

THE 'SUSTAINABLE' MEANING OF THE NOTION OF INVESTMENT IN INVESTMENT ARBITRATION

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Abstract: The article tackles the question of whether there are any grounds in investment arbitration for ascribing a 'sustainable' meaning to the notion of investment. It begins with the observation that sustainable development has become increasingly more present in investment treaties. It then carries out an in-depth analysis of the scope of references to sustainable development in preambles and definitions of investment in investment treaties. The analysis allows to indicate as many as seven different approaches to defining the notion of investment with or without the use of references to sustainable development. The results of the analysis are compared with the current approach of arbitral jurisprudence to the interpretation of the notion of investment. Particular attention is given to the *Salini* element of contribution of an investment to the economic development of the host state, which could be modified into the element of contribution to sustainable development. The article's main argument is that sustainable development exerts only minimum influence on the interpretation of the notion of investment in investment arbitration. The article proposes interpretative aids that could ensure greater presence of sustainable development in interpretation of the notion of investment.

Resumé: Článek se zabývá otázkou, zda v investiční arbitráži existují důvody pro přisuzování „udržitelného“ významu pojmu investice. Začíná konstatováním, že udržitelný rozvoj se v investičních smlouvách stále více objevuje. Poté provádí hloubkovou analýzu rozsahu odkazů na udržitelný rozvoj v preambulích a definicích investic v investičních smlouvách. Analýza umožňuje naznačit až sedm různých přístupů k definování pojmu investice s použitím odkazů na udržitelný rozvoj nebo bez nich. Výsledky analýzy jsou porovnány se současným přístupem arbitrážní judikatury k interpretaci pojmu investice. Zvláštní pozornost je věnována *Saliniho* testu příspěvku investice k hospodářskému rozvoji hostitelského státu, který by mohl být modifikován na prvek příspěvku k udržitelnému rozvoji. Hlavním argumentem článku je, že udržitelný rozvoj má pouze minimální vliv na interpretaci pojmu investice v investiční arbitráži. Článek navrhuje interpretační pomůcky, které by mohly zajistit větší zastoupení udržitelného rozvoje ve interpretaci pojmu investice.

Key words: investment arbitration; investment treaties; sustainable development; the notion of investment; ICSID Convention; the *Salini* test; contribution of an investment to the economic development of the host state; *quid pro quo* of investment arbitration; *jurisprudence constante*; jurisdiction *ratione materiae*; legitimacy crisis

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1. Introductory remarks

Sustainable development has become increasingly more present in investment law and arbitration.¹ Although the relationship between investment arbitration and sustainable development has been the subject of a lively debate in recent years², little attention has been given to the interplay between sustainable development and the notion of investment. The present article examines whether sustainable development may be of relevance by the interpretation of the notion of investment in investment arbitration.

The article proceeds as follows. Section Two examines the character of the notion of investment as one of the most contentious issues of investment arbitration, actively contributing to its legitimacy crisis. It then describes focal points of the current reform of investment arbitration, characterized by narrowing the scope of the definitions of investment and frequent incorporation of sustainable development into the texts of investment treaties. These preliminary remarks constitute the starting point for the detailed analysis of the scope of references to sustainable development in preambles to investment treaties and definitions of investment, undertaken within Section Three with the aim of identifying provisions, under which an investment should contribute to the economic or sustainable development of the host state. Section Four assesses the scope, in which contribution of an investment to the economic development of the host state, as the element of the *Salini* test³, is applied in investment arbitration. Section Five merges the outcomes of the research undertaken within Sections Three and Four and purports to analyse whether there are any grounds in investment arbitration for interpreting the notion of investment as requiring the contribution to sustainable development of the host state. The article ends with conclusions.

2. The ambiguity of the notion of investment and the reform of investment arbitration

The notion of investment remains one of the core concepts of investment arbitration as a basis for jurisdiction *ratione materiae* of investment tribunals.⁴ For years, the meaning

¹ ORTINO, Federico, 'Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing' (2017) 30 *Leiden Journal of International Law* 71; MUCHLINSKI, Peter, 'Negotiating New Generation International Investment Agreements. New Sustainable Development Oriented Initiatives' in HINDELANG, Steffen, KRAJEWSKI, Marcus (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (OUP 2016) 41; NEWCOMBE, Andrew, 'Sustainable Development and Investment Treaty Law' (2007) 8 *Journal of World Investment & Trade* 357.

² See, among many, EMMERT, Frank, ESENKULOVA, Begaiym, 'Why Can't We Be Friends? Protecting Investors While Also Protecting Legitimate Public Interests and the Sustainable Development of Host Countries in Investor-State Arbitration' (2019) 48 *Texas Journal of Business Law* 48.

³ The test for the existence of an investment, adopted by the ICSID arbitral tribunal in the *Salini v. Morocco* Decision on jurisdiction, consisting of four elements: contribution to an investment, a certain duration of an investment, participation in the risks of an investment and contribution of an investment to the economic development of the host state. See *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on jurisdiction (21 July 2001) para 52.

