwater v. Tanzania[38], ATA Construction v. Jordan[39], Inmaris v. Ukraine[40], Alpha Projektholding v. Ukraine[41], Bernardus Henricus Funnekotter and others v. Zimbabwe[42] cases and the Annulment Committee in the Malaysian Historical Salvors v. Malaysia case. These Tribunals alongside with the legal scholars supporting their views have focused on the very similar arguments defying application of the double-barreled test:

- *Travaux preparatoires* of the ICSID Convention suggests that the definition of the term "investment" is to be the left for ICSID's contracting States to agree upon;
- The policy-making determination of which assets deserve the legal protection has to be left to the states and not entrusted to unaccountable Tribunals.
- Object ant purpose of ICSID convention advocates an open and wide access for its protection.

These arguments will be elaborated in the following.

Travaux preparatoires of ICSID convention against the autonomous meaning of the term "investment"

The starting point of the majority of the above mentioned arbitral bodies when defying the necessity to rely on the double-barreled test to define investment for the ICSID arbitration was the idea that the term "investment" of article 25(1) of ICSID convention is left undefined

[37] See e.g.: Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction (31 July 2001), para. 44 (Thereafter – Salini v. Morocco); 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 June 2006), para. 90 (Thereafter - Jan de Nul v. Egypt).

[38] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award (24 July 2008). (Thereafter - Biwater v. Tanzania).

[39] ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2, Award (18 May 2010) (Thereafter - ATA Construction v. Kingdom of Jordan).

[40] Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine, ICSID Case No. ARB/08/8, Decision on Jurisdiction (8 March 2010) (Thereafter – Inmaris v. Ukraine)

[41] Alpha Projektholding GmbH v. Ukraine, ICSID Case No. ARB/07/16, Award (8 November 2010) (Thereafter - Alpha Projektholding v. Ukraine).

[42] Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe, ICSID Case No. ARB/05/6, Award (22 April 2009) (Thereafter – Bernardus Henricus Funnekotter v. Zimbabwe)

intentionally.[43] According to the Tribunals this implies that the definition of the term "investment" is to be the subject of agreement between Contracting States.[44] To reach this conclusion these arbitral bodies relied heavily on the t*ravaux preparatoires* of ICSID convention. For example the annulment committee in the Malaysian Historical Salvors v. Malaysia case states on the matter:

> *"71. The preparatory work of the Convention as well as the Report of the Executive Directors thus shows that: <…> (d) the critical criterion adopted was the consent of the parties. By the terms of their consent, they could define jurisdiction under the Convention. Paragraph 23 of the Report provides that: "[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre…." Paragraph 27 imports that the term "investment" was left undefined "given the essential requirement of consent by the parties."*[45]

According to the professor Julian Davis Mortenson[46] these Tribunals were very accurate on the matter - it is indeed the *travaux preparatoires* of ICSID convention which reveals the intended blank meaning of the term "investment" of article 25(1).[47] In order to arrive to the same conclusions as did he, professor Mortenson suggests taking into consideration the two following aspects of the preparatory works of ICSID convention:

- First, the deadlock of creation of the Convention. In the beginning of the 1960's at the very outset of international evaluation of the draft document of what was to become the ICSID convention the two "camps" have formed. One consisting of mainly developing countries, which required the precise definition of investment due to the fear of Tribunal's political influence to the national policies of the countries. And another consisting of the capital exporting developed states, which suggested, that the term "investment" if it even has to be included into convention's jurisdictional requirements has to be left without any further restrictions in order to protect the widest possible range of their exporters' assets.[48] The clash of interests between these two camps was so immense, that despite various different methods employed to resolve it during the drafting process, even in the very last stages of drafting of the ICSID convention it remained unchanged. At that time it seemed

[43] Biwater v. Tanzania, para. 312; Malaysian Historical Salvors v. Malaysia, Decision on the Application for Annulment para. 63, Inmaris v. Ukraine, para. 129; Alpha Projektholding v. Ukraine para. 311,
[44] Biwater v. Tanzania, para. 312; Malaysian Historical Salvors v. Malaysia, Decision on the Application for Annulment para. 71; Inmaris v. Ukraine, para. 130; ATA Construction v. Kingdom of Jordan, para 111.
[45] Malaysian Historical Salvors v. Malaysia, Decision on the Application for Annulment, para. 71 (emphasis added)
[46] Assistant Professor of Law in Michigan University.
[47] Mortenson, J. D. *supra* note 18, p. 280
[48] *Ibid.* p. 285-287

certain that the agreement on the definition of the term "investment" was impossible to reach.[49]

- Second, the compromise solving the deadlock. At precisely this moment when the drafting process came to the impasse, the delegates of the United Kingdom proposed a solution which has joined the interests of both sides. The United Kingdom's proposal did two essential things:
  - It included the term "investment" into convention and thus retained the jurisdictional grant only to investment disputes and at the same time deleted any definition of this term;
  - It added a new subsection to the Article which defined the Centre's jurisdiction, establishing a possibility for states to notify other signatories of the categories of disputes that a certain state would not consider submitting to arbitration.

The concept of this compromise was that a term "investment" was left unrestricted, but the States parties to the convention gained access to procedural mechanisms allowing them to create individual limitations for this term. This limitation resulted in the occurrence of article 25(4) in the ICSID convention. The convention was signed soon after the proposed compromise.[50]

Based on these aspects of *travaux preparatoires* of ICSID convention established above professor Mortenson proposes that it was exactly the purpose of the drafters of ICSID convention to leave the term "investment" of Article 25(1) of the ICSID convention blank and unrestricted.[51] According to him and other supporting authors, this was the direct outcome of the compromise imbedded in parts 1 and 4 of article 25 of the ICSID convention.[52] Accordingly then it is claimed that any definition of the term "investment" of Article 25(1) restricting the definitions of term "investment" of the BITs goes against the will of the signatories of the ICSID convention.[53]

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[49] Mortenson, J. D. *supra* note 18, p. 289

[50] Article 25(4) of the ICSID convention: "*Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).*"

[51] Mortenson, J. D. *op. cit*., p. 261

[52] Cole, T. and Vaksha, A. K., *supra* note 11, p. 319: "*An Article 25(4) notification must be understood, then, as something more than merely informational, but less than a reservation. That is, they are best understood as a conferral of power on each individual contracting state, to place limits on the definition of 'investment' in Article 25(1) that will be applicable in any dispute in which it is a party." (emphases added)*

[53] Mortenson, J. D. *op. cit*., p. 318: "The whole point of the grand bargain is that states are free to decide what kinds of foreign economic enterprise to encourage as a way of developing their domestic economies. ICSID tribunals should not stand in the way."

Role of Arbitral Tribunals in determining the meaning of the term "investment" under ICSID convention

The second argument against the application of the double-barreled test according to both the jurisprudence and the legal scholars is the authority to form the policy. Starting again with the jurisprudential approach – several of the double-barrel test opposing Tribunals has claimed that the policy making in the determination of what falls under the cloak of investment is to be left for the political institutions of the States signing the agreement of investment protection and not for the Tribunals.[54] An illustrative example supporting this notion is given by the Tribunal in the Biwater v. Tanzania case:

> *"314. <…> If very substantial numbers of BITs across the world express the definition of "investment" more broadly than the Salini Test, and if this constitutes any type of international consensus, it is difficult to see why the ICSID Convention ought to be read more narrowly."*[55]

And the Tribunal in the Alpha Projektholding v. Ukraine case pushes this concern even further:

> *"130. <…> A tribunal would have to have very strong reasons to hold that the States' mutually agreed definition of investment should be set aside."*[56]

Furthermore the annulment committee in the Malaysian Historical Salvors v. Malaysia case points out, that there are agreements of investment protection, where the ICSID is the only option of the international protection of investment. And as this was the situation in the Malaysian Historical Salvors v. Malaysia case, the committee promoted the position, that:

> "62. <…> *It cannot be accepted that the Governments of Malaysia and the United Kingdom concluded a treaty providing for arbitration of disputes arising under it in respect of investments so comprehensively described, with the intention that the only arbitral recourse provided between a Contracting State and a national of another Contracting State, that of ICSID, could be rendered nugatory by a restrictive definition of a deliberately undefined term of the ICSID Convention, namely, "investment," as it is found in the provision of Article 25(1)."*[57]

[54] Biwater v. Tanzania, para. 314, Malaysian Historical Salvors v. Malaysia, Decision on the Application for Annulment para. 62, Inmaris v. Ukraine, para. 130.
[55] Biwater v. Tanzania, para. 314.
[56] Alpha Projektholding v. Ukraine para. 314.
[57] Malaysian Historical Salvors v. Malaysia, Decision on the Application for Annulment para. 62.

The legal scholars built well on these ideas. The problem of a policy making issue is based on the following factual circumstances. First, the term "investment" is able to determine the entire scope of investment protection regime.[58] Second, the term "investment" is not defined in the ICSID convention and is thus obscure.[59] Third, the term "investment" is usually explicitly defined in the BITs.[60] Now the problem rising from these factual circumstances is that when Tribunals apply narrower definition of the term "investment" than the one established in a particular BIT, they become the subjects, which model the investment protection regime. Some legal scholars alongside with the above quoted arbitral bodies does not seem to agree that the Tribunals are entitled with this role.[61] It is because of two main reasons - first, the role of consent to the arbitration, and second, the authority of the state to legaly bind itself:

- **Consent to arbitration**: It is an often quoted[62] phrase of the Report of the Executive Directors following the establishment of the final wording of ICSID convention, that the "*[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre"*[63]. When witnessed in the light of *travaux preparatoires* of ICSID convention and especially the British compromise proposed in the deadlock of the drafting process[64] this phrase may be understood as reflecting the freedom provided for the Member States of ICSID convention to determine and to shape their obligations in the area of investment protection.[65] And this

[58] Mortenson, J. D. *supra* note 18, p. 292
[59] See e.g.: Cole, T. and Vaksha, A. K., *supra* note 11, p. 316: "*Yet, if any treaty term has ever been ambiguous, it is 'investment' in Article 25(1) of the Convention.*"
[60] See e.g.: Agreement between the Government of the Republic of Lithuania and the Government of the Russian Federation on the Promotion and Reciprocal Protection of Investments (signed 29 June 1999, entered into force 24 May 2004), established in "Valstybės žinios" 2000 m. Nr. 59-1763, (Lithuania – Russia). Article 1(2*): The term "investment" shall mean all kinds of assets, invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with legislation of the latter Contracting Party, and shall include in particular, though not exclusively:*
a) movable and immovable property as well as respective property rights;
b) shares, stocks, bonds and other forms of participation in the enterprises and companies;
c) claims to money, invested to create economic value, and claims to any performance having an economic value and connected with investments;
d) *exclusive rights to the objects of the intellectual property (copyrights, patents, industrial designs and models, trade marks, service marks, goodwill and know-how);*
e) rights to conduct economic activities conferred by law or under contract, including, in particular, concessions to search for, cultivate, extract and exploit natural resources.
Any change of form in which assets are invested or reinvested shall not affect their character as investment provided such change does not contradict the legislation of the Contracting Party in which territory the investments are made.
[61] See e.g.: Bechky, P. S. *supra* note 12, p. 1069: "*Tribunals do not enjoy the drafters' freedom*." .See also Cole, T. and Vaksha, A. K., *op. cit*., p. 327.
[62] See e.g.: Malaysian Historical Salvors v. Malaysia, Decision on the Application for Annulment, para. 70; Mortenson, J. D. *op. cit*., p. 292.
[63] The Report of the Executive Directors, p. 9.
[64] See p. 15-16 of the Master Thesis
[65] Mortenson, J. D. *supra* note 18, p. 292

is usually done thorough defining investment in BITs. Thus it is not surprising that when Tribunals reject the otherwise BIT compatible claims based on the definition of the term "investment" of Article 25(1) of ICSID convention[66] it raises objections to such actions.

Interestingly this interpretation of notion of consent is in a way compatible with the remark of Professor Cristoph Schreuer[67], who is an iconic person in the sphere of the foreign investment law and as such is often referred to in the decisions of Arbitral Tribunals including the Tribunal in the famous Salini case.[68] Despite generally being a proponent of the double-barreled test[69] the Professor Schreuer has recognized that in the cases where there is a consent of the parties towards the definition of investment the line of distinction between the meaning of this term in BIT and ICSID convention gets "*somewhat blurred*".[70]

- **Autonomy of the state**. It is established in the ICSID convention itself that the essential element of ICSID investment protection regime is the individual agreements between the states.[71] When the Tribunals enforce their position on the definition of the term "investment" they intrude in the sphere of economic politics of the states, for which Tribunals have neither a mandate nor the required expertise.[72] Furthermore, by restricting the definition of the term "investment" of the BITs the Tribunals hinder the flexibility and the opportunities for the development of investment law, which is deemed unsatisfactory at least by some member states of the investment protection bargain.[73]

Therefore it can be concluded, that according to the Tribunals and the legal scholars referred above, due to the role of consent to ICSID jurisdiction and the principal of legal autonomy of the state it might be against the mandate of the ICSID's Tribunals to interfere with the definition of the term "investment" embedded in various BITs.

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[66] See e.g. Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction (27 September 2012) (Thereafter – Quiborax v. Bolivia).

[67] Professor Cristoph Schreuer is an author of "The ICSID Convention: A Commentary". He has written expert opinions in many investment cases and has served as arbitrator in ICSID and UNCITRAL cases.

[68] Salini v. Morocco, para. 54.

[69] Schreuer, C. H. *supra* note 12, p. 233

[70] Schreuer, C. H. The ICSID Convention: a Commentary. Cambridge, 2001 p. 62

[71] Preamle of ICSID convention: "*no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration*"

[72] Mortenson, J. D. *supra* note 18, p. 305

[73] *Ibid*. p.: 302-304, see also: Mihaly International Corp. v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2, Award (15 March 2002) para. 33. "*the definition was left to be worked out in the subsequent practice of States, thereby preserving its integrity and flexibility and allowing for future progressive development of international law on the topic of investment*."

