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Celebrating 50 Years of the VCLT: Misapplying the General Rule of Treaty Interpretation – The Salini Test

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It is well settled in the practice of ICSID tribunals that the general rule of treaty interpretation embodied in Article 31(1) of the Vienna Convention on the Law of Treaties ("Vienna Convention") applies to the interpretation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"). While the Vienna Convention does not govern the ICSID Convention directly (either because not all Contracting States of the ICSID Convention are parties to the Vienna Convention, or because the ICSID Convention entered into force in 1966, before the Vienna Convention, which entered into force in 1980), Article 31(1) of the Vienna Convention has been applied by ICSID tribunals in interpretation of the ICSID Convention on the basis that Article 31(1) is a codification of the customary international law rule on the interpretation of treaties. But while the applicability of Article 31(1) of the Vienna Convention in the interpretation of the ICSID Convention has been not a problem so far, the correct application of the general rule of treaty interpretation has been a real issue in the practice of ICSID tribunals (see also here).

One of the most relevant examples of misapplication of the general rule of treaty interpretation is the so-called *Salini* test, named after the decision rendered in 2001 in the case of *Salini v Morocco.* In deciding whether the dispute arose out of an investment for the purposes of the ICSID Convention, the *Salini* tribunal, despite the lack of a definition of investment in the ICSID Convention, laid down four elements of a purported notion of investment within the meaning of the ICSID Convention: (i) contribution; (ii) a certain duration of performance of the contract; (iii) a participation in the risks of the transaction; and (iv) the contribution to the economic development of the host State of the investment. Since 2001, except for a small number of decisions, most ICSID tribunals that had to decide on whether the dispute arose out of an investment for the purposes of the ICSID Convention followed the *Salini* test blindly, without any proper scrutiny as to whether the *Salini* test is consistent with the general rule of treaty interpretation of the Vienna Convention.

The main problem of the *Salini* test as a matter of treaty interpretation is the fact that the elements of the purported notion of investment within the meaning of the ICSID Convention confers a special meaning on the term "investment". Except for the first

element — contribution — the other three elements are an unequivocal departure from the ordinary meaning of the term "investment". They are not typical features of an investment but are elements that qualify the term "investment", and, as such, they exclude from the ICSID Convention investments that do not have a certain duration, are not subject to risk and/or do not contribute to the economic development of the host State.

Although there is nothing in the ICSID Convention that qualifies the term "investment" in such way, the *Salini* test is clearly based on the idea that it is not the object and purpose of the ICSID Convention to allow the submission of disputes arising out of any type of investment because not every investment *deserves* the *protection* afforded by the ICSID Convention but only the *protected investments*. As the arbitral tribunal considered in *Karkey Karadeniz Elektrik Uretim A.S. v Pakistan*, it is "appropriate to take into account the four elements set forth by the tribunal in the *Salini v. Morocco* case in order to identify an investment protected by the ICSID Convention".

The teleological interpretation advocated by ICSID tribunals is more obvious in relation to the contribution to the economic development of the host State, the so-called economic development requirement.

The economic development requirement was first applied in the *CSOB case*. In the decision on objections to jurisdiction of 24 May 1999, quoting the first recital of Preamble of the ICSID Convention — "[c]onsidering the need for international cooperation for economic development, and the role of private international investment therein" — the *CSOB* tribunal asserted that "[t]his language permits an inference that an international transaction which contributes to cooperation designed to promote the economic development of a Contracting State may be deemed to be an investment as that term is understood in the Convention". In other words, according to this approach, a transaction that is not an investment may qualify as an investment for the purposes of the ICSID Convention if it contributes to the economic development of a Contracting State.

In *Salini*, however, the economic development requirement was applied differently, not to expand the meaning of the term "investment" for the purposes of the ICSID Convention, but to restrict it. As pointed out by the tribunal in *Salini*, "[i]n reading the [ICSID] Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition". As the contribution to the economic development would be a "condition", an investment will not be an investment within the meaning of the ICSID Convention unless it contributes to the economic development of the host State.

But while the *CSOB* and the *Salini* tribunals adopted two different approaches towards the economic development requirement, both decisions have in common the same approach towards the interpretation of the term "investment" as the term is employed in the ICSID Convention. Both decisions conferred on the term "investment" a special meaning, in a clear departure from the ordinary meaning of the term, based on the object and purpose stated in the Preamble of the ICSID Convention, which is taken as a factor operating independently from or alternatively to the ordinary meaning of the

term “investment”, either to expand its meaning to transactions that are not investments or to restrict ICSID arbitration to disputes arising out of investments that contribute to the economic development of the host State.

The decisions of the ICSID tribunals that followed the *Salini* test show that, while the general rule of treaty interpretation is always stated to be applicable in the interpretation of the ICSID Convention without any reservation, it is not unlikely that ICSID tribunals, when required to interpret the ICSID Convention, will fail to apply the general rule of treaty interpretation consistently.

The use of the object and purpose to confer a special meaning on a term employed in an international treaty, allowing a teleological interpretation that departs from the ordinary meaning of the term is not consistent with the general rule of treaty interpretation. While treaty interpretation is the search for the intention of the parties to the treaty in order to give effect to the consent of the parties to be bound by the treaty, the general rule of treaty interpretation establishes a method in which each element plays a relevant role as a source of the parties’ intention. In accordance with Article 31(1) of the Vienna Convention, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Above all, the primary source of the intention of the parties is the actual terms employed in the treaty — the text of the treaty — which must be assumed to have been employed in accordance with its ordinary or natural meaning.

Pursuant to the general rule of treaty interpretation, a term may only be given a meaning that differs from its ordinary meaning — a special meaning — if the parties to the treaty intended to do so. In this sense, Article 31(4) of the Vienna Convention provides that “[a] special meaning shall be given to a term if it is established that the parties so intended”. But the object and purpose of a treaty may not be relied on in order to establish that the parties intended to confer a special meaning on a term. Under the general rule of treaty interpretation of the Vienna Convention, the reference to the object and purpose of a treaty — which provides for a teleological element in treaty interpretation and is also linked to the principle of effectiveness, or the principle *ut res magis valeat quam pereat* — is not an autonomous source of the intention of the parties. Its use is a second step and contingent upon the ordinary meaning of the terms and may not be used to override the text of the treaty. Article 31(1) of the Vienna Convention provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms […] in the light of its object and purpose” and not that the treaty shall be interpreted in the light of its object and purpose.

It is not, therefore, the task of ICSID tribunals to read into the ICSID Convention a special meaning of the term “investment”, even if such ICSID tribunals consider that the ICSID Convention has a special object and purpose. It always worth remembering that, as the International Court of Justice observed in the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* case, “[i]t is the duty of the Court to interpret the Treaties, not to revise them”.

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