⁴ WAIBEL, Michael, 'Subject matter jurisdiction: the notion of investment (2021) 19 *ICSID Reports* 25, 26; DOLZER, Rudolf, SCHREUER, Christoph, *Principles of International Investment Law* (2nd edn OUP 2022) 83. Apart from jurisdictional issues, the notion of investment can be relied upon in relation to material standards of investment protection, such as fair and equitable treatment (FET) or most-favoured-nation (MFN) treatment. See DOUGLAS, Zachary, 'Property, Investment, and the Scope of Investment Protection Obligations' in

of the notion of investment has become one of the most disputed issues in investment arbitration.⁵ This phenomenon can be explained by multiple factors.

First, it should be recalled the silence of the ICSID Convention⁶ on the meaning of the notion of investment⁷, as a result of which the question of what constitutes an 'investment' under Article 25(1) of ICSID Convention has arisen to become one of the most controversial issues of the ICSID jurisprudence since at least mid 1990s.⁸ Following the arbitral decisions in *Fedax*⁹ and *Salini*¹⁰, divergent decisions of ICSID arbitral tribunals have been issued and at least two different approaches ('objective' and 'subjective') can be identified.¹¹

Second, uncertainty on the meaning of the notion of investment is generated by the broadness and diversity of the definitions of investment in investment treaties, which differ

DOUGLAS, Zachary, PAUWELYN, Joost, VIÑUALES, Jorge Enrique, *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 364–365.

⁵ *Addiko Bank AG v. Montenegro*, ICSID Case No ARB/17/35, Award (24 November 2021) para 310.

⁶ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966), International Centre for Settlement of Investment Disputes, April 2006 <<https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf>> accessed 27 September 2024 (ICSID Convention).

⁷ BROCHES, Aron, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1972) 136 *Collected Courses of the Hague Academy of International Law* 340–341. The silence of the ICSID Convention is sometimes interpreted as an intentional omission. See DELAUME, Georges, 'Convention on the Settlement of Investment Disputes Between States and Nationals of Other States' (1966) 1 *International Lawyer* 64, 70; ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1968, reprinted in 2006) II-2, 821–822; MORTENSON, Julian Davis, 'The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law' (2010) 51 *Harvard International Law Journal* 257, 289–290.

⁸ DEL-GLIGOR, Katharina, *Towards Consistency in International Investment Jurisprudence. A Preliminary Ruling System for ICSID Arbitration* (Brill Nijhoff 2017) 209.

⁹ *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (11 July 1997) para 4. Since it was the *Fedax* Decision on jurisdiction that first formulated the criteria for the existence of an investment in arbitral jurisprudence, the *Salini* test, as noticed by *Brigitte Stern*, might be better named as the *Fedax* test. See STERN, Brigitte, 'The Contours of the Notion of Protected Investment' (2009) 24 *ICSID Review* 534, 536.

¹⁰ See n. 3.

¹¹ On various approaches to interpretation of the notion of investment see among many: BEN HAMIDA, Walid, 'Two Nebulous ICSID Features: The Notion of Investment and the Scope of Annulment Control. Ad Hoc Committee's Decision in Patrick Mitchell v. Democratic Republic of Congo' (2007) 24 *Journal of International Arbitration* 287, 289–291; GAILLARD, Emmanuel, 'Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice' in BINDER, Christina, KRIEBAUM, Ursula, REINISCH, August, WITTICH, Stephan (eds), *International Investment Law for the 21st Century – Essays in Honour of Christoph Schreuer* (OUP 2009) 403, 405–411; STERN (n 9) 535–541; HO, Jean, 'The Notion of ICSID Investment: Ongoing "Confusion" or "Emerging Synthesis"?' (2010) 26 *Arbitration International* 633, 638–644; LEGUM, Barton, MOUAWAD, Caline, 'The meaning of "investment" in the ICSID Convention' in BEKKER, Pieter H. F., DOLZER, Rudolf, WAIBEL, Michael (eds), *Making Transnational Law Work in the Global Economy. Essays in Honour of Detlev Vagts* (CUP 2010) 326, 329–333; MORTENSON (n 7) 269–278; DUPONT, Pierre-Emmanuel, 'The Notion of ICSID Investment: Ongoing "Confusion" or "Emerging Synthesis"?' (2011) 12 *Journal of World Investment & Trade* 245, 253–257; SHAN, Wenhua, WANG, Lu, 'The Concept of "Investment": Treaty Definitions and Arbitration Interpretations' in CHAISSE, Julien, CHOUKROUNE, Leila Delphine, JUSOH, Sufian (eds), *Handbook of International Investment Law and Policy* (Springer 2021) 23, 32–37; CHAN, Darius, LAI, Justin, 'Two decades after Salini v Morocco: the case for retaining the Salini test with modifications' (2023) 39 *Arbitration International* 63.

significantly and most often do not provide a clear guidance as to the scope of protected investments. While most of these definitions still apply the broad, ‘asset-based’ approach,¹² there exist various other approaches, including enterprise-based and circular definitions of investment.¹³

Third, in arbitral jurisprudence and literature still exist unresolved questions about the classification of specific economic activities, assets and rights as investments, including portfolio investments¹⁴, sovereign bonds¹⁵, and commercial transactions.¹⁶ Recently, new questions have arisen about the qualification of investments as intellectual property rights¹⁷, digital assets¹⁸, tradable carbon emission credits¹⁹ or arbitral awards²⁰.