Object ant purpose of ICSID convention against the application of double-barreled test

To make the third argument against the application of double-barreled approach to the term "investment" both arbitral Tribunals and legal scholars point to the object ant purpose of ICSID convention which is one of the main tools in interpreting any treaty[74]. The main problem with it is not that the object and purpose of ICSID convention, which is "*to promote the flow of private investment to contracting countries by provision of a mechanism which, by enabling international settlement of disputes, conduces to the security of such investment"*[75], prohibits or restricts separation of the meaning of investment in ICSID convention and BITs, but the fact that it does not shed much light on the term "investment"[76] at all. Thus it also does not seem to encourage the separation of the terms.

After familiarizing ourselves with the object and purpose of ICSID convention it does not make it hard to discern that the object and purpose of ICSID convention is broad and capacious in its meaning. According to such authors as Joseph M. Boddicker[77] in such situations where the object and purpose statements are broad, "*should there be any doubt if an investment is entitled to protection, the term "investment" must be construed in favor of investment protection and in favor of ICSID jurisdiction*."[78] Otherwise, if the Tribunals decline jurisdiction over cases where an investor alleges mistreatment by a host state, the tool of their protection – the ICSID convention – is itself ripped off of its duty to 'promote the flow of private investment'.[79]

Summary of the criticism to the autonomous meaning of the term "investment"

As it has been presented above there are three main reasons against the separation of the meaning of the term "investment" from the ICSID convention and the BITs. These are:

- First, t*ravaux preparatoires* of the ICSID Convention and the compromise embedded in the parts 1 and 4 of the Article 25 of it may be interpreted as intentionally leaving the definition of the term "investment" of article 25(1) blank.

[74] Vienna Convention on the Law of Treaties, (opened for signature 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331. (UN), Artivle 31(1) (Thereafter - VCLT)
[75] Malaysian Historical Salvors v. Malaysia, Decision on the Application for Annulment, para. 57
[76] See e. g.: *Ibid*.
[77] New York State Attorney, Expert in International Arbitration & Litigation. Author of the article "Whose Dictionary Controls?: Recent Challenges To The Term "Investment" In Icsid Arbirtration".
[78] Boddicker, J. Whose Dictionary Controls?: Recent Challenges to the Term 'Investment' in ICSID Arbitration. *American University International Law Review*. 2010, Vol. 25, No. 5, p. 1054
[79] Cole, T. and Vaksha, A. K., *supra* note 11, p. 309 See also: Chrostin, J. B. U. Sovereign Debt Restructuring and Mass Claims Arbitration before the ICSID, The Abaclat Case, Harvard International Law Journal. 2012, Vol. 53 Issue 2, p. 511.

- Second, the importance of the role of consent to ICSID arbitration together with the authority of the state to bind itself with legal commitments may be seen as restricting the ability of the arbitral Tribunals to restrict application of the BIT's definition of investment.
- Third, one of the ways to interpret the object ant purpose of ICSID convention, which are broad in their content, is to consider them granting a broad access to the jurisdiction of ICSID Tribunals in the situation of uncertainty.

It is noteworthy that the arbitral decisions setting stage for the dismissal of the double-barreled approach are quite up to date from the perspective of development of ICSID jurisprudence. However among them there is one, which stands out with its importance. It is the decision of the annulment committee in the Malaysian Historical Salvors v. Malaysia case. It is because this decision is attributed to the well-respected legal analysts - Judge Stephen M. Schwebel[80] and Judge Peter Tomka[81]. Their legal prestige definitely adds credibility not only to their decision but also to the representation of entire approach defying the necessity of currently trending double-barreled test establishing the autonomous meaning of the term "investment" of Article 25(1) of ICSID convention.

The best proof of the importance of the latter decision are the decisions in the subsequent Inmaris v. Ukraine and Alpha Projektholding v. Ukraine cases where Tribunals have paid the great respect to the opinion established in the decision of annulment committee in the Malaysian Historical Salvors v. Malaysia case.[82] Furthermore, it would not be too speculative to conclude that in another subsequent case – the Bernardus Henricus Funnekotter and others v. Zimbabwe case – the Tribunal's choice to fully skip the analysis of whether the term "investment" in the Article 25(1) of ICSID convention has a separate meaning and proceed directly to the definition of investment of the BIT was also influenced by the decision of annulment in the Malaysian Historical Salvors v. Malaysia case. Therefore as it is duly noted by the Pierre-Emmanuel Dupont[83] that "*[w]hether approved or disapproved, the contribution of the* [Malaysian Historical Salvors case's] *ad hoc committee to the debate* [of the content of invetment in article 25(1) of ICSID convention] *is likely to be considered a milestone in the future*."[84]

[80] President of the The International Court of Justice (1997-2000)
[81] Current President of the The International Court of Justice. Assumed position since February 6 of 2012.
[82] Inmaris v. Ukraine, para. 131, Alpha Projektholding v. Ukraine, paras. 311, 313 (both Tribunals refer to the Decision on the Application for Annulment in Malaysian Historical Salvors case)
[83] Senior Lecturer at Free Faculty of Law, Economics and Management of Paris (FACO)
[84] Dupont, P.-E. *supra* note 30, p. 250

Furthermore the importance of the legal scholars contributing on the matter of defying the application of the currently popular double-barreled test should also not be underappreciated. It is because a considerable group of legal scholars analyzing the term "investment" are at least not completely satisfied with how the jurisprudence of ICSID went on a subject of double-barreled test. The only thing what varies among them is the degree of their expressed dissatisfaction with the separation of definition of investment between BITs and ICSID convention. Some of them, like professor Schreuer, have taken the more conservative position on the matter by merely recognizing the possible shortcomings of the approach[85], but at the same time remaining simple spectators of the evolving jurisprudence. Others, like professor Julian Davis Mortenson, have taken a balder stance, asking for the reverse of the current trend to interpret term "investment" as having separate meanings in BITs and ICSID convention. Such authors demand to reinstate the application of subjective approach to the interpretation of this term. However it is clear, that when even such respected scholars as professor Schreuer raises his doubts on the matter of application of double-barreled test, the debate over interpretation of the term investment is still an ongoing dispute to be solved in the future.

Thus even though the already present voices against the application of the double barreled test currently compose only a minority's opinion in matters of dealing with the interpretation of the term "investment" of ICSID convention, this minority is "*a significant and enduring minority, not to be dealt with lightly*."[86]

Arguments supporting the application of the autonomous meaning of the term "investment"

As it has already been established in the Chapter I of this Master Thesis, jurisprudence of ICSID in its large part is in favor of application of double-barreled test providing an autonomous definition of investment under the ICSID convention. This situation is well illustrated by the fact that before the findings of the annulment committee in the Malaysian Historical Salvors v. Malaysia case, the application of the double-barreled test was for quite some time regarded as a common-sense and the Tribunals which applied this test usually just shortly presented that the term "investment" of Article 25(1) of ICSID convention had an independent meaning and then proceeded with the definition of the term "investment" of ICSID convention.[87] However upon the existence of

[85] P. 19 of the Master Thesis
[86] Dupont, P.-E. *op. cit*. p. 253
[87] See e.g.: Jan de Nul v. Egypt, para. 90: The Tribunal Establishes that „*[i]t is common ground between the parties that the jurisdiction of the Tribunal is contingent upon the existence of an "investment" within the meaning of Article 25 of*

substantial criticism toward the necessity of application of the autonomous definition of investment, which was provided above, taking into consideration that this test is popular in its application, there has also to be good reasons for the application of double-barreled. There are three main reasons of that: first, the reason of incorporation of the term "investment" itself into the Article 25(1) of ICSID convention; second, the idea that the arbitral Tribunals are not the right subjects to arbitrary frame the access to the investment protection regime of ICSID; third, the role of the precedent in the jurisprudence of ICSID. Let us address these reasons in the established order.

The use of rule of effectiveness in the interpretation of the term "investment" of Article 25(1) of the ICSID convention

The main and triumphant reason for the application of the double-barreled test was always the inclusions of the term "investment" itself into Article 25(1) of ICSID convention.[88] According to the rule of effectiveness[89] established in the article 31.1 of the Vienna convention on the law of treaties (thereafter – VCLT) the terms included into a treaty must have an effect and be interpreted in their ordinary meaning.[90] Several Tribunals supporting the application of the double-barreled test have explicitly commented against the depriving meaning of the term "investment" of article 25(1) of ICSID convention. For example the Joy Mining v. Egypt Tribunal (which was later recited by other Tribunals on the matter[91]), stated the following:

> *"The parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention. Otherwise Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision."*[92]

This position is highly compatible with legal scholars commenting on the matter stating for example that "*[a]fter all, the contracting parties could have omitted the term 'investment'*

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the ICSID Convention and of an investment under the BIT". Then the Tribunal proceeds with the application of Salini test. See also: Malaysian Historical Salvors v. Malaysia, Award on Jurisdiction, para. 43.

[88] Boddicker, J. *supra* note 78, p. 1068-1069: "*In the absence of specific evidence to the contrary, treaty texts are the only safe guide to the common intent of the parties*."

[89] Principle *ut res magis valeat quam pereat*.

[90] VCLT Article 31(1). See also: Patrick Mitchell v. Republic of the Congo, para 25; Bechky, P. S. *supra* note 12, p. 1056.

[91] Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award (14 July 2010), para. 109 (Thereafter - Saba Fakes v. Turkey).

[92] Joy Mining Machinery v. Egypt, para. 50; See also: Quiborax v. Bolivia, para 212; Saba Fakes v. Turkey, para. 108.

completely from Article 25(1), thereby giving parties to a dispute total freedom to determine for themselves which of their disputes should be brought before an ICSID tribunal."[93]

Furthermore, it is an interesting fact, but at the time of drafting ICSID convention there was indeed an attempt to withdraw the term "investment" from what later became Article 25(1) of ICSID convention.[94] This attempt failed due to the concerns of the states involved into drafting of ICSID convention that in such scenario political or commercial disputes may suffice the jurisdictional requirements of ICSID convention, which was clearly an unwanted result. [95] Nevertheless this failed attempt suggests that the drafters of the ICSID convention might have wanted to establish investment as a constraining *ratione materiae* jurisdictional requirement.[96]

The designated role to the Tribunals to identify the definition of the term "investment" of Article 25(1) of ICSID convention

The second argument supporting the application of the double-barreled test is a policy making argument. As it was established previously, the legal scholars and arbitrators defying the use of this test claim that the Tribunals are ill-suited to make policy decisions, rejecting explicit definitions of investment established in BITs. [97] However the Member States of the ICSID convention does not seem to feel the same way. There are three reasons supporting such statement.

- First, after the establishment of the dominance of the application of the Salini test which restricted the more flexible definitions of investment of the BITs, Member States of the ICSID convention did not seem to have responded negatively to such situation.[98]
- Second, a number of States have invoked the double-barreled test narrowing the definitions of investment of BIT's in their argumentation defining the investment in the cases (including very recent cases) where the Member states are the parties themselves.[99] This narrower definition of investment was invoked claiming that a particular kind of an assent was never intended to be an "investment" under the ICSID convention.[100]

[93] Cole, T. and Vaksha, A. K., *supra* note 11, p. 317
[94] Mortenson, J. D. *supra* note 18, p. 281-282.
[95] *Ibid*. p. 282.
[96] See e.g. Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, Dissenting Opinion by Georges Abi-Saab (28 October 2011), para. 46. See also: Levesque, C, *supra* note 11, p. 250.
[97] See p. 14 of the Master Thesis.
[98] Hwang, M. S. C. Recent Developments in Defining "Investment". ICSID Review. 2010, Volume 25, Issue 1, p. 25.
[99] See e.g.: Quiborax v. Bolivia, para. 198: [Position of the Bolivia] "*The meaning of the term "investment" is to be found in the BIT and the ICSID Convention.304 Thus, the definition of "investment" is subject to a double-test*."
[100] Hwang, M. S. C. *supra* note 98, p. 25.

- Third, lately after the reoccurrence of the subjective approach toward the definition of the term "investment", the Member States of ICSID convention are reestablishing the definitions of investment in their BITs to more restricted ones resembling the criteria of the Salini test.

It might be true that some of these reasons to apply double-barreled test could have been inspired by the urge of selective application of provisions of ICSID convention when protecting themselves from the claims launched against Member States of ICSID convention.[101] Nevertheless these acts form the subsequent practice of the states. And, according to the Article 31.2(b) of Vienna convention on the law of treaties, such practice is to be taken into account when interpreting the requirements of any treaty.[102]

The doctrine of the precedent supporting the interpretation of autonomous definition of the term "investment" of article 25(1) of ICSID convention

The third argument supporting the application of the double-barreled test is reliance on the doctrine of precedent. Despite the fact that there is no imperatively binding precedent in ICSID system[103] it is very common in the ICSID jurisprudence that both – parties of certain dispute[104] and the arbitral Tribunals[105] – ground their arguments and decisions on the findings of previous ICSID Tribunals. This is usually done by employing the reasoning, that "*subject to compelling contrary grounds,* [the Tribunal] *has a duty to adopt solutions established in a series of consistent cases."*[106] And then applying this doctrine to the question of application of the double-barreled test, even though some Tribunals recognize that the separation of definitions of the term "investment" is

[101] Mortenson, J. D. *supra* note 18, p. 306-307
[102] VCLT Article 31.2(b).
[103] See e.g.: Saba fakes v. Turkey Para. 96: "*The Tribunal is not bound by the decisions adopted by previous ICSID tribunals*." See also: Quiborax v. Bolivia, para. 46; Boddicker, J. *supra* note 78, p. 1041.
[104] See e.g.: Saba fakes v. Turkey Para 95: "*In their respective submissions on the definition of „investment," both Parties extensively relied on the numerous ICSID awards and decisions that have addressed the notion of investment within the meaning of Article 25(1) of the ICSID Convention*."
[105] See e.g.: Quiborax v. Bolivia, paras. 214-217; Consortium Groupement L.E.S.I.- DIPENTA v. République algérienne démocratique et populaire, ICSID Case No. ARB/03/08, Award (10 January 2005) Para. 13 (Thereafter - L.E.S.I.- DIPENTA v. Algeria); Malaysian Historical Salvors v. Malaysia, Award on Jurisdiction, paras. 44-45.
[106] See e.g.: Quiborax v. Bolivia, para. 46; Pey Casado v. Chile (ICSID Case No. ARB/98/2), Award (9 May 2008) para 119.

currently not unanimous in the ICSID case-law[107], it usually does not prevent them from reliance on the precedent set by previous Tribunals on the analysis on the matter.[108]

Mainly based on these three reasons the current majority of ICSID jurisprudence is in favor of separate definitions of the term "investment" in ICSID convention and in BITs and requires to meet both of them to establish jurisdiction.

