

# The Objective Criteria for Qualifying a Transaction as an Investment under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States

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## Abstract

*This paper discusses one of the most controversial substantial issues of investor-state dispute settlement system under the ICSID Convention, which is how to qualify a transaction as an investment, given the variety of different approaches and rather uncertain determinations in the text of the ICSID Convention as to the notion of investment. This problem is a cornerstone one for investment law, since the existence of an investment is one of the jurisdictional requirements for the dispute to get resolved under the auspices of the ICSID. The paper does not give any recipe, but it rather sheds light on different points of view, trying to underline their advantages and to find a balanced and up-to-date approach. This paper is organised in the following way: in the first section the necessity of the objective criteria is addressed; the second section overviews the Salini test and its application; the third section discusses the jurisdictional and the typical characteristics methodological approaches to the application of the objective criteria, the fourth section reviews the particular objective criteria.*

## 1. Introduction

The ICSID Convention was designed to establish a reliable mechanism for the settlement of disputes concerning investments in order to promote the flux of capital to states and to protect foreign investments. It is important to mention for the further analysis that the idea to create the ICSID Convention belongs to the World Bank, namely to the then General Counsel Aron Broches.<sup>1</sup>

Article 25 (1) of the ICSID Convention sets out the jurisdictional requirements, which should be fulfilled for the legal matter to fall under the protection of the Convention. One of them is that the legal dispute should arise directly out of *an investment* (emphasis added).

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<sup>1</sup> Christoph H. Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) ix.

However, the Convention does not contain any definition of “investment”. Consequently, the notion of investment under the ICSID Convention is one of the most debatable issues both in practice and in theory. Let alone the importance of defining “investment” for the jurisdictional purposes, one more reason why the issue is so topical, as Dupont points out, is that ‘with the explosion of claims against states, states began to explore fresh avenues of defending the claims’.<sup>2</sup>

This paper will focus on the “objectivist” approach to defining “investment” in light of the objective criteria, established in both the ICSID jurisprudence and in the academic research.

It is necessary to make two preliminary remarks. First, this discussion makes sense if one adheres to the well-established in the ICSID jurisprudence two-fold (or double-keyhole, or double-barreled) test, which means that a transaction should fall under both the ICSID Convention’s notion of investment and that of the BIT.<sup>3</sup> It should also be noted that the usage of the word “objective” about the above-mentioned criteria is not the same as the meaning of this word in philosophy, where it is used to detect something corresponding to reality, factual, non-controversial. “Objective criteria” in this paper is used in favour of an autonomous definition of “investment” under the ICSID Convention as opposed to the subjective definition, which is derived mainly from common sense.<sup>4</sup>

## 2. Justification of the need of the objective criteria

Even among the so-called “objectivists”, i.e. those who argue that the notion of investment should have an autonomous meaning based on specific criteria, there is no agreement on how many of them should be used and which of them best characterise an investment, not to mention whether these criteria are strict like a checklist or they are merely the yardsticks to provide the arbitrators with some guidance. Nevertheless, today it seems clear from both the scholarly opinions and the ICSID tribunals’ awards that the notion of investment should have an objective definition and it should not be left exclusively to the BITs, since otherwise the whole ICSID system may be undermined.<sup>4</sup>

<sup>2</sup> Pierre-Emmanuel Dupont, ‘The Notion of ICSID Investment: ‘Ongoing Confusion’ or ‘Emerging Synthesis?’ (2011) 12 J World Investment & Trade 245, 248.

<sup>3</sup> *CSOB v The Slovak Republic* (ICSID Case No ARB/97/4) Decision of the Tribunal on Objections to Jurisdiction 24 May 1999 para 68; *Salini v Morocco* (ICSID Case No ARB/00/4) Decision on Jurisdiction 23 July 2001 paras 44, 52; *Global Trading v Ukraine* (ICSID Case No ARB/09/11) Award 1 December 2010 para 45; *CMC v Mozambique* (ICSID Case No ARB/17/23) Award 24 October 2019 paras 353, 354; Dupont (n 2) 251; Michael Hwang and Jennifer Lee Cheng Fong, ‘Definition of Investment - A Voice from the Eye of the Storm’ (2011) 1 AsianJIL 99, 102.

<sup>4</sup> *Salini v Morocco* (n 3) para 52; *Global Trading v Ukraine* (n 3) para 43; Sébastien Manciaux, ‘The Notion of Investment: New Controversies’ (2008) 9 J World Investment & Trade 443, 445; Perry S. Bechky, ‘Salini’s Nature: Arbitrators’ Duty of Jurisdictional Policing’ (2018) 17 LPICT 145, 151-152.