The unresolved questions of the interpretation of the notion of investment raise legitimacy concerns, adds to the backlash against investment arbitration²¹ and, consequently, to the

¹² FRANCK, Susan D., ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions’ (2005) 73 *Fordham Law Review* 1521, 1533–1534; SHAN and WANG (n 11) 25.

¹³ On different approaches adopted in the definitions of investment in investment treaties see QI, Huan, ‘The Definition of Investment and Its Development: For the Reference of the Future BIT between China and Canada’ (2011) 45 *Revue Juridique Themis* 541, 552–554; SHAN and WANG (n 11) 25–32; SALACUSE, Jeswald W., *The Law of Investment Treaties* (OUP 2021) 207–220; WAIBEL (n 4) 31–32.

¹⁴ SORNARAJAH, Muthucumaraswamy, ‘Portfolio Investments and the Definition of Investment’ (2009) 24 *ICSID Review* 516; DEKASTROS, Michail, ‘Portfolio Investment: Reconceptualising the Notion of Investment under the ICSID Convention’ (2013) 14 *Journal of World Investment & Trade* 286; RISSO, Giorgio, ‘Portfolio Investment in ICSID Arbitration: Just a Matter of Consent?’ (2020) 37 *Journal of International Arbitration* 341.

¹⁵ MONTANARO, Francesco, ‘Poštova Banka SA and Istrokapital SE v Hellenic Republic. Sovereign Bonds and the Puzzling Definition of “Investment” in International Investment Law’ (2015) 30 *ICSID Review* 549; NAKAJIMA, Kei, ‘Parallel Universes of Investment Protection? A Divergent Finding on the Definition of Investment in the ICSID Arbitration on Greek Sovereign Debts’ (2016) 15 *The Law & Practice of International Courts and Tribunals* 472; ORTOLANI, Pietro, ‘Are Bondholders Investors? Sovereign Debt and Investment Arbitration after Poštova’ (2017) 30 *Leiden Journal of International Law* 383.

¹⁶ PAHIS, Stratos, ‘Investment Misconceived: The Investment Commerce Distinction in International Investment Law’ (2020) 45 *The Yale Journal of International Law* 69.

¹⁷ MERCURIO, Bryan, ‘Awakening the Sleeping Giant: Intellectual Property Rights in International Investment Agreements’ (2012) 15 *Journal of International Economic Law* 871; ARAGON, Michael, ‘The Expanding Concept of Investment Provides for Transnational Enforcement of Patent Rights under Investment Agreements – An Analysis through the Lens of Reasoning in Relevant Arbitral Awards’ (2020) 42 *Houston Journal of International Law* 573.

¹⁸ HORVÁTH, Enikő, KLINKMÜLLER, Severin, ‘The Concept of “Investment” in the Digital Economy: The Case of Social Media Companies’ (2019) 20 *Journal of World Investment & Trade* 577–617; ENGFELDT, Helena, ‘Should ICSID go Gangnam style in light of non-traditional foreign investments including those spurred on by social media? Applying an industry-specific lens to the Salini test to determine Article 25 jurisdiction’ (2014) 32 *Berkeley Journal of International Law* 44.

¹⁹ BENNET, Lisa, ‘Are tradable carbon emission credits investments? Characterization and ramifications under international investment law’ (2010) 85 *New York University Law Review* 1581.

²⁰ MISTELIS, Loukas A., ‘Award as an Investment: The Value of an Arbitral Award or the Cost of Non-Enforcement’ (2013) 28 *ICSID Review* 64.

²¹ On the backlash against investment arbitration see: WAIBEL, Michael, KAUSHAL, Asha, CHUNG, Kyo-Hwa, BALCHIN, Claire (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010); LANGFORD, Malcolm, BEHN, Daniel, FAUCHALD, Ole Kristian, ‘Backlash and State Strategies in International Investment Law’ in AALBERTS, Tanja (ed), *The Changing Practices of International Law* (CUP 2018) 70; LINDSETH, Peter L., ‘Theorizing Backlash: Supranational Governance and International Investment Law and Arbitration in Comparative Perspective’ (2020) 21 *Journal of World Investment & Trade* 34.

legitimacy crisis of this arbitration.²² Lack of coherence of investment jurisprudence leads to jurisprudence scholarship to suggest a small capability of investment tribunals to respond to the critique against the system of investment arbitration in the area of the definition of investment.²³