Summary of the application of subjective approach to the term investment

Having established the reasons both advocating and opposing the subjective approach to the term "investment" there are couple of concluding remarks to be made. First, it is noteworthy that even the minority of arbitral bodies which provided the arguments against the currently dominant application of double-barreled test[109] have to some extent accepted this separation. Apart from the ATA Construction v. Jordan Tribunal, which has straightforwardly went from the non-existence of definition of the term "investment" to the conclusion that its scope is to be determined by the will of parties signing a BIT, most of the other Tribunals mentioned in first part of this chapter have not necessarily rendered the term "investment" as completely meaningless. Most of the these Tribunals agreed that there might be an "outer limit" implied in the term "investment" of article 25(1) of ICSID convention[110]. These outer limits would be the manifestly non-investment disputes like ones based on a "*simple sale and like transient commercial transactions*."[111]

The second remark then is that this lack of radicalism in identifying the meaning of the term "investment" based purely on the BIT's definition of this term forms part of the situation why the majority of ICSID Tribunals are currently supporting the autonomous definition of the term "investment". It is a common sense that the success of any legal regime is based on the clarity of application of rules which gives the regime the content. And while the subjective approach to investment struggles with the consistency in application of its own ideas, this gives additional strength to already substantial arguments supporting the autonomous definition of the term "investment" of article 25(1) of ICSID convention.

[107] Saba fakes v. Turkey, para. 97: "*As far as the definition of „investment" is concerned, however, the Tribunal observes that, while a number of ICSID tribunals have dealt with this notion, no unanimous approach has emerged so far from the existing case law"*.
[108] *Ibid*, para. 109.
[109] See p. 14 of the Master Thesis.
[110] Malaysian Historical Salvors v. Malaysia, Decision on the Application for Annulment, para. 70; Inmaris v. Ukraine, para. 131; Alpha Projektholding v. Ukraine, para 313.
[111] Malaysian Historical Salvors v. Malaysia, Decision on the Application for Annulment, para. 69; Alpha Projektholding v. Ukraine, para. 314.

THE CROSSROADS OF THE AUTONOMOUS DEFINITION OF THE TERM "INVESTMENT" OF ARTICLE 25(1) OF ICSID CONVENTION

It was already established in the Chapter I of this Master Thesis that the current trend of interpreting the term "investment" lies within accepting the application of double-barreled test and giving an autonomous meanings to this term in BIT's and ICSID convention. Therefore the next challenge in researching what part does the application of the criterion of the contribution to the economic development take when identifying the investment under the Article 25(1) of ICSID convention is determining the meaning of the autonomous term "investment" of Article 25(1) itself.

Facing this particular challenge it would be hard to depreciate the contribution on the matter of Professor Emmanuel Gaillard[112] whose article "*Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice*"[113] was referred to by the ICSID Tribunals[114] and praised by other legal scholars[115]. In this article Professor Emmanuel Gaillard reviews the previous practice of ICSID tribunals when defining investment under the Article 25(1) of ICSID convention and retracts the main ways in which this term is approached from the maze of approaches applied.

According to Professor Emmanuel Gaillard there are two main distinct methodologies applied in providing the term "investment" of the Article 25(1) of ICSID convention the autonomous meaning[116]:

- The first method in determining the meaning of investment is deductively ***defining*** it. The Tribunals following this method "*have based their assessment on the presumption that there exists a true definition of an investment, and that such a definition is based on constitutive elements or criteria*."[117] This method is often associated with the famous

[112] Professor of law in several universities (e.g. Harvard Law School, Yale law school, Sciences Po Law School), practicing attorney (e.g. representing the majority shareholders in former Yukos Oil Company against the Russian Federation) and acting arbitrator (e.g. Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20)

[113] Gaillard, E. Identify or define? Reflections on the evolution of the concept of investment in ICSID practice. International *Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*. Oxford, 2009.

[114] See e.g. Ambiente Ufficio S.p.A. and others v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) (Thereafter - Ambiente Ufficio v. Argentina).

[115] See e.g. Dupont, P.-E. *supra* note 30, p. 253: "*From a conceptual point of view, Professor Gaillard's reflections on the existence of two distinct methodological approaches to the notion of investment under the ICSID Convention <…> have without contest clarified the debate, in that they have helped involved actors to situate their respective approaches to the notion of ICSID investment*."

[116] Gaillard, E. *op. cit*. p. 407

[117] Id. See cases e.g.: Jan de Nul v. Egypt; 2012 09 27 Quiborax v. Bolivia; Ambiente Ufficio S.p.A. and others v. Argentine Republic, ICSID Case No. ARB/08/9, Dissenting Opinion of Santiago Torres Bernárdez (2 May 2013) (Thereafter - Ambiente Ufficio v. Argentina, Dissenting Opinion of Santiago Torres Bernárdez) ; KT Asia Investment

Salini case[118] which introduced into the jurisprudence of ICSID the test consisting of mandatory requirements which the asset has to meet to consider it an investment under the Article 25(1).[119] This test became widely known as the Salini test[120] and the entire approach of defining investment through a list of mandatory criteria is known as an objective approach.[121]

- The second method in determining the meaning of investment is intuitively ***identifying*** it. The Tribunals, which endorsed this method, "*have considered* [that] *the presence of* [some] <…> *'characteristics' of an investment* [are] *sufficient to satisfy the Convention's requirement that an investment exists*."[122] The origin of this method could be traced to the ideas of one of the founding fathers of the ICSID Convention Aron Broches[123]. Aron Broches considered the investment to be readily recognizable[124] fitting the famous Justice's Potter Stewart's description of pornography "*I know it when I see it*"[125]. This method is often applied in the borderline situations, where not all requirement of objective approach are clearly met, but the Tribunal has a presentiment that certain asset or activity constitutes an investment.[126] In this case Tribunal choses to apply only the criteria of investment supporting its presentiment. This approach where Tribunals intuitively identifies the meaning of the term investment under Article 25(1) is in known as intuitive approach or the typical characteristics approach.[127]

These both methods as a matter of fact usually refer to the very similar characteristics of investment.[128] At the first glance the only difference between them is the degree of necessity to meet all criteria of investment. Under the objective approach, the Tribunals set themselves a

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Group B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/09/8, Award (17 October 2013) (Thereafter - KT Asia Investment Group v. Kazakhstan).

[118] Salini v. Morocco

[119] *Ibid*. para. 52

[120] Reference to the test in cases e.g.: Pheonix v. Czech Republic; Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction (2 July 2013) (Thereafter - Philip Morris v. Uruguay) ; Ambiente Ufficio v. Argentina.

[121] See e.g.: Stern, B. *supra* note 20, p. 27: "*The objective approach is the approach taken by the tribunals which think that there are some objective criteria flowing from the ICSID Convention*." See also: Cole, T. and Vaksha, A. K., *supra* note 11, p. 315. See cases which refer to the objective definition of investment e.g.: Quiborax v. Bolivia; Saba Fakes v. Turkey.

[122] Gaillard, E. *supra* note 114, p. 407.

[123] ICSID Executive Director during the drafting process of ICSID convention; later the first Secretary-General of ICSID.

[124] Given, J. P. *supra* note 16, p. 476

[125] Bechky, P. S. *supra* note 12, p. 1054-1055

[126] Malaysian Historical Salvors v. Malaysia, Award on Jurisdiction, paras 70-72.

[127] Schreuer, C. H. *supra* note 12, p. 233.

[128] See p. 33 of the Master Thesis.

requirement to reassure that every requirement of the objective definition of investment is met in order for the Tribunal to acquire the jurisdiction. This means that if even one of them is missing this is a complete bar for the Tribunal to hear a case on its merits. Now the typical characteristics approach is more liberal in allowing some of the characteristics of investment to be missing or only partially present for the asset or activity still to encompass as an investment.[129]

A good example illustrating difference between these approaches is the following. A person X buys the shares of the foreign drug research company. Then he reimburses it with money for the research and after only a few months of running it sells the company, as its price went up due to the expected development of a new drug. It is usually agreed that for an asset or activity, which in this case is shares of the drug company, to be accounted as an investment the minimum duration of an activity related to the asset must be present for at least two years.[130] Now if the Tribunal would evaluate the presented situation applying the objective approach of determining existence of investment, it would consider the above activity not to constitute an investment. It is because one of the requirements of investment – the duration requirement – is missing. However the short duration of an activity would not become troublesome in identifying the existence of investment for the Tribunal applying the intuitive approach, if it was to find the other characteristics of the investment present.

Now the other difference of the above established methods of defining and identifying investment under the Article 25(1) of ICSID convention is "*the insistence by the proponents of the intuitive method that the 'characteristics' allowing the 'identification' of an investment may, in fact, vary from one case to another*."[131] This means that depended on the circumstances of the certain case the Tribunal has a margin of appreciation to choose which criteria it deems proper to apply in determining the existence of investment. In other words – while under the objective approach the Tribunals should at least in theory[132] have always the same list of criteria of investment, in application of typical characteristics approach this list may vary from case to case based on the asset or activity being investigated.

This last difference has a major importance for the further elaboration of this paper. Against the background of difference of variable criteria of investment, even at the current moment

[129] Gaillard, E. *supra* note 114, p. 407
[130] See. e.g. Salini v. Morocco, para. 54: "<…> *The transaction, therefore, complies with the minimal length of time upheld by the doctrine, which is from 2 to 5 years* <…>."
[131] Gaillard, E. *op. cit.*
[132] In the jurisprudence of ICSID the list of criteria of investment under the objective approach varies. See p. 34 of the Master Thesis.

it may be deduced that the criterion of contribution to the economic development of the host state, the application of which is the center of this Master Thesis, may have very different implications under the different approaches to the term "investment" of Article 25(1) of ICSID convention.[133]

If the objective approach to the term "investment" is applied, the criterion of the contribution to the economic development of the host state, if it is considered to be a part of the definition of investment, becomes one of the mandatory jurisdictional requirements. The non-compliance with this requirement automatically bars the jurisdiction of ICSID. Furthermore, every additional requirement stemming from the criterion of the contribution to the economic development, such as sub-requirements of substantial or positive contribution to the economic development, in fact provides additional jurisdictional barriers, which Professor Emmanuel Gaillard even sees as the additional separate criteria to jurisdiction of ICSID.[134] Therefore the application of the deductive definition of investment imposes a restricting effect on the criterion of the contribution to the economic development.

However, if the intuitive approach to the determination of the term "investment" is applied, the criterion of the contribution to the economic development of the host state has different implications. First, if the criterion of the contribution to the economic development of the host state requirement is considered to be the part of investment's definition, but are not met in a certain case, that does not necessarily bar the jurisdiction of ICSID.[135] Second, if the criterion of contribution to the economic development of the host state is not an autonomous part of the definition of investment, it may act as an implicit part of other criteria of investment providing indirect effect to (dis)acknowledging an asset or activity as investment.[136] Lastly, if this criterion is part of the definition of investment, it can substitute the other criteria of investment resulting in providing certain asset the status of investment.[137] Thus to sum up – the application of the intuitive approach provides a much less restricting effect on the criterion of the contribution to the economic development of the host state.

Based on the details explained above, the further analysis of the criterion of the contribution to the economic development of the host state will be elaborated separately under the objective and intuitive approaches.

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[133] Gaillard, E. *supra* note 114, p. 406.
[134] *Ibid*. p. 414
[135] See p. 50 of the Master Thesis.
[136] See p. 54 of the Master Thesis.
[137] See p. 55-56 of the Master Thesis.

CRITERION OF THE CONTRIBUTION TO THE DEVELOPMENT OF THE HOST STATE UNDER THE AUTONOMOUS OBJECTIVE DEFINITION OF INVESTMENT

It was explained in the Chapter III of this paper that if one is to give an autonomous meaning to the term "investment" of Article 25(1) of ICSID convention this meaning is either objective or based on the typical characteristics. The fourth chapter of the Master Thesis will be dedicated the former one. It is because the objective approach to the term "investment" is currently the most popular approach in the matter of investment identification.[138]

First part of this chapter will be devoted to the genesis of the objective approach to the term "investment". It will also explain its reasons of application and will identify the objective criteria of this term, which also include the criterion of the contribution to the development of the host state. The second part of this chapter will provide the overall summary of arguments for and against the objective definition of investment. It will show that the objective approach may be dismissed completely as a single unit. That is important because, as it was already established, one of the ways to dismiss the application of the criterion of the contribution to the development of the host state of investment is dismissing the entire approach containing such criterion. Third part of this chapter will then focus entirely on the contribution to the development of the host state criterion explaining how it became part of the objective approach and revealing the roots of its controversy. Then the fourth part will take us through the evolution of application of the criterion of contribution to the development of the host state. Finally, the last part of this chapter will be devoted for the conclusions on the criterion of the contribution to the development of the host state as a potential part of the objective definition of term "investment" of Article 25(1) of ICSID convention.

The genesis of the autonomous objective approach to the term "investment"- the Salini test

The reason of the appearance of the objective approach to the term "investment" of Article 25(1) of ICSID convention is in fact very pragmatic and simple. It is closely related to the explosion in growth of number of the disputes submitted to ICSID in the previous decade.[139] What this meant was that the states, which almost without any exceptions find themselves in the position of

[138] See. e.g. : Ghaffari, P. Jurisdictional Requirements under Article 25 of the ICSID Convention: Literature Review. *The Journal of World Investment & Trade*. 2011 Volume 12, Issue 4, p. 607, 614: "*Notwithstanding this tension underlying the scope of ICSID jurisdiction, a recent shift in ICSID jurisprudence towards so-called restrictive view of investment - or of the test professed in Fedax and Salini - is indicative of trendsetting* <…>."
[139] Dupont, P.-E. *supra* note 30, p. 247-248.

respondent,[140] were faced with a quickly rising inconvenience of claims for compensation against them. This inconvenience had got states thinking of how to avoid this nuisance. And one of the solutions to reduce the amount of the claims against them was to bar the gates of jurisdiction of ICSID using the once heated controversy of definition of investment.[141]

The timing of the appearance of the objective jurisdictional approach fits perfectly with the latter proposal. It was mentioned above that the body of cases of ICSID started growing exponentially in around the beginning of the first decade of the XXI century. Therefore it is not a surprise that the first cases to introduce the criteria based approach to the identifying of investment was the Fedax v. Venezuela case of 1997[142] and the Salini v. Morocco case of 2001.

Interestingly, when researching the influence of these cases on the objective approach to the term "investment" of Article 25(1), despite the fact that the Fedax v. Venezuela case has preceded the Salini v. Morocco case, it is the latter one which is being considered to be the foundation of this entire approach.[143] The reason for this is that despite the fact that the Fedax v. Venezuela case introduced the same criteria of investment as the Salini v. Morocco case did later[144], it did not insisted on these criteria being mandatory. Based on that, the Fedax v. Venezuela case represents the typical characteristics approach.[145] Thus it is not without a reason it is commonly accepted that the entire objective approach is closely associated with the criteria of the Salini v. Morocco case[146] and the list of objective criteria of investment is often called the *Salini test*[147].

The dispute in the Salini v. Morocco case involved a three-year highway construction contract, where Kingdom of Morocco (thereafter - Morocco) refused to pay any of the fees allegedly due under the contract. The investor – Salini Costruttori S.p.A. and Italstrade S.p.A –

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[140] UNCTAD's summary of investor-state dispute settlement: *38 of the 58 new cases, respondents are developing or transition economies and in 15 cases they are developed countries. For five cases the respondent country is unknown*.

[141] Dupont, P.-E. *supra* note 30, p. 248: "*It shows that, with the explosion of claims against states, states began to explore fresh avenues of defending the claims*."

[142] Fedax N.V. v. Republic of Venezuela, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction (11 July 1997) (Thereafter – Fedax v. Venezuela)

[143] Gaillard, E. *supra* note 114, p. 403: "*An important milestone in the evolution of the ICSID case law on the notion of investment is the decision rendered on 23 July 2001 in Salini v Morocco."*

[144] Salini v. Morocco, para. 52, Fedax v. Venezuela, para. 43.

[145] Mortenson, J. D. *supra* note footnote No. 38: "*Interestingly, Fedax appears to have been the first case to mention the analytical factors now relied on by the restrictive approach. See infra note 55. But its application of them was deferential in the extreme."*

[146] See. e.g. : Ghaffari, P. *supra* note 139, p. 607: "*The current ICSID jurisprudence largely suggests that the test adopted in Salini case may be an appropriate instrument to define what constitutes ‚investment' for the purposes of passing the jurisdictional stage of investment arbitration*."

[147] See e.g. Quiborax v. Bolivia, para. 220: "*The Tribunal appreciates that the element of contribution to the development of the host State is generally regarded as part of the well-known four-prong Salini test*." (emphasis added); Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012), para. 5.43 (Thereafter – Electrabel v. Hungary).

responded to such behavior by initiating a claim in ICSID. The demands of the claim were objected by Morocco claiming that the case concerned at best the mere contractual breaches and it was not an investment dispute. If proved, that would have meant that the Tribunal presiding over the case had no jurisdiction over the matter. The Tribunal however disagreed with this position. It decided that the dispute was an investment dispute for the ICSID purposes.[148]

The outcome itself of the Salini v. Morocco case was not surprising or unexpected. However the importance of this case lies elsewhere – it was the first case where Tribunal applied a mandatory test consisting of the cumulative objective criteria to determine the existence of investment under Article 25(1) of ICSID convention. The original Salini test included the following criteria: first – the contribution of capital of the investor; second – certain duration of performance of the contract; third – a participation in the risks of the transaction of losing the capital; fourth – the contribution to the economy of the host state.[149]

The Salini v. Morocco Tribunal based their choice of these criteria on the legal doctrine of that time.[150] Professor Julian Davis Mortenson, suggests and the author of this Master Thesis agrees that a large part of the intellectual foundation for the objective interpretation of term "investment" could be traced to the Cristoph Schreuer's scholarly works.[151] In his discussion of the article 25(1) of ICSID convention in his 1st edition of the commentary to the ICSID convention[152] this author has suggested the typical features of the investment: (1) a certain duration of the enterprise, (2) a regularity of expected profit and return, (3) an assumption of risk of investor, (4) a substantial commitment by the investor and (5) some significance for the host state's development.[153] It raises no doubt, that the objective criteria of term "investment" established in Salini v. Morocco case closely resembles the above established typical characteristics of investment.

However after the establishment of original objective criteria of investment of Article 25(1) of ICSID convention in the Salini v. Morocco case, the test itself has later varied adding, removing and modifying criteria of the original list. The best analysis of the variations of Salini test was presented by the Tribunal in the Saba Fakes v. Turkey case[154], where the Tribunal has made a

[148] Salini v. Morocco, para. 58.
[149] *Ibid*. para. 52
[150] See e.g.: Gaillard, E. *supra* note 114, p. 404-406.
[151] Mortenson, J. D. *supra* note 18, p. 271
[152] Schreuer, C. H. *supra* note 70, p.
[153] *Ibid*. p. 122
[154] Saba Fakes v. Turkey. Interesting fact – the president of this Tribunal was the professor E. Gaillard.

short summary of the variations of the list of objective criteria of investment.[155] These are the approaches to the objective definition of investment identified by the Tribunal:

- The original Salini test.
- The three criteria approach, where the criterion of the contribution to economic development of the host state was dropped from the test.[156] This approach will acquire our attention later in this chapter.
- The five criteria approach, following the professor Schreuer's suggested list with the bigger accuracy, adding to the original Salini test the requirement of a regularity of expected profit and returns.[157]
- The Tribunal in the Phoenix v. Czech Republic has identified the six criteria approach. It added to the original Salini test the requirements that assets must be invested (1) in good faith and (2) in accordance with the laws of the host State to qualify as investment.[158]
- Lastly some of the Tribunals have suggested *"that the requirements listed by the Salini Tribunal should be examined as to the "nature and degree of their presence" in a given case*.[159] An example could be decomposing the requirement of duration into qualitative and quantitative modules."[160]

It is at this time self-evident that the clash between the three criteria approach and the original Salini test is most relevant to the center of this Master Thesis – the applicability of the criterion of contribution to economic development of the host state. However, before turning specifically to this clash, keeping up with the principle of practical applicability of this Master Thesis, it is also sensible to review the application of the objective approach to the definition of investment as a single unit. After all, if the objective definition of investment can be dismissed from the application in its entirety, it is one of the ways to dismiss the application of the contribution to economic development of the host state criterion as a part of it.

Arguments advocating and opposing the application of the Salini test as a unified construct

[155] *Ibid*. paras. 102-105.
[156] The first case to employ this approach was L.E.S.I.- DIPENTA v. Algeria. See Para. 13 of this case.
[157] See e.g. Joy Mining Machinery v. Egypt, para 53.
[158] Pheonix v. Czech Republic, para 114.
[159] Saba Fakes v. Turkey, para. 105. Reference by the Saba Fakes Tribunal is made to the Malaysian Historical Salvors v. Malaysia, Award on Jurisdiction, para 106.
[160] Malaysian Historical Salvors v. Malaysia, Award on Jurisdiction, para 111.

It is quite obvious that the mere wish of the states to apply the additional jurisdictional test just in order to decrease the risen number of claims against them is not on its own sufficient to justify the demand to increase the jurisdictional scrutiny. Thus even if the true reason to invoke the autonomous objective definition of investment of Article 25(1) of ICSID convention was to reduce the number of claims against states, there had also to be objectively credible reasons advocating the restriction of the interpretation of the term "investment".

What was important at the time of rising numbers of the claims being initiated under the auspices of ICSID, was that the general growth of number of cases included more of an investment border-line cases. Prior to the Fedax v. Venezuela and the Salini v. Morocco cases most of the cases heard by the Arbitral Tribunals of ICSID have considered the large scale infrastructural investments.[161] These cases obviously did not have much of uncertainty in qualifying assets or activities as an investment. However when the new line of smaller scale cases considering the wider range of capital appeared, the states decided to seize an opportunity and to use this moment claiming for the need to clarify what really constitutes investment.

Arguments advocating the application of the Salini test as a unified construct

The first argument advocating the application of the objective approach to the term "investment" of Article 25(1) is the idea that if this term is itself included into the Article 25(1) of ICSID convention it has to have a separate identifiable meaning. This idea has been accurately presented by the Joy Mining Machinery v. Egypt Tribunal:

> *"49. The fact that the Convention has not defined the term investment does not mean, however, that anything consented to by the parties might qualify as an investment under the Convention. <…>*
>
> *50. The parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention. Otherwise Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision."*[162]

This line of argumentation is based on the two premises. First is that if the drafters of ICSID convention would not have wanted to limit the jurisdiction of ICSID specifically to

[161] Mortenson, J. D. *supra* note 18, p. 271
[162] Joy Mining Machinery v. Egypt, paras 49-50. (emphasis added)

investment disputes they would have omitted the term "investment" from the Article 25(1) completely.[163] This claim gathers great portion of its strength from a fact that such proposal was suggested but rejected during the drafting process of ICSID convention.[164]

The second premise is that standing in line with the requirements of Article 31 of VCLT a term has to be given the ordinary meaning. According to the proponents of objective approach to the term "investment" this objective meaning of the term has a hard-core definition.[165] This line of argumentation was inspired by the urge to oppose the lack of stability employing the intuitive method when defining investment. It revolves around the desire of rigid predictability of the ICSID protection regime, claiming that unless the term "investment" was defined objectively the entire ICSID regime will always hinge in uncertainty[166], which is contrary to the aim of ICSID to promote development through investment[167], because the foreign nationals will be less likely to engage in private investment without the guaranties of predictable protection.[168]

However despite these lines of persuasive and in practice adopted argumentation the objective approach to the definition of the term "investment" of Article 25(1) has also drawn some criticism.

Arguments opposing the application of the Salini test as a unified construct

Almost every criteria of any variation of the Salini test has attracted criticism.[169] However as this Master Thesis is devoted to mainly the analysis of the applicability of the criterion of the economic development of the host state, the criticism of every separate criterion will not be established. Nevertheless the Salini test draws a considerable amount of criticism as a pack of criteria.

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[163] Cole, T. and Vaksha, A. K., *supra* note 11, p. 317: "*After all, the contracting parties could have omitted the term 'investment' completely from Article 25(1), thereby giving parties to a dispute total freedom to determine for themselves which of their disputes should be brought before an ICSID tribunal*.".

[164] Mortenson, J. D. *supra* note 18, p. 284-285.

[165] See. e.g.: Ambiente Ufficio v. Argentina, Dissenting Opinion of Santiago Torres Bernárdez, para. 260: "*Moreover, all those decisions listed the three elements of contributions, durability and operational risk which appear as a minimum common denominator, namely as the hard-core or intrinsic ordinary meaning of the concept of investment of Article 25(1) of the Convention, as rightly stated by the above Saba Fakes decision."*(emphasis added).

[166] Mortenson, J. D. *op. cit*. p. 267

[167] Preamble of ICSID convention: *Considering the need for international cooperation for economic development, and the role of private international investment therein*; See also: Mortenson, J. D. *op. cit*. 304.

[168] Boddicker, J. *supra* note 78, p. 1065

[169] See e.g. criticism of the duration requirement in Mortenson, J. D. *op. cit*. p. 298.

The main reason for this is the fact that none of the Salini criteria are to be found in the ICSID convention.[170] This suggests that they may not to be considered to be mandatory as a matter of law if reading ICSID convention as a plain legal text.[171] It is not surprising thus that some of the Tribunals proceed with a lot of caution when interpreting the meaning of term "investment" using the textually non-existent criteria. It is not uncommon that such Tribunals reject the entire objective approach of interpretation of the term "investment" Article 25(1) of ICSID convention.[172] And although the same Tribunals quite often review the applicability of the Salini criteria to the circumstances of the case[173], this is done applying the typical characteristic approach, which will be the focus of the next Chapter.