To overcome the legitimacy crisis of investment arbitration, the attempts to reform investment treaties have been made. The main point of the present reform of investment treaties is to narrow the scope of investment protection, while broadening the regulatory space for states²⁴, to overcome the negative effect of investment treaty protection on the exercise of regulatory powers by states, called 'regulatory chill'²⁵. Within the reform, several provisions have been introduced into investment treaties that move towards warranting the 'right to regulate' of states.²⁶ Frequent incorporation of the right to regulate into investment treaties means that such issues as health, environmental protection and human rights have been brought to the front of the investment treaties' debate²⁷. This trend leads to the departure from the foundation of investment arbitration, called *quid pro quo* of investment arbitration²⁸ or bargain between states²⁹, under which investment protection is granted

²² On the legitimacy crisis of investment arbitration see FRANCK (n 12) 1582–1587; SCHNEIDERMAN, David, 'Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?' (2011) 2 *Journal of International Dispute Settlement* 471, 471–476; KULICK, Andreas, 'Reassertion of Control: An introduction' in KULICK, Andreas (ed), *Reassertion of Control over the Investment Treaty Regime* (CUP 2016) 3, 3–6; GALÁN, Alexis, 'The Search for Legitimacy in International Law: The Case of the Investment' (2019) 43 *Fordham International Law Journal* 79, 92–102. On the areas, within which the legitimacy crisis manifests itself, see BEHN, Daniel, FAUCHALD, Ole Kristian, LANGFORD, Malcolm, 'Introduction: The Legitimacy Crisis and the Empirical Turn' in BEHN, Daniel, FAUCHALD, Ole Kristian, LANGFORD, Malcolm (eds), *The Legitimacy of Investment Arbitration. Empirical Perspectives* (CUP 2022) 1, 4–12.

²³ VAN HARTEN, Gus, *Investment Treaty Arbitration and Public Law* (OUP 2007) 251; LANGFORD, BEHN, FAUCHALD (n 22) 22–23.

²⁴ BROUDE, Tomer, HAFTEL, Yoram Z., THOMPSON, Alexander, 'Legitimation through Modification: Do States Seek More Regulatory Space in Their Investment Agreements?' in BEHN, Daniel, FAUCHALD, Ole Kristian, LANGFORD, Malcolm (eds), *The Legitimacy of Investment Arbitration. Empirical Perspectives* (CUP 2022) 531, 531.

²⁵ SCHILL, Stephan, 'Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?' (2007) 24 *Journal of International Arbitration* 469, 470; TIENHAAARA, Kyla, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in BROWN, Chester, MILES, Kate (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011) 606, 606; BONNITCHA, Jonathan, *Substantive protection under Investment Treaties* (CUP 2014) 113–114; BONNITCHA, Jonathan, SKOVGAARD POULSEN, Lauge N., WAIBEL, Michael, *The Political Economy of the Investment Treaty Regime* (OUP 2017) 238–243.

²⁶ On the relationship between right to regulate and the scope of investment protection see TITI, Catharine, *Right to regulate in International Investment Law* (Brill Nijhoff 2014) 35–40. On investment treaty provisions, which affirm that states retain the right to regulate see PAINE, Joshua, 'Autonomy to Set the Level of Regulatory Protection in International Investment Law' (2021) 70 *International and Comparative Law Quarterly* 697, 716–722.

²⁷ DUGGAL, Kabir, RANGACHARI, Rekha, GUPTA, Kanika, 'Consequences of crisis and the great re-think: COVID-19's impact on energy investment, sustainability and the future of international investment agreements' (2021) 14 *Journal of World Energy Law and Business* 133, 135–136.

²⁸ DOUGLAS, Zachary, *The International Law of Investment Claims* (CUP 2011) 135–136; DOLZER and SCHREUER (n 4) 26–27.

²⁹ SALACUSE, Jeswald W., SULLIVAN, Nicholas P., 'Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (2005) 46 *Harvard International Law Journal* 67, 77; KAUSHAL, Asha, 'Revisiting History: How The Past Matters For The Present Backlash Against The Foreign Investment Regime' (2009) 50 *Harvard International Law Journal* 491, 491 and 508; SALACUSE, Jeswald W., 'The Emerging Global Regime for Investment' (2010) 51 *Harvard International Law Journal* 428, 440–441; ORTINO, Federico,

to investors in exchange for inflow of investments³⁰ that should contribute to economic development of host states.³¹ Under *quid pro quo* of investment arbitration, investment protection is inextricably linked with economic development³², which has been reflected in the text of Preamble to ICSID Convention³³ and in preambular references to economic development in numerous investment treaties.³⁴ It has been noticed that incorporation of ‘economic development’ into the preambles to investment treaties constitutes today an ‘almost standard treaty language’.³⁵

The other notable dimension of the reform of investment treaties is frequent use in investment treaties of recourses to sustainable development.³⁶ The role of foreign direct investment in implementation of sustainable development agenda has been immensely important.³⁷ Although the first investment treaty to mention sustainable development was Costa Rica–the Netherlands BIT of 1999³⁸, consecutive generations of investment treaties did not contain any express references to sustainable development, even in their preambles.³⁹ Although in BITs concluded in early 2000, there appeared preambular references to non-

‘Refining the Content and Role of Investment ‘Rules’ and ‘Standards’: A New Approach to International Investment Treaty Making’ (2013) 28 *ICSID Review* 152, 154; PAUWELYN, Joost, ‘At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed’ (2014) 29 *ICSID Review* 372, 416.

³⁰ Basically, from capital-importing states. See ROBERTS, Anthea, ‘Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System’ (2013) 107 *American Journal of International Law* 45, 76.

³¹ By this assumption, investment protection was never the only object and purpose of investment treaties. In fact, the terms ‘prosperity’ and ‘development’ of states-parties to investment treaties were always relevant terms in the identification the treaties’ long-term purposes. Cf ORTINO (n 1) 77; CHI, Manjiao, *Integrating Sustainable Development in International Investment Law. Normative Incompatibility, System Integration and Governance Implications* (Routledge 2018) 16–17.

³² In 2007, it was noticed by Andrew Newcombe that investment treaties regularly referred to ‘favourable conditions’ or a ‘stable framework’ for investment and linked this framework to economic development. See NEWCOMBE (n 1) 364.

³³ It is the very first sentence of the Preamble to the ICSID Convention that states as follows: ‘*Considering the need for international cooperation for economic development, and the role of private international investment therein*’.

³⁴ See preamble to Ecuador–United States of America Bilateral Investment Treaty (signed 27 August 1993, entered into force 11 May 1997), <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1065/download>> accessed 30 September 2025.

³⁵ CHI (n 31) 17. On the evolution of preambular references to development in investment treaties, see OLAOYE, Kehinde Folake, SORNARAJAH, Muthucumaraswamy, ‘Domestic Investment Laws, International Economic Law, and Economic Development’ (2013) 22 *World Trade Review* 109, 111–121.

³⁶ JOHNSON, Lise, SACHS, Lisa, LOBEL, Nathan, ‘Aligning International Investment Agreements with the Sustainable Development Goals’ (2019) 58 *Columbia Journal of Transnational Law* 58, 81–94; SCHACHERER, Stefanie, *Sustainable Development in EU Foreign Investment Law* (Brill Nijhoff 2021) 41–44; MEKONNEN, Seid Demeke, ‘The Emergence of a Sustainable Development-Friendly Model Bilateral Investment Treaties and Its Lesson for Least-Developed Countries’ (2023) 20 *Manchester Journal of International Economic Law* 144, 151–156.

³⁷ LAUTERPACHT, Elihu, ‘Foreword’ in CORDONIER SEGGER, Marie-Claire, GEHRING, Markus W., NEWCOMBE, Andrew (eds), *Sustainable Development in World Investment Law* (Wolters Kluwer International 2011), lxix.

³⁸ As identified by FAUCHALD, Ole Kristian, ‘International investment law in support of the right to development?’ (2021) 34 *Leiden Journal of International Law* 181, 189.

³⁹ As noticed by MUCHLINSKI (n 1) 46: ‘*the preambles of first generation IIAs have tended to be short with emphasis on the primary goal of investment stability or favourable conditions for investment and cooperation rather than wider sustainable development goals*’.

economic aspects, such as social and environmental ones, express references to sustainable development were rather rare.⁴⁰ Obviously, references to 'economic development' or 'development' were common in investment treaties,⁴¹ but they were understood as economic in nature, which remained in line with *quid pro quo* of investment arbitration.

Today's shift towards greater presence of states' interests in investment treaties together with greater openness on different (environmental, labour, social etc.) interests brings sustainable development to the centre of attention of investment treaties and, consequently, investment arbitration. Nevertheless, the question of whether investment arbitration should serve sustainable development remains still unresolved.⁴² Investment treaties do not bring any unambiguous answers. Although it is noticed that provisions of investment treaties relating to sustainable development are increasingly more often incorporated into treaties' preambles,⁴³ the pace of these changes is still relatively slow. The OECD study of 2014 evidenced that while inclusion of sustainable development has become a dominant treaty practice present in more than three-fourths of investment treaties concluded between 2008 and 2014, the overwhelming majority of 88% investment treaties still did not contain any reference to sustainable development.⁴⁴ More recent studies does not reveal any breakthrough in this respect. The United Nations Conference on Trade and Development (UNCTAD) study of 2022 indicates that of 224 investment treaties concluded since the adoption of the Sustainable Development Goals Agenda by the UN General Assembly in 2015, only 31% include provisions addressing the sustainable development goals directly.⁴⁵ Similarly, the analysis of ASEAN investment treaties performed in 2022 reveals that still only 26% of these treaties contain any reference to sustainability issues.⁴⁶ Nevertheless, the trend of incorporating sustainable development into the texts of investment treaties is visible and cannot be ignored.