Another reason to reject the application of the Salini test as a sole construct is that it's mandatory criteria of investment were gathered analyzing only the early jurisprudence of ICSID.[174] Furthermore, these criteria were extracted by analyzing the jurisprudence of ICSID Tribunals and not focusing on the meaning of investment of Article 25(1) of the ICSID convention itself.[175] This gives, that such criteria are based on the attributes of mainly the large scale investment, which was doubtfully the aim of the drafters of ICSID convention.[176]

Furthermore the application of the variations of the Salini test is even more doubtful taking into consideration the fact that a substantive part of its criteria – namely the requirements of minimum contribution requirement[177], the minimum duration requirement[178] and the substantial contribution requirement – were explicitly rejected during the drafting of Convention.[179] And although it is rightfully so, that the application of *travaux pretarationes* is to be considered with

[170] See e.x. Biwater v. Tanzania, para. 312; Alpha Projektholding v. Ukraine, para. 311.
[171] Biwater v. Tanzania, para. 312; Inmaris v. Ukraine, para. 129; Alpha Projektholding v. Ukraine, para. 311.
[172] Ambiente Ufficio v. Argentina, para. 460: "<…> *the Tribunal would like to caution against a restrictive reading of the jurisdictional provisions of the ICSID Convention which does not find its base in the Convention itself, but rather draws on concerns regarding the ability, and appropriateness, of arbitral tribunals to tackle difficulties relating to the substantive side of a case*."
[173] See e.g. *Ibid*. paras. 479-487.
[174] Date of the first release of the Schreuer's 1st commentary – 2001, date of the first release of D. Carreau, T. Flory, and P. Juillard, Droit International Economique (3rd ed.), on which Salini Tribunal relied in its decision – 1990.
[175] Mortenson, J. D. *supra* note 18, p. 271: "*Schreuer's description was in many ways tentative and in the spirit of surveying the investment disputes that had actually been adjudicated to that point.".*
[176] Bechky, P. S. *supra* note 12, p.: "*Nothing in the text of the ICSID Convention excludes small investments (or small claims) from the Centre's jurisdiction or otherwise discriminates against small investments. Indeed, the negotiating history reveals the conscious rejection of proposals excluding small disputes and small investments from the Centre's reach."*
[177] It was proposed during the drafting of ICSID convention, that the minimum bar for the contribution requirement would be 100.000,00 US dollars.
[178] During the drafting of ICSID convention it was proposed that the minimum duration of investment requirement would be 5 years.
[179] Mortenson, J. D. *op. cit*. p. 297-300

caution[180] and that the exclusion of criteria of investment during the drafting process does not necessarily exclude the application of them[181], this explicit rejection of criteria of investment definitely adds to the skepticism toward the application of the objective approach to investment.

There is also an argument that the Salini test has a negative effect on the investment relationships of the past, present and the future. The appreciation of objective definition of investment makes reasonably substantive part of the previous jurisprudence of ICSID questionable, as not all the previous findings of the Tribunals are compatible with the criteria of objective definition of investment.[182] Furthermore, and it is even more disturbing, the same applies also to the current jurisprudence. The autonomous objective definition of the term "investment" of Article 25(1) is an easily accessible path to the initiation of the annulment procedures in the ICSID case.[183] And considering the self-evident reluctance of states to admit their wrongs, this path becomes harmful in the terms of abuse of the process of restituting the rights of investors. This harm, interestingly, was foreseen by the Aron Broches during the drafting of ICSID convention and apparently became an issue at the present.[184]

Finally there are authors claiming that the application of the objective definition of the investment introduces rigidity in the investment protection regime. According for example to the contribution of Tony Cole and Kumar Vaksha "*the minimum content of an Article 25(1) 'investment' is best understood as being evolutionary in nature, changing over time to reflect changing understandings of the meaning of the term."*[185] The static state of any of the chosen variation of Salini test would obviously deny the proposed evolutionary nature.

Conclusion on the application of the Salini test as a unified construct

As it was just shown the application of the objective approach to the term "investment" of article 25(1) of ICSID convention has its advocates and prosecutors. Interestingly, the proportions of each are quite different in the jurisprudence of ICSID and the fields of scholarly works. While the majority of the legal scholars tend to oppose the objective definition of investment[186], this

[180] Ambiente Ufficio v. Argentina, Dissenting Opinion of Santiago Torres Bernárdez, para 212.
[181] *Ibid*. para 213.
[182] Mortenson, J. D. *supra* note 18, p. 278.
[183] See e.g. cases: Patrick Mitchell v. Republic of the Congo; Malaysian Historical Salvors v. Malaysia, Decision on the Application for Annulment.
[184] Bechky, P. S. *supra* note 12, p. 1055: "<…> *There was the further danger that a definition might provide a reluctant party with an opportunity to frustrate or delay the proceedings by questioning whether the dispute was encompassed by the definition.".*
[185] Cole, T. and Vaksha, A. K., *supra* note 11, p. 328.
[186] See e.g. articles: Boddicker, J. *supra* note 78; Mortenson, J. D. *op. cit.*; Given, J. P. *supra* note 16.

approach still manages to get high appreciation from the present day arbitral Tribunals[187]. The main reason for this might be that despite much criticism directed against the application of variations of the Salini test, the critics are not able to present another viable and effective alternative, which could sufficiently substitute the clear-cut Salini test.[188] Under this background it is now time to direct the focus to the most controversial requirement of this test – the criterion of the contribution to the development of the host state.

The criterion of the contribution to the development of the host state as part of the objective definition of the term investment of article 25(1) of ICSID convention

It was established above quite a few times that the criterion of the contribution to the development of the host state is considered to be quite a controversial one. Now is the time to analyze why it is so. The first time the criterion of the contribution to the development of the host state appeared as a part of the Salini test was the Salini case itself. The main question is, however, how did this criterion find its way into the test. And this issue is a bit more complicated than many authors claim it to be.[189] When answering this question the works of the Professor Emmanuel Gaillard once again provide the substantial aid.

It was established in the previous parts of this Master Thesis that there is a little doubt that the scholarly writings of professor Schreuer took its part as an inspiration for the introduction of the contribution to the development of the host state criterion into the Salini test.[190] Furthermore it was also mentioned that when inventing the objective definition of the term "investment" of article 25(1) of ICSID convention the Salini v. Morocco Tribunal duly noted the definition of investment established in the commentary of the Professor Emmanuel Gaillard.[191] Interestingly though, the definition of the investment proposed in this commentary consisted only of the other three criteria of the original Salini test and did not include the criterion of the contribution to the development of the host state.[192] Therefore the Tribunal had to seek it from somewhere else. That "somewhere else" was the preamble of the ICSID convention:

[187] See e.g. cases: Electrabel v. Hungary; KT Asia Investment Group v. Kazakhstan.
[188] Ghaffari, P. *supra* note 139, p. 611.
[189] See e. g. *Ibid* p. 608. Author describes the appearance of criterion of contribution to the development of the host state referring to the World Bank's Executive Directors' Report on ICSID Convention and the Preamble of the Convention, where the investment related development is established.
[190] See p. 33 of the Master Thesis.
[191] See p. 39 of the Master Thesis.
[192] Gaillard, E. *supra* note 114, p. 405.

> *"52. <…> The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction (cf commentary by E. Gaillard, cited above, p. 292). In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition*."[193]

The relevant part of the preamble of the ICSID convention reads as follows:

> *"The Contracting States [c]onsidering the need for international cooperation for economic development, and the role of private international investment therein <…> [h]ave agreed as follows*"[194]

It is self-evident that the Preamble of ICSID convention does indeed mentions the economic development. It is imbedded into the ICSID convention as one of the aims of this convention. However that does not necessarily mean that this mentioning of economic development must be elevated to the mandatory jurisdictional requirement of investment.[195] It may be, as it is not an unusually claimed, that the contribution to the economic development of the host state is a consequence of functioning ICSID regime, but not the mandatory prerequisite to access it.[196] This gives, that the roots of the whim of Salini v. Morocco Tribunal to incorporate this criterion into the objective definition of the term "investment" of article 25(1) of ICSID convention has to come from some even deeper intellectual waters. Professor Emmanuel Gaillard suggests a reasonable explanation of this situation.

According to the professor Emmanuel Gaillard what happened when solving the Salini v. Morocco case, was that the Tribunal got mixed between two different approaches to the term "investment". [197] The first approach proposed by the Professor Emmanuel Gaillard himself suggesting that the objective meaning of "investment" entailed three criteria – contribution of

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[193] Salini v. Morocco, para. 52

[194] Preambe of ICSID convention.

[195] Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Decision (25 Sept., 2001), para. 232: "*It is correct that the Preamble of the ICSID Convention evokes a contribution to the economic development of the host State. <…> in protecting the investments, the Convention promotes the development of the host state. This does not mean that the development of the host State is a constitutive element of the notion of investment*." (emphasis added)

[196] See e.g.: Quiborax v. Bolivia, para. 220: *The Tribunal appreciates that the element of contribution to the development of the host State is generally regarded as part of the well-known four-prong Salini test. Yet, such contribution may well be the consequence of a successful investment; it does not appear as a requirement*. (emphasis added).

[197] Gaillard, E. *supra* note 114, p. 405: *More generally, the justification of the four-fold test established by the Salini decision is based on the combination of two fundamentally diverging approaches*.

capital, risk of losing the capital and duration of the investment.[198] The second approach, which was presented by the former Senior Legal Adviser to the World Bank Georges Delaume, was based solely on the contribution to the development of the host state of investment.[199]

Georges Delaume recognized that direct investments, which are usually the only possible type of investment stemming from the Gaillard's presented criteria of investment, are not the only means from a foreign party when assisting the development of the host state.[200] He thus considered "*the definition based on contribution, duration, and risk to be too restrictive* [and] *suggested a more flexible test based solely on the Preamble to the Convention: the contribution to the host State's economic development*."[201] This test was supposed to provide ISCID's protection to a wider range of investment.

Now, what has happed in the process of solving the Salini v. Morocco case is that these two approaches, although being intellectually divergent, got merged.[202] The original Salini test included the criterion of the contribution to the development of the host state as a mandatory part of the objective definition of the term "investment".

The evolution of appreciation of the criterion of contribution to the development of the host state within the objective definition of investment

The previous part of Chapter III of the Master Thesis has showed that the incorporation of the criterion of the contribution to the development of the host state into the objective definition of investment of article 25(1) of ICSID convention was quite controversial. The next obvious issue then is, what was the reception this controversy by the latter ICSID jurisprudence. The following analyses will provide the analyses showing that the application of this criterion undergone some important shifts of appreciation of it. Based on that, the fourth part of this chapter will be divided into two sections. The first one will consider the early[203] and supportive post Salini v. Morocco jurisprudence on the application of the criterion of the contribution to the development of the host state. And latter, the second section will present the currently[204] dominant position negating the application of this criterion as a part of the Salini test.

[198] Ibid.
[199] Senior Legal Adviser of International Centre for Settlement of Investment Disputes (ICSID), 1985-1986.
[200] Gaillard, E. *supra* note 114, p. 406.
[201] *Ibid*.
[202] *Ibid*.
[203] Time frame of years 2001-2008.
[204] Time frame of years 2009-2013.

The early post Salini jurisprudence supporting the application of the criterion of the contribution to the development of the host state

The generalized conclusion on the application of criterion of the contribution to the development of the host state in the jurisprudence of ICSID during the years 2001 to 2008 is that arbitral Tribunals have appreciated this criterion.[205] A typical example of incorporation of this criterion into objective definition of investment could be found in the passages of Jan de Nul v. Egypt case:

> *"91. The ICSID Convention contains no definition of the term "investment". The Tribunal concurs with ICSID precedents which, subject to minor variations, have relied on the so-called "Salini test". Such test identifies the following elements as indicative of an "investment" for purposes of the ICSID Convention: (i) a contribution, (ii) a certain duration over which the project is implemented, (iii) a sharing of operational risks, and (iv) a contribution to the host State's development, being understood that these elements may be closely interrelated, should be examined in their totality and will normally depend on the circumstances of each case. (see also the unchallenged statement of Prof. Schreuer, Exh. C-165, ¶ 24, p. 9)"*[206]

The reason why this passage is a good example of incorporation of the criterion of the contribution to the development of the host state into the definition of investment, is that it provides the sources encouraging the Tribunals to imbed this criterion into the test. These are: (1) the previous decisions of ICSID jurisprudence (with a standing out number of references to the Salini v, Morocco case)[207] and (2) the writings of legal scholars (with a standing out number of references to the works of professor Schreuer)[208]. Thus what was happening in the period from roughly year 2001 until the year of 2008 was that the Tribunals preferring the incorporation of the contribution to the

[205] See Malaysian Historical Salvors v. Malaysia, Award on Jurisdiction Tribunal's analysis of the previous decisions of ICSID Tribunals in paras 73-104. See also: Dupont, P.-E. *supra* note 30, p. 257: "*The requirement of a contribution to the economic development of the host State, held by several tribunals before 2008, has long been criticized by a significant part of the doctrine, and has been discarded in a large number of decisions."* (emphasis added).

[206] Jan de Nul v. Egypt, para. 91 (emphasis added)

[207] See e.g. Joy Mining Machinery v. Egypt, para. 53. Tribunal refers to the previous decisions of ICSID tribunal for its conclusion on the criteria of investment.

[208] See e.g.: Patrick Mitchell v. Republic of the Congo, para. 31. Ad hoc committee refers to the scholarly writings of professor Schreuer.

development of the host state criterion into the Salini test were in large part employing the "pilling on" effect, which consists of the principle "We think it to be A because previous Tribunals though it to be A".

Next question then – what was considered to be the content of the criterion of the contribution to the development of the host state of the objective definition of investment? The answer to this question, however, was not an easy one to find, because the precise content of this criterion did not make major relevance in the cases concerning big infrastructural projects, which then and at the moment compose the greater part of the ICSID jurisprudence. Compliance with this criterion was too obvious for the Tribunals in such cases to get into more detailed analyzes of it.[209]

The helpful explanation after some time of application of this criterion came from the Annulment committee from the Patrick Mitchell v. Republic of the Congo case. This case was, as the Annulment committee has established itself, atypical case from the perspective of assets being argued to be investment.[210] The case analyzed the situation of expropriation by the governmental authorities of the legal consulting firm established by an US citizen in the Democratic Republic of Congo. Due to the fact that a legal consulting firm's contribution to the foreign state is not on its face clear, the Annulment committee had to provide a more detailed approach to the criterion of the contribution to the development of the host state. In relevant part of the decision the ad hoc Committee held:

> *"33. The ad hoc Committee wishes nevertheless to specify that, in its view, the existence of a contribution to the economic development of the host State as an essential – although not sufficient – characteristic or unquestionable criterion of the investment, does not mean that this contribution must always be sizable or successful; and, of course, ICSID tribunals do not have to evaluate the real contribution of the operation in question. It suffices for the operation to contribute in one way or another to the economic development of the host State, and this concept of economic development is, in any event, extremely broad but also variable depending on the case."*[211]

[209] See e.g. GEA Group Aktiengesellschaft v. Ukraine, ICSID Case No. ARB/08/16, Award (31 March 2011) (Thereafter - GEA Group v. Ukraine) para. 143: "*In the circumstances of this case, this is a controversy that need not be resolved. Out of an abundance of caution, the Tribunal has considered all potentially applicable criteria and, as set out below, each leads to the same conclusion with respect to each of the alleged "investments" in question*."