The reform of investment treaties has multiple dimensions, since narrowing the scope of investment protection manifests itself also in adopting restrictive definitions of investment in investment treaties. As a result, definitions of investment in recently concluded investment

⁴⁰ An example is the preamble to Canada Model BIT of 2004 <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2820/download>> accessed 30 September 2025. See LEVASHOVA, Yulia, 'Role of sustainable development in Bilateral Investment Treaties: recent trends and developments' (2011) 1 *Journal of Sustainable Finance & Investment* 222, 225. More on preambular references to sustainable development see: BALTAG, Crina, DAUTAJ, Ylli, *Investors, States, and Arbitrators in the Crosshairs of International Investment Law and Environmental Protection* (Brill Nijhoff 2020) 16–18.

⁴¹ See Preamble to Germany–Tanzania BIT (signed 30 January 1965, entered into force 12 July 1968) <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1426/download>> accessed 30 September 2025: 'Recognizing that encouragement and contractual protection of such Investments are apt to stimulate private business initiative and to increase the prosperity of both nations'.

⁴² FAUCHALD (n 38) 181.

⁴³ CORDONIER SEGGER, Marie-Claire, *Crafting Trade and Investment Accords for Sustainable Development* (OUP 2021) 176–183.

⁴⁴ GORDON, Kathryn, POHL, Joachim, BOUCHARD, Marie, 'Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey' (2014) 1 OECD Working Paper on International Investment, 5.

⁴⁵ United Nations Human Rights Council, Expert Mechanism on the Right to Development, 'Right to development in international investment law. Overview of the ongoing study by the Expert Mechanism on the Right to Development', Fifth session, 9–11 March 2022, para 12.

⁴⁶ MCLAUGHLIN, Mark, 'Mapping Sustainable Development in Investment Treaties: An Analysis of ASEAN States' Practice' (2022) 17 *Asian Journal of WTO and International Health Law and Policy* 115, 131.

treaties often exclude from their scope specific categories of investment, such as portfolio investments⁴⁷ or commercial contracts.⁴⁸ These limitations, though introduced without any express references to sustainable development, are perceived as ‘development-friendly’⁴⁹, which corresponds with the trend of incorporating sustainable development into investment treaties.

Considering the identified directions of the present reform of investment arbitration, the primary question to be answered within the following sections of the present article is whether the definitions of investment in investment treaties are becoming more akin to sustainable development. More specifically, is sustainable development introduced into the definitions of investment, or at least into the preambles to investment treaties?

Further question to be answered is whether the identified trends in investment treaty making have a bearing on arbitral jurisprudence? Is arbitral jurisprudence on the notion of investment becoming more sustainable-friendly? Especially, has the *Salini* element of contribution to the economic development of the host state been transformed into an element of contribution to sustainable development?

3. Are preambles and definitions of investment in investment treaties becoming more akin to sustainable development?

The aim of the present section of the article is to examine whether the current trends in investment treaty making lead to the greater presence of sustainable development in preambles and definitions of investments in investment treaties. As relevant for the analysis there were considered investment treaties concluded between 2014 and 2023.⁵⁰ The date of 2014 was identified as the first year, when an express reference to sustainable development was incorporated into the text of the definition of investment in an investment treaty.⁵¹ On the grounds of the outcome of the research, the examined treaties were divided into seven groups. The identified groups were listed from these which contain no references to sustainable development to these which include such references both in their preambles and definitions of investment. Additionally, the use of the elements of the *Salini* test in investment treaties were examined with the aim of finding whether there exists any

⁴⁷ Iran–Slovakia Bilateral Investment Treaty (signed 19 January 2016, entered into force 30 August 2018) art. 1(2) <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3601/download>> accessed 30 September 2025; Belarus–India Bilateral Investment Treaty (signed 24 September 2018, entered into force 5 March 2020) art. 1(4) <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5724/download>> accessed 30 September 2025. Cf ACCONCI, Pia, ‘The “Unexpected” Development-Friendly Definition of Investment in the 2013 Resolution of the Institut de Droit International’ (2013) 23 *Italian Yearbook of International Law* 69, 82; WAIBEL (n 4) 32–35; FAUCHALD (n 38) 189.

⁴⁸ Burkina Faso–Turkey BIT (signed 11 April 2019) art. 1(1) <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6087/download>> accessed 30 September 2025.

⁴⁹ ACCONCI, Pia, ‘Sustainable Development and Investment: Trends in Law-Making and Arbitration’ in GATTINI, Andrea, TANZI, Attila, FONTANELLI Filippo (eds), *General Principles of Law and International Investment Arbitration* (Brill Nijhoff 2018) 290, 317–318.

⁵⁰ See, however, OLAOYE and SORNARAJAH (n 35) 122, who identify the 2015 as a commencement of the period of reform of international investment law entailing the shift towards sustainable economic development.

⁵¹ Egypt–Mauritius Bilateral Investment Treaty (signed 25 June 2014, entered into force 17 October 2014) art. 1(1) <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3285/download>> accessed 30 September 2025.

correlation between the use of sustainable development and the elements of the *Salini* test, especially whether the *Salini* element of contribution to economic development has been transformed into the element of contribution to sustainable development. As a result, it has been proposed a classification consisting of seven groups of investment treaties that enables a comparison of different approaches to the incorporation of sustainable development into the texts of preambles and definitions of investments in investment treaties.

The first and relatively small group of investment treaties identified within the research includes these, in which no references to the elements of the *Salini* test and sustainable development are present, neither in the texts of preambles, nor in definitions of investment. The examples are Hungary–United Arab Emirates BIT of 2021⁵² and Bahrain–Japan BIT of 2022,⁵³ in which traditional, broad definitions of investment with the use of the formulation ‘every kind of asset’ were adopted.

The second group includes investment treaties, which also do not introduce any references to sustainable development in their preambles and definitions of investment, but, contrary to the first group, apply the three-elementary versions of the *Salini* test, which follows the emerging, at least in ICSID arbitration, *jurisprudence constante* on the notion of investment.⁵⁴ Characteristically, the *Salini* test is applied without the element of contribution to the economic development of the host state. To this group belong treaties concluded recently in the Asia–Pacific Region, including Australia–Japan Economic Partnership Agreement (JAIPA) of 2014⁵⁵, Australia–China Free Trade Agreement (ChAFTA) of

⁵² Hungary–United Arab Emirates Bilateral Investment Treaty (signed 15 July 2021, entered into force 10 April 2021) art. 1(1) <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6423/download>> accessed 30 September 2025.

⁵³ See Bahrain–Japan Bilateral Investment Treaty (signed 23 June 2022, entered into force 6 September 2023) art. 1(a) <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6431/download>> accessed 30 September 2025.

⁵⁴ See ICSID arbitral decisions in: *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/09/2, Award (31 October 2012) para 295; *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No ARB/09/8, Award (17 October 2013) para 170; *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No ARB/14/1, Award (16 May 2018) para 199; *Rasia FZE and Joseph K. Borkowski v. Republic of Armenia*, ICSID Case No ARB/18/28, Award (20 January 2023) paras 374–376. Cf STERN, Brigitte, Dissenting Opinion to *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru Award* (6 December 2022) paras 77–78. See also VARGIU, Paolo, ‘Beyond Hallmarks and Formal Requirements: A Jurisprudence Constante on the Notion of Investment in the ICSID Convention’ (2009) 10 *Journal of World Investment & Trade* 753, 767–768; GAILLARD, Emmanuel, BANIFATEMI, Yas, ‘The Long March towards a Jurisprudence Constante on the Notion of Investment: *Salini v. Morocco*, ICSID Case No ARB/00/4’ in KINNEAR, Meg, FISCHER, Geraldine R., MINGUEZ ALMEIDA, Jara, TORRES, Luisa Fernanda, URAN BIDEGAIN, Mairée (eds), *Building International Investment Law: The First 50 Years of the ICSID Convention* (Kluwer Law International 2015) 97, 116–123; MUSURMANOV, Ilyas, ‘The Implications of *Romak v Uzbekistan* for Defining the Concept of Investment’ (2013) 20 *Australian International Law Journal* 105, 125.

⁵⁵ Australia–Japan Economic Partnership Agreement (signed 8 July 2014, entered into force 15 January 2015) art. 14(2)(f) <<https://www.dfat.gov.au/trade/agreements/in-force/jaepa/full-text/Pages/full-text-of-jaepa>> accessed 30 September 2025.

2015⁵⁶ and Association of South–East Asian Nations (ASEAN)–Hong Kong and China SAR Investment Agreement of 2017⁵⁷.

In the third group of investment treaties, lack of any reference to sustainable development in the texts of preambles and definitions of investment is ‘compensated’ by the strong emphasis being put on the economic development as one of the main purposes of the treaty. References to economic development are present both in the preambles to these treaties and in the definitions of investment, which incorporate the expanded versions of the *Salini* test, including the element of contribution to the economic development of the host state. This group encompasses significant number of investment treaties concluded as of 2016 by Türkiye, ranging from Jordan–Turkey BIT of 2016⁵⁸ to Türkiye–Uruguay BIT of 2022.⁵⁹ Incorporation of a binding criterion of the contribution to the economic development of the host state into the definition of investment constitutes a new phenomenon in investment treaty making⁶⁰ and a departure from the prevailing arbitral jurisprudence, which perceive the element of contribution to economic development rather as a non-binding criterion.⁶¹

The following groups of investment treaties, as opposed to the ones discussed so far, do contain express references to sustainable development in their preambles. Among these groups, fourth group appears to be the largest. It includes these investment treaties, in which preambular references to sustainable development are not accompanied by the use of the elements of the *Salini* test in the definitions of investment. Consequently, no references to economic development or sustainable development are present in the definitions of investment. This group has been constantly growing.⁶² As evidenced by UNCTAD International Investment Agreements Mapping Project, out of 77 investment treaties mapped by UNCTAD that refer to sustainable development in their preambles, only 32 treaties lists required characteristics of investment in their definitions of investment.⁶³ This

⁵⁶ Australia–China Free Trade Agreement (signed 17 June 2015, entered into force 20 December 2015) art. 9(1)(d) <<https://www.dfat.gov.au/trade/agreements/in-force/chafta/official-documents/Pages/official-documents>> accessed 30 September 2025.