[210] Patrick Mitchell v. Republic of the Congo, para. 39: "<…> *a legal consulting firm is a somewhat uncommon operation from the standpoint of the concept of investment* <…>".

[211] *Ibid*. para. 33 (emphasis added).

The first important argument form the passage above is that the Tribunal did not require for the contribution to be successful in order for an asset to be considered to be an investment. This provides the safeguard for projects which did not have their chance to be executed. An example of this happening could be the hostile acts of the host State at the very beginning of the project.[212]

The second important issue explained by the ad hoc Committee in the Patrick Mitchell v. Republic of the Congo case was that the contribution could come in many forms. As it was elaborated on the matter by other Tribunals investments can come *"in ways other than pure cash, e.g. as human capital or intellectual property rights"*[213] as long as the evaluation of such investments does not become too speculative[214].

The third important issue to be taken from the above excerpt is that the contribution to the host states economy must not be sizable. However the overall practice concerning the application of the criterion of the contribution to the development of the host state during the period of year 2001-2008 actually differs from the statement of the ad hoc Committee.[215] This deserves special notice.

The Tribunal in the Joy Mining Machinery v. Egypt case when applying the Salini test had established that:

> *"53. Summarizing the elements that an activity must have in order to qualify as an investment, both the ICSID decisions mentioned above and the commentators thereon have indicated that the project in question should have a certain duration, a regularity of profit and return, an element of risk, a substantial commitment and that it should constitute a significant contribution to the host State's development."*[216]

In addition to that, the sole Arbitrator of the Malaysian Historical Salvors v. Malaysia case concludes after analyzing the most important cases on the matter until the year 2007 that the majority of ICSID jurisprudence swings to the side which requires for the contribution to the host

[212] Gaillard, E. *supra* note 114, p. 415-416.
[213] Malaysian Historical Salvors v. Malaysia, Award on Jurisdiction, para. 139.
[214] *Ibid*. para. 144
[215] See e.g. Joy Mining Machinery v. Egypt, para. 53: "*Summarizing the elements that an activity must have in order to qualify as an investment, both the ICSID decisions mentioned above and the commentators thereon have indicated that the project in question <…> should constitute a significant contribution to the host State's development*.", see also: Malaysian Historical Salvors v. Malaysia, Award on Jurisdiction, para. 14.
[216] Joy Mining Machinery v. Egypt, para. 53.

state's economy to be substantial.[217] There is couple of illustrative examples when the Tribunals required contributions to be substantial:

- In the Joy Mining Machinery v. Egypt case the Tribunal did not hold the ~10 million UK pounds worth bank guaranties held against the supplier of the mining equipment to be a significant contribution. The Tribunal considered that asset of such worth is nothing "<…> *to be compared with the concept of "contrats de développement économique" or even contracts entailing the concession of public services*."[218] This conclusion was in that case the part of the reasoning why the Tribunal did not recognize the bank guaranties constituting the investment under the Article 25(1) of ICSID convention.
- The Malaysian Historical Salvors v. Malaysia case was even more interesting on the subject. It is because the analysis of the decision came to the point where the substantiality aspect of the contribution criterion became the decisive aspect determining the jurisdiction of the Tribunal.[219] The sole Arbitrator in this case decided that the salvage expedition, which found a long ago sunken ship, salvaged its cargo and sold it in the international auction for ~3 million US dollars[220], as an activity did not account for an investment. It was due to its too minor relevance on the contribution to the Malaysia's economy.[221] The Tribunal reached this decision despite the claimant's contentions that additionally to the value of auctioned items the claimant also contributed to Malaysian economy among other things by helping to establish the local salvaging companies, transferring its know-how to these companies, helping to attract tourism by providing items for museums and employing local workforce.[222]

To sum up, the arguments stated above proves that the criterion of the contribution to the development of the host state, with its aspects presented above, in the period from year 2001 to year 2008 was usually welcome in their analyses on the matters of jurisdiction. However this situation started changing as more relatively small worth claims started being initiated under the ICSID umbrella. It was then the time to review the applicability of the criterion of contribution to the host

[217] Malaysian Historical Salvors v. Malaysia, Award on Jurisdiction, para. 123: "*The Tribunal considers that the weight of the authorities cited above swings in favor of requiring a significant contribution to be made to the host State's economy.".*
[218] Joy Mining Machinery v. Egypt, para. 57.
[219] Malaysian Historical Salvors v. Malaysia, Award on Jurisdiction, para. 123.
[220] Claimant also claimed for the compensation for the part of the salvaged items, which were withheld by the Malaysian authorities, accounting the value of these items of 400.000 US dollars additionally to the sum of sold items. See Malaysian Historical Salvors v. Malaysia, Award on Jurisdiction, para. 14.
[221] Malaysian Historical Salvors v. Malaysia, Award on Jurisdiction, paras. 143-145.
[222] *Ibid*. paras. 143-144.

state's economy and especially it substantiality requirement as the part of objective definition of investment.

The present ICSID jurisprudence on the application of the criterion of the contribution to the development of the host state

It may be argued that the Malaysian Historical Salvors v. Malaysia case came as the tipping point inspiring the reconsideration of the criterion of the contribution to the development of the host state. Many legal publicists were dissatisfied with the outcome of this case.[223] And taking into account that the criterion of the contribution to the development of the host state was the decisive factor in this case, this criterion became the main target for the wave of criticism.

This was not then a big surprise when the Annulment committee of this case reversed the decision of the Sole arbitrator suggesting to provide jurisdictional access to ICSID arbitration for the claimant.[224] Furthermore the ad hoc Committee did that "in style". This decision not only re-inspired the acknowledgement of subjective approach to the determination of the meaning of the term "investment" of article 25(1) of ICSID convention[225], but its important implicit message was also that the small scale non-infrastructural projects cannot be rejected the jurisdiction of ICSID just because they do not provide substantial contribution to the economic development of their host state.

The other decision which sparkled the fire burning down the contribution to the development of the host state criterion as a part of Salini test was, interestingly, the decision which came with only one day's difference to the decision of the ad hoc Committee of the Malaysian Historical Salvors case. This was the decision of the Tribunal in the Phoenix v. Czech Republic case.

In this case the Tribunal was tasked with determining the existence of measures adequate to expropriation against the property of company incorporated in Israel[226]. In the jurisdictional part of the case when identifying the criteria of investment the Tribunal has stated:

> "85. *It is the Tribunal's view that the contribution of an international investment to the development of the host State is impossible to ascertain – the more so as there are highly diverging views on what constitutes*

[223] See e.g.: Bechky, P. S. *supra* note 12; Boddicker, J. *supra* note 78; Mortenson, J. D. *supra* note 18.
[224] Malaysian Historical Salvors v. Malaysia, Decision on the Application for Annulment, para. 81.
[225] See p. 21 of the Master Thesis.
[226] Phoenix v. Czech Republic, paras 24-33.

"development". A less ambitious approach should therefore be adopted, centered on the contribution of an international investment to the economy of the host State, which is indeed normally inherent in the mere concept of investment as shaped by the elements of contribution/duration/risk, and should therefore in principle be presumed."[227]

Although this self-explanatory excerpt of the decision was not entirely original in its interpretation of the contribution to the development of the host state criterion of the Salini test[228] but it marked the beginning of the new era of interpretation of this criterion.

The following decisions have clarified the reasons of why the contribution to the economic development of the host state criterion was, in the words of the Phoenix v. Czech Republic Tribunal, impossible to ascertain. It was because of the two main reasons which are well put in the decision of an Alpha Projektholding v. Ukraine case. Although the Tribunal in this case employed the mix of subjective and intuitive approaches toward the definition of investment of Article 25(1) of ICSID convention it nevertheless managed to effectively capture the essence of the grown dissatisfaction with the criterion contribution to the economic development of the host state:

"312. The Tribunal is particularly reluctant to apply a test that seeks to assess an investment's contribution to a country's economic development. Should a tribunal find it necessary to check whether a transaction falls outside any reasonable understanding of "investment," the criteria of resources, duration, and risk would seem fully to serve that objective. The contribution-to-development criterion, on the other hand, would appear instead to reflect the consequences of the other criteria and brings little independent content to the inquiry. At the same time, the criterion invites a tribunal to engage in a post hoc evaluation of the business, economic, financial and/or policy assessments that prompted the claimant"s activities. It would not be appropriate for such a form of second-guessing to drive a tribunal"s jurisdictional analysis."[229]

The approach discarding the criterion of contribution to the economic development of the host state from the Salini test based on the reasons established in the above passage got fixed in the

[227] *Ibid*. para. 81.
[228] See e. g. L.E.S.I.- DIPENTA v. Algeria, para 13: "*On the other hand, it is not necessary that the investment contribute more specifically to the host country's economic development, something that is difficult to ascertain and that is implicitly covered by the other three criteria"*. See also: Sedelmayer v. Russian Federation, ad hoc arbitration under the Stockholm Chamber of Commerce arbitration rules, Award (7 July 1998), para. 224.
[229] Alpha Projektholding v. Ukraine, para. 312.

jurisprudence of ICSID and has not changed up to the present day.[230] It is now not known for the author of this Master Thesis any existent cases, which since the beginning of the year 2010 have applied the objective definition of investment of Article 25(1) of ICSID convention, which included the separate requirement of contribution to the economic development of the host state. Furthermore, the approach objectively identifying the definition of investment by only three remaining requirement of Salini test – the requirements of contribution of capital, duration and risk[231] - have even spread outside the frontiers of ICSID. In this respect the decision in the Romak v. Uzbekistan [232] case deserves a special notice.

This case have considered the situation where a Swiss company Romak, brought a BIT claim under the UNCITRAL rules against Uzbekistan seeking payment of a commercial arbitral award arising from an unpaid sale of wheat. Republic of Uzbekistan disagreed with the claim, arguing on the jurisdictional matter, that Romak did not make an investment in Uzbekistan. In this case the investments seemed to encompass requirements of the BIT, as BIT defined investment to "include every kind of assets" including "claims to money".[233] However the Tribunal rejected this argument, claiming that: (1) the BIT allowed investors to choose ICSID and (2) this choice would be rendered useless if investment in the BIT were given a wider scope than ICSID permits. It concluded that an investment in the BIT should be treated the same regardless whether claimant decides to arbitrate in ICSID or UNCITRAL arbitration.[234]. Then it discussed the application of variations of Salini test in ICSID jurisprudence[235] and decided that investments defined in the BIT also have *an inherent meaning or plain meaning* which composes of the first three requirements of the Salini test.[236] Based on that the Tribunal then decided that acclaimed investment of Romak did not meet any of these criteria and thus cannot be considered an investment.[237]

From the perspective of the application of the criterion of the contribution to the economic development of the host state, the importance of Romak SA v. Republic of Uzbekistan case is that this case made the objective test of three criteria definition of investment much stronger. It is because from all the competing variations of the definition of the term "investment", including the

[230] See. e. g. cases: Quiborax v. Bolivia; Electrabel v. Hungary; KT Asia Investment Group v. Kazakhstan.
[231] See p. 34 of the Master Thesis.
[232] Romak S.A.(Switzerland) v . The Republic of Uzbekistan, UNCITRAL, PCA Case No. AA280, Award (26 November 2009) (Thereafter – Romak v. Uzbekistan)
[233] Ibid. para. 97. See Article 1(2) of Swiss-Uzbekistan BIT (document's full title in french: Entre la Confédération suisse et la République d'Ouzbékistan concernant la promotion et la protection réciproque des investissements).
[234] Ibid. paras. 192-195
[235] Ibid. paras. 196-205
[236] Ibid. paras. 207-208
[237] Ibid. paras. 209-243

subjective and intuitive approaches, the objective three criteria approach to this term was the one to break through the frontiers of ICSID. The proof of its influence is that now it is not uncommon for the present day ICSID Tribunals to refer to this case when establishing a three prong variation of the Salini test.[238]

Conclusions on the criterion of the contribution to the development of the host state as part of the objective definition of term "investment"

Four issues have been covered in this Chapter. These were: (1) the overall appearance of the objective approach toward the definition of investment; (2) the arguments criticizing and advocating the objective approach; (3) the placement of the criterion of the contribution to the development of the host state into the objective definition of investment and (4) the evolution of application of this criterion in the jurisprudence of ICSID. After analyzing these four issues it is now time to reach a conclusion on the first proposition of this Master Thesis – should the criterion of the contribution to the economic development of the host state constitute a part of the autonomous objective definition of the term "investment" of Article 25(1) of ICSID convention.

The answer to the first proposition of the Master Thesis is negative. Despite the continuous effort of the member states of ICSID convention, when acting as a defendant in the arbitral procedures, to preserve the criterion of the contribution to the economic development of the host state as a part of the objective definition of the term "investment" [239] the explications of the recent ICSID Tribunals shows no prospers for this criterion to be coming back as one of the mandatory test's requirements of objective definition of investment. Taking into account the above presented controversial instalment of the criterion into the definition of the term "investment" and the subjective nature of this criterion – it is rightfully so. After all, if one is to provide an objective meaning to the term "investment" of Article 25(1) of ICSID convention it goes against the very foundations of this approach to include an element of subjectivity into approach. Therefore the criterion of the contribution to the economic development of the host state should not constitute a part of the autonomous objective definition of the term "investment" of Article 25(1) of ICSID convention.

[238] See e.g.: GEA Group v. Ukraine, para. 141; Quiborax v. Bolivia, para. 198.
[239] See e.g. KT Asia Investment Group v. Kazakhstan para. 148; Philip Morris v. Uruguay, paras. 176-182.

CRITERION OF THE CONTRIBUTION TO THE DEVELOPMENT OF THE HOST STATE UNDER THE AUTONOMOUS INTUITIVE DEFINITION OF INVESTMENT

It was established in the chapter III of the Master Thesis that there are two ways to approach the term „investment" from the Article 25(1) of the ICSID convention. The meaning to this term may be given by decomposing it into the objective mandatory criteria or by attaching the appropriate characteristics of investment to the asset or activity, which intuitively appears to be an investment. Now, when the last chapter of this paper has dealt with the former approach of the two, this chapter will direct its focus to the intuitive definition of investment.

The intuitive approach to the definition to investment is unquestionably the least structured approach to the term "investment" of the Article 25(1) of the ICSID convention. It has many variations, because as the name of the approach suggests, the Tribunals applying this approach attach their own individual understanding of investment to the assets or activities being considered in a certain case. And while this approach likely covers also an array of unusual descriptions of investment[240] for the practical purposes it is most sensible to stick with what could be described as the most common formula of the intuitive definition of investment.

The most common intuitive definition of the term "investment" in the jurisprudence of ICSID is such where a Tribunal examines an asset or activity with a list of attributes which are typically present in the investment.[241] It is noteworthy that the same Salini criteria are being used also under the intuitive approach to investment.[242] However, as it was already established in chapter III of the Master Thesis, despite the fact that the same criteria of investment applies both in objective and intuitive approaches to the autonomous meaning of the term "investment", there is a substantial difference in the application of these criteria in the two approaches. Unlike in the objective definition of investment in the subjective approach to this term, the degree and even existence of the separate criteria may vary.[243]

The intuitive approach of the term "investment" of the Article 25(1) of the ICSID convention may be regarded as a middle ground between the subjective and the objective definitions of this term. This approach has an autonomous definition of investment from the ones in

[240] See e.g. case Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011). The Tribunals develops a concept of the term "investment" from the Article 25(1) of the ICSID convention consisting of the contribution criterion and creating "fruits and value". See paras 343-351 of the case. For the detailed analysis of the case see also: Chrostin, J. B. U. *supra* note 79 and Levesque, C, *supra* note 11.
[241] See e.g. Schreuer, C. H. *supra* note 12, p. 233, Gaillard, E. *supra* note 114, p. 407-410.
[242] See e.g. Ambiente Ufficio v. Argentina, para. 476.
[243] See p. 28-29 of the Master Thesis.

the BITs and at the same time it does not impose the narrow and restrictive definition of investment. This makes the intuitive approach to investment immune to some of the strongest arguments against the other two approaches: first, it does not abandon the treaty interpretation rules requiring to provide the distinct meaning to the terms of a treaty[244]; second, it does not impose strict jurisdictional limits to other that traditional types of investment[245].

However the intuitive approach of the term "investment" is highly susceptible to the claim of uncertainty in determining the meaning of the jurisdictional gateway term "investment". None of the other two approaches provides so little of guidance to the determination of the meaning of the term investment. And it has to be taken into consideration that the legal clarity is a highly desired commodity in any legal regime.

Furthermore, the autonomous intuitive definition of investment is sometimes being confused with the subjective approach to the term investment.[246] However it is not surprising having in mind that it is not uncommon that the two approaches – the subjective approach and the autonomous intuitive approach – are being applied simultaneously.[247] This merger of the approaches apparently smoothens the path for the Tribunals to accept an asset or activity as investment in more unconventional cases where this asset or activity finds support in both – BIT and in at least some of the typical characteristics accustomed to this term.

However these are just the very general guidelines providing arguments supporting and opposing the application of the autonomous intuitive approach to the term investment of the Article 25(1) of the ICSID convention. Due to the fact that this approach is considerably wide in models of its application and is depended in great part on the circumstances of a particular case, the only option to stay in the orbit of the criterion of the contribution to the economic development of the host state is to analyze only the cases, which had effect on this particular criterion of investment. Having the practical applicability to be the guiding principle of this Master Thesis the following analyses will consist of such cases.

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[244] See p. 36-38 of the Master Thesis for more detailed analysis on the criticism of objective approach to the term "investment" of Article 25(1) of the ICSID convention.

[245] See p. 13-20 of the Master Thesis for more detailed analysis on the criticism of subjective approach to the term "investment" of Article 25(1) of the ICSID convention.

[246] Gaillard, E. *supra* note 114, p. 410: „*The deductive approach does not simply recognize the 'typical characteristics' of an investment, but rather endeavours to give it a true definition. It is based on the idea that the intuitive approach is in reality nothing but another iteration of the subjectivist theory, which merely merges the requisite of investment with the condition of consent.*" (emphases added)

[247] See e.g. Philip Morris v. Uruguay, paras. 199-201, 206.

Application of the criterion of contribution to the economic development of the host state under the autonomous intuitive definition of the term "investment"

It was established above that the criteria of the investment have different effect when being applied in the intuitive approach to the term "investment". That also applies for the criterion of the contribution to the economic development of the host state. The main substantial difference in application of this criterion from when it is applied in the objective approach is the criterion of the contribution to the economic development of the host state does not have the restricting effect.[248] Applying it as a typical characteristic rather than as a mandatory requirement of investment allows the Tribunals to exercise caution in overburdening an evaluation of an asset with the determinations of the precise content of the criterion. The Tribunal is thus able to dismiss such highly controversial issues as: (1) determination of the minimum value of the contribution[249]; (2) the incoherence in determining the substantiality of contribution depended on the host state of the investment[250] or (3) the determination of the range of what constitutes contribution[251]. Using the criterion of the contribution to the economic development of the host state under the intuitive approach the Tribunal may accept an asset or activity to be investment determining simply that the asset or activity has some positive impact for the economic development of the country. This enhances the more liberal interpretation of the term "investment" and eliminates at least in part the restrictive impact from determination of investment, which is the main objection to its application in the objective approach to this term.

Furthermore, when the Tribunals exercise autonomy in the application of the criterion of the contribution to the economic development of the host state, this criterion does not need to suffer from the subjectivity in its post-hoc interpretation, which is the main reason why this criterion was dropped from objective approach of determination of existence of investment.[252] When applying this criterion under the intuitive approach the Tribunal is not bound to make a decision based on an actual outcome of contribution made. In such case the Tribunal may determine the satisfaction of the requirement simply by observing that an investor has made a good faith effort to contribute to the economy of the host country. Among other existing and potential situations this would allow to

[248] Gaillard, E. *supra* note 114, p. 413.
[249] Bechky, P. S. *supra* note 12, p. 1054.
[250] *Ibid*. p. 1070, See also: Given, J. P. *supra* note 16, p. 496-497.
[251] Given, J. P. *op. cit*. p. 495
[252] See p. 46-47 of the Master Thesis for detailed analysis of the reasons why the criterion of the contribution to the economic development of the host state was dropped from the objective definition of the term "investment" from the Article 25(1) of the ICSID convention.

pass as investment such seemingly investment-type assets as a turnout to be financially unprofitable infrastructural projects[253] or activities of experimental nature[254].

Furthermore, in addition to not having some weaknesses rising from the interpretation of the criterion of the contribution to the economic development of the host state under the objective approach to investment, in the intuitive approach this criterion has some addition benefits. There are at least two of these: (1) it may act as a screening mechanism from harmful investment and (2) it may act as a pathway for unusual types of investment to encompass as such. These two usages of the criterion of the contribution to the economic development of the host state deserve the separate analysis.

Criterion of the contribution to the economic development of the host state as a screening mechanism of noxious investment

It was demonstrated in the Chapter IV of this Master Thesis that the latest trend in currently most popular objective approach to the term "investment" is to apply this approach without the criterion of contribution to the economic development of the host state.[255] This shift in the application of the original Salini test has drawn some attention worthy criticism. This criticism is noticeably well put in the dissenting opinion of Judge Mohamed Shahabuddeen to the majority's decision in the annulment procedures in the Malaysian Historical Salvors v. Malaysia case.[256]

In his dissenting opinion Judge Mohamed Shahabuddeen expresses his concern that the abandonment of the criterion of contribution to the economic development of the host state from the definition of investment may lead to situations where private entities are earning their wealth at the expense of development of a host state of investment.[257] In his opinion, such investment does not deserve the protection of ICSID regime.[258] According to the judge it is highly unlikely that the state parties of the ICSID convention have agreed at the expense of their own to provide the protection to activities directed exclusively to the enrichment of the foreign private entities.[259] In such instance

[253] See e.g. case Biwater v. Tanzania.
[254] See e.g. case Malaysian Historical Salvors v. Malaysia, Award on Jurisdiction. Other types of experimental investment could include development of drugs, technology, etc.
[255] See p. 47-48 of the Master Thesis.
[256] Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Dissenting Opinion of Judge Mohamed Shahabuddeen (19 February 2009) (Thereafter - Malaysian Historical Salvors v. Malaysia, Dissenting Opinion of Judge Mohamed Shahabuddeen)
[257] Ibid. para. 22.
[258] Ibid. para. 17.
[259] Ibid. para. 21.

the ICSID's underlying principle of the balance of interests between the states and investors is being completely rejected.[260]

Judge Mohamed Shahabuddeen draws support for his conclusion from the Preamble of ICISD convention[261] and from the Report of the Executive Directors on the ICSID Convention[262]. Also he is not alone in denying the sensibility of rejection of application of the criterion of contribution to the economic development of the host state. The similar idea is imbedded in the dissenting opinion of Makhdoom Ali Khan to the majority's decision in the recent Deutsche Bank AG v. Sri Lanka case.[263] In his dissent the arbitrator Makhdoom Ali Khan argues that the criterion of the contribution to the economic development of the host state "*preserves a vital link between an investment and the intended purpose of the* [ICSID] *Convention"*[264] and that disregarding this criterion severs this link.[265] Furthermore, even the Tribunal in Phoenix v. Czech Republic, which is in substantial part responsible for the rejection of the CTED criterion from the objective definition of investment[266], agrees that the presumption of implication of this criterion into the other three criteria may be reversed in the situations where the good faith interests of the state have to be protected.[267]

This criticism, however, does not apply to the criterion of the contribution to the economic development of the host state under the intuitive approach to the term "investment". Not being dropped from the application in identifying investment, this criterion remains as a potentially useful screening mechanism for an investment which does not contribute to the development of the host state. Being not bound by the necessity of formalization, unlike in the objective approach to the term "investment", this criterion may reject protection of ICSID to the noxious investment even if it is applied as the implicit part of the other criteria of investment or if it is in any of its modified forms which made it more compatible to the circumstances of a certain case.[268]

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[260] Malaysian Historical Salvors v. Malaysia, Dissenting Opinion of Judge Mohamed Shahabuddeen, para 19: "<...> *[t]hus, the* [ICSID] *Convention is aimed to protect, to the same extent and with the same vigour the investor and the host State <...>."*.

[261] *Ibid*. paras. 16-18.

[262] *Ibid*. paras. 19-20.

[263] Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2, Dissenting Opinion of Makhdoom Ali Khan (23 October 2012) (Thereafter - Deutsche Bank v. Sri Lanka, Dissenting Opinion of Makhdoom Ali Khan)

[264] *Ibid*. para. 46.

[265] *Ibid*. para. 47.

[266] See p. 46-47 of the Master Thesis.

[267] Pheonix v. Czech Republic, para. 86: "<…> *If the investor carries out no economic activity, which is the goal of the encouragement of the flow of international investment, the operation, although possibly involving a contribution, a duration and some taking of risk will not qualify as a protected investment, as it does not satisfy the purpose of the ICSID Convention*."

[268] Deutsche Bank v. Sri Lanka, Dissenting Opinion of Makhdoom Ali Khan, paras. 40-45

Criterion of the contribution to the economic development of the host state as a pathway for recognition of unusual types of investment

Two facts were already established above when considering the application of the intuitive approach toward the determination of investment: (1) the fact that this approach is usually applied assessing the less conventional assets and (2) the fact that the criteria in the intuitive approach have the ability to be interchangeable. The combination of these facts together with the incorporation of the criterion of the contribution to the economic development of the host state into the equation has one more interesting result – this criterion may be a way out in recognizing unconventional assets or activities as investment.

Although the idea that criteria of investment are interdependent and have to be considered globally was notably established in the Salini v. Morocco case[269], which is the grounding case of the objective definition of investment, and was restated by other Tribunals endorsing the objective approach to determination of investment[270], it is the intuitive approach to the definition of investment where the global assessment of investment's criteria shines in its full colors. An excellent example of this claim is the CSOB v. Slovakia case.[271]

In this case the Tribunal had to consider if the loan which was the part of the restructuring agreement of the national bank (CSOB) could be considered an investment. The Tribunal found the answer to this problem to be positive. More importantly, it did so grounding its decision solely with the CSOB's importance to the development of the Slovakia's banking sector[272] despite the self-evident claims that the other typical requirements of the investment (Salini test) were not met by the asset being evaluated in the case[273].

Despite the fact that it is one of the first cases introducing the intuitive approach toward the definition of investment[274] and its decision on objections to jurisdiction has occurred in the year 1999, it is still respected and influential case being quite often quoted even by current day

[269] Salini v. Morocco, para. 52: "*In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract. As a result, these various criteria should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here*." (emphasis added).
[270] See e.g.: Jan de Nul v. Egypt, para. 91.
[271] Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, May 24 1999.
[272] *Ibid*. para. 88.
[273] *Ibid*. paras. 79, 90.
[274] Gaillard, E. *supra* note 114, p. 407: „*The CSOB decision of 24 May 1999 is the first clear example of the application of the intuitive method in ICSID case law*."