⁵⁷ Association of South–East Asian Nations (ASEAN)–Hong Kong and China SAR Investment Agreement (signed 12 November 2017, entered into force 17 June 2019) art. 1(e) <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5655/download>> accessed 30 September 2025.

⁵⁸ Jordan–Turkey Bilateral Investment Treaty (signed 27 March 2016) art. 1(1) <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6097/download>> accessed 30 September 2025.

⁵⁹ Türkiye–Uruguay Bilateral Investment Treaty (signed 23 April 2022) art. 1(2) <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6430/download>> accessed 30 September 2025.

⁶⁰ UNCTAD, ‘Taking stock of IIA reform: recent developments, IIA Issues Note. International Investment Agreements’ (2019) <https://unctad.org/system/files/official-document/diaepcbinf2019d5_en.pdf> accessed 30 September 2025: ‘It is worth highlighting a number of innovative features included in IIAs in 2018. These features either go beyond traditional reform-oriented clauses, have rarely been encountered in earlier IIAs and/or break new ground: Conditioning treaty coverage on the economic contribution of the investment to the host State economy, by including this requirement in the definition of investment’.

⁶¹ See Section Four.

⁶² It has been noticed that several recent investment treaties only incorporate the purpose of promoting sustainable development into their preambles without amending the traditional substantive and procedural provisions. See ZAGEL, Gudrun Monika, ‘Achieving Sustainable Development Objectives in International Investment Law’ in CHAISSE, Julien, CHOUKROUNE, Leïla, JUSOH, Sufian (eds), *Handbook of International Investment Law and Policy* (Springer 2021) 1, 16.

⁶³ UNCTAD, Mapping of IIA Content <<https://investmentpolicy.unctad.org/international-investment-agreements/ii-mapping>> accessed 30 September 2025.

means that the examined group could encompass more than the half of all treaties (40 out of 77), in which preambular references to sustainable development are present. In other words, it could contain the number of treaties exceeding the total number of treaties belonging to the remaining groups encompassing treaties with preambular references to sustainable development (numbered from 5 to 7). The examples of investment treaties belonging to the fourth group are Brazil–Mexico BIT of 2015⁶⁴ and Central African Republic–Rwanda BIT of 2019.⁶⁵

The fifth group encompasses these investment treaties, which merge preambular references to sustainable development with the shortened, three-elementary version of the *Salini* test in the definitions of investment. Contrary to the emerging arbitral jurisprudence, in which only the elements of contribution to investment, duration and risk are applied⁶⁶, in the examined investment treaties the element of duration is often replaced by the element of expectation of gain or profit.⁶⁷ Importantly, definitions of investment does not introduce the element of contribution to the economic or sustainable development of the host state, despite their preambular references to sustainable development. Presented group encompasses constantly widening range of investment treaties, including China–Korea FTA of 2015⁶⁸, PACER Plus of 2017⁶⁹, USMCA of 2018⁷⁰, The Netherlands Model BIT of 2019⁷¹, Regional Comprehensive Economic Partnership (RCEP) of 2020⁷² and New Zealand–United Kingdom FTA of 2022.⁷³ To this group belongs also Hungary–Oman BIT of 2022.⁷⁴

⁶⁴ Brazil–Mexico Bilateral Investment Treaty (signed 26 May 2015, entered into force 7 October 2018) art. 3(1)(2) <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4718/download>> accessed 30 September 2025.

⁶⁵ Central African Republic–Rwanda Bilateral Investment Treaty (signed 15 October 2019) art. 1 <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6428/download>> accessed 30 September 2025.

⁶⁶ See n. 54.

⁶⁷ See China–Korea Republic Free Trade Area (signed 1 June 2015, entered into force 20 December 2015) art. 12(1) <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3461/download>> accessed 30 September 2025: *'investment means every kind of asset that an investor owns or controls, directly or indirectly, which has the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk'*.

⁶⁸ Ibid.

⁶⁹ The Pacific Agreement on Closer Economic Relations (PACER) Plus (signed 14 June 2017, entered into force 13 December 2020) art. 9(1) <<https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/pacer-plus/pacer-plus-text-and-resources/>> accessed 30 September 2025.

⁷⁰ Agreement between the United States of America, the United Mexican States, and Canada (signed 30 November 2018, entered into force 1 July 2020) art. 14(1) <<https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>> accessed 30 September 2025.

⁷¹ The Netherlands Model Bilateral Investment Treaty (adopted 22 March 2019) art. 1(2) <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download>> accessed 