Tribunals[275]. And from the perspective of the criterion of the contribution to the economic development of the host state the decision of the Tribunal in the CSOB v. Slovakia case shows the overwhelming effect this criterion may have in determining ICSID's jurisdiction under the intuitive approach toward the definition of investment.

Conclusion on the application of the criterion of contribution to the economic development of the host state under the autonomous intuitive definition of the term "investment"

It was demonstrated in this chapter that the intuitive approach to the term "investment" add flexibility and liberalism to the same criteria usually associated with investment in comparison to its counterpart – the objective approach. The criterion of the contribution to the economic development of the host state also shines in the new light under the intuitive definition of the term "investment". Against this background it is now time to reach a conclusion on the second proposition of this Master Thesis – should the criterion of the contribution to the economic development of the host state constitute a part of the autonomous intuitive definition of the term "investment" of Article 25(1) of ICSID convention.

The answer to this proposition is positive. Being cut loose from the necessity of its formalization under the intuitive approach to investment, the criterion of the contribution to the economic development of the host state is thus no longer burdened by the subjectivity of its interpretation. This allows the Tribunals of ICSID to use this criterion only when it is relevant for the circumstances of the case. It is not surprising thus, that the criterion of the contribution to the economic development of the host state is still being successfully applied by the present-day Tribunals endorsing the intuitive approach to term "investment".[276] And it is rightfully so, taking into account the abilities of this criterion to act as a screening mechanism for the noxious investment and to become a pathway to the jurisdiction of ICSID for the unconventional investment. Against this background it is nothing but a common sense that the criterion of the contribution to the economic development of the host state should constitute a part of the autonomous intuitive definition of the term "investment" of Article 25(1) of ICSID convention.

[275] See references to the CSOB v. Slovak Republic case in e.g. Ambiente Ufficio v. Argentina, para. 426.
[276] See e.g. cases: Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 Septeber 2009); Ambiente Ufficio v. Argentina.

CONSLUSIONS

The analysis provided in the chapters one and three of the Master Thesis has identified that the term "investment" established in the Article 25(1) of the ICSID convention has a three main ways of being interpreted. These are: (1) the subjective approach – providing the blank meaning to the term "investment" and referring the content of this term to the relevant BIT; (2) the autonomous objective approach – prescribing the term "investment" with the checklist of mandatory criteria, all of which must be satisfied when identifying an asset or activity as investment and (3) the autonomous intuitive approach – the common application of which is based on the attachment of the eligible typical characteristics of investment to the asset being considered in a particular case. These approaches have different effects on the ways of application or non-application of the criterion of the contribution to the economic development of the host state. Thus the final conclusions of the Master Thesis will be divided accordingly taking into consideration the divergence of approaches to the interpretation of the term "investment":

1. The criterion of the contribution to the economic development of the host state under the subjective approach to the term "investment" of Article 25(1) of the ICSID convention

As it was demonstrated in the chapter two of the Master Thesis, an exclusive application of the subjective approach to the term "investment" of Article 25(1) of the ICSID convention is one of the ways to completely dismiss the criterion of the contribution to the economic development of the host state from any application of it. The subjective approach to the term "investment" provides a paramount significance to the consent of the parties to arbitrate the dispute. Under the pure subjectivist interpretation of the term "investment" the content of this term is taken from the document of the consent to ICSID arbitration. This means, that the term "investment" of Article 25(1) of the ICSID convention is stripped of the autonomous meaning including any possible criteria of this term including the criterion of the contribution to the economic development of the host state.

Despite the fact that the subjective approach to the term "investment" had its peak of the application of it before the beginning of the 21st century, recently it has become relevant again. In the last five years the jurisprudence of ICSID was supplemented with a few important decisions, which have induced the prospects of the return of the application of this approach. Among the authors of these decisions are such legal juggernauts like the presidents of the ICJ Judge Stephen M.

Schwebel and Judge Peter Tomka. Against this background, it would not be an ill-advised approach for the legal practitioner to apply the subjective definition of the term "investment" of Article 25(1) of the ICSID convention if appropriate to the circumstances of the represented position.

2. The criterion of the contribution to the economic development of the host state under the autonomous objective approach to the term "investment" of Article 25(1) of the ICSID convention

The autonomous objective approach to the term "investment" of Article 25(1) of the ICSID convention is in substantial part responsible for the introduction of the criterion of the contribution to the economic development of the host state into the definition of investment. This criterion was established as a part of the checklist of cumulative mandatory requirements of investment in the cornerstone case of the objective approach – the Salini v. Morocco case. After the introduction of the criterion of the contribution to the economic development of the host state into Salini v. Morroco case in year 2001 it was then mostly successfully applied for nearly a decade.

However the appreciation in the application of this criterion has undergone the major shift in the end of the first decade of the 21st century. Due to the subjective nature of this criterion requiring the Tribunals to conduct the *post-hoc* evaluation of the contribution to the development and the incoherence in defining the limitations of this criterion among the ICSID Tribunals, the criterion of the contribution to the economic development of the host state was dismissed from the objective definition of the term "investment" of Article 25(1) of the ICSID convention. Despite the fact that the states finding themselves in the position of the respondent in ICSID arbitration are still trying to apply this criterion for their advantage, in the last four years none of the ICSID Tribunals have applied the criterion of the contribution to the economic development of the host state as a part of objective definition of the term "investment". Against this background, it would not be advisable for the legal practitioner to try to include the criterion of the contribution to the economic development of the host state into an objective definition of the term "investment". It is because from the current jurisprudential and the scholarly perspectives this criterion was rightfully dismissed from the objective definition of "investment" of Article 25(1) of the ICSID convention.

3. The criterion of the contribution to the economic development of the host state under the autonomous intuitive approach to the term "investment" of Article 25(1) of the ICSID convention

Just like the name of the intuitive approach to the term "investment" of Article 25(1) of the ICSID convention suggests this approach is the least integral of the three approaches. This attribute of the approach resonates with the application of the criterion of the contribution to the economic development of the host state. The application of this criterion is different from the application of it in the objective definition of investment.

Under the intuitive definition of "investment" the criterion of the contribution to the economic development of the host state does not suffer from the necessity of a strict structure. This dismisses the necessity of the unwanted *post-hoc* evaluation of contribution of assets to the economic development of a state and also denounces the importance of the precise limitations of this criterion. Because of these reasons the Tribunals of ICSID did not dismiss the criterion in question from the intuitive definition of the term "investment" and this criterion is still being successfully applied in the present day arbitral procedures.

Furthermore there are additional benefits which the criterion of the contribution to the economic development of the host state provides under the intuitive definition of "investment". First, the incorporation of this criterion into the definition of investment allows Tribunals to use it as a screening mechanism for the assets, which are designated only to the enrichment of their owners at the expense of the interests of the host state. Second, due to the interchangeability of the criteria under the intuitive approach to the term "investment", this criterion has a potential to recognize the atypical investments as being such.

Against this background, the application of the criterion of the contribution to the economic development of the host state is advised for the legal practitioner if it is compatible with circumstances of the situation. Taking into account the absence of the flaws of this criterion from the objective approach and the additional benefits rising from the incorporation of this criterion into the intuitive definition of the term "investment", it may be concluded that the criterion of the contribution to the economic development of the host state is a rightful part of the intuitive definition of the term "investment" of Article 25(1) of the ICSID convention.

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MISCELLANEOUS

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SUMMARY

It may seem as a paradox, but the worldwide World Bank's regime of international investment protection even after almost fifty years of its establishment is still in uncertainty toward the definition of the term "investment". The core term "investment" is established undefined in Article 25(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (thereafter – ICSID convention) and thus the Tribunals diverge substantially on the matter of interpretation of this term. Among many criteria of the term "investment" there is one, which stands out with the controversy surrounding its application. It is the criterion of the contribution to the development of the host state. The aim of this Master Thesis is to provide a detailed guide of the ways of application and non-application of this criterion. The analysis provided in the different chapters of the Master Thesis revealed the following results:

1. One of the ways to dismiss the application of the criterion of the contribution to the development of the host state is to render the entire term "investment" as blank. The application of this approach suggests acquiring definition of investment solely from the document of consent to the arbitration. In such instance the term "investment" of Article 25(1) of ICSID convention is stripped of its autonomous meaning including the criterion in question. However, despite the re-inspiration of this otherwise historical approach in the years 2009-2010, this so called "subjective approach" has not appeared in its pure form in the jurisprudence of ICSID since.

2. One of the ways to introduce the criterion of the contribution to the development of the host state into the definition of the term investment" of Article 25(1) of ICSID convention is to apply it as the part of the autonomous objective definition of this term. Under this approach, which was popular in the years 2001-2008, this criterion was a stationary part of the definition of the term "investment" acting as a mandatory requirement for the access to the investor-state arbitration. However due to its subjective nature requiring the Tribunals to conduct a *post-hoc* evaluation of the invested capital, it was dropped from the objective definition of investment and has not reappeared as a part of it in the last four years.

3. Another way to insert the criterion of the contribution to the development of the host state into the definition of the term investment" of Article 25(1) of ICSID convention is to apply it under the autonomous intuitive definition of this term. Under such approach this criterion does not have a mandatory restrictive effect and is thus being applied by the present day Tribunals. Under this approach the criterion in question is especially helpful as a screening mechanism to identify the harmful to the development investment and for identification of unusual types of investment.

SANTRAUKA

Paradoksalu, tačiau net po beveik penkiasdešimties metų sėkmingo veikimo Pasaulio banko įsteigtame tarptautiniame užsienio investicijų apsaugos režime vis dar nesutariama dėl pačios termino „investicija“ sąvokos. 1965 m. Konvencijos dėl valstybių ir kitų valstybių piliečių ginčų investicijų srityje sprendimo (toliau – ICISD konvencija) 25(1) straipsnis įtvirtina investicijos terminą kaip jurisdikcinį kriterijų, tačiau jo neapibrėžia. Tai sąlygoja skirtingą termino „investicija“ interpretavimą tarp jį taikančių arbitražinių tribūnolų.

Nagrinėjant investicijos terminą įdomu tai, jog tarp įvairių šiam terminui apibrėžti taikytų kriterijų yra vienas kriterijus išsiskiriantis savo kontraversiškumu. Tai prisidėjimo prie ekonominio valstybės vystymosi kriterijus. Atsižvelgus į šį kontroversiškumą, šio baigiamojo magistro darbo tikslu tapo noras sukurti aktualų žemėlapį, kuriame atsispindėtų būdai įtraukti arba pašalinti minėtą potencialų investicijos kriterijų iš investicijos termino sąvokos. Atlikus aktualių teisės šaltinių analizę nagrinėjamo kriterijaus atžvilgiu, nustatyta jog:

1. Vienas iš būdų netaikyti prisidėjimo prie ekonominio valstybės vystymosi kriterijus yra interpretuoti patį terminą „investicija“, kaip blanketinį. Šis, labiau istorinis, investicijos termino interpretativimo būdas šio termino reikšmę nustato pagal dokumente, kuriame įtvirtintas sutikimas ginčą spręsti abritraže, numatytą investicijos sąvokos apibrėžimą. Visgi, nepaisant 2009-2010 m. vykusio mėginimo sugrąžinti šį investicijos interpretavimo būdą į arbitražinių Tribūnolų praktiką, per pastaruosius ketverius metus jis ICSID arbitražinių tribūnolų sprendimuose nepasirodė.

2. Vienas iš būdų įtraukti prisidėjimo prie ekonominio valstybės vystymosi kriterijų į termino „investicija“ sąvoką yra interpretuoti šį terminą, kaip turintį objektyvią reikšmę. Taikant šį investicijos termino interpretavimo metodą ICISD arbitražiniai tribūnolai 2001-2008 m. laikotarpiu beveik visuomet įtraukdavo naginėjamą kriterijų į investicijos sąvoką. Tačiau vėliau situacija pasikeitė: pastebėjus, jog prisidėjimo prie ekonominio valstybės vystymosi kriterijus yra sunkiai apibrėžiamas, o jo taikymas subjektyvus, šis kriterijus buvo pašalintas iš dažniausiai ICSID arbitražinių Tribunolų praktikoje naudojamos objektyvios termino „investicija“ definicijos.

3. Dar vienas būdas įtraukti prisidėjimo prie ekonominio valstybės vystymosi kriterijų į termino „investicija“ sąvoką, yra taikyti šios sąvokos interpretavimui intuityvius kriterijus, įtraukiant ir šį kriterijų. Šis investicijos termino interpretatimo būdas yra neretai pasirenkamas su netipiškomis investicijomis susidūriančių taip pat ir esamojo laiko ICSID arbitražinių tribūnolų. Taip yra, nes nespraudžiant šio kriterijaus į griežtus objektyvumo rėmus, jis atsikrato nepageidaujamo subjektyvumo ir tampa naudingu vertinant kapitalo atitikimą investicijos sąvokai.

ANNOTATION

Topic of the Master Thesis: Definition of investment in International Centre for Settlement of Investment Disputes: criterion of the contribution to the development of the host state.
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The Master Thesis are dedicated to the analysis of the interrelationship of the term „investment“ of Article 25(1) of the ICSID convention and criterion of the contribution to the development of the host state, which is argued to be part of the definition of investment. The aim of this paper is to draw a map for a legal practitioner, of ways of application and non-application of the criterion of the contribution to the development of the host state. Analysis provided in the Master Thesis explaines how and why the criterion of the contribution to the development of the host state may be applied or not applied within the three divergent approachres to the term „investment“ Article 25(1) of the ICSID convention: the subjective approach, the autonomous objective approach and the autonomous intuitive approach.

Keywords: ICSID, investment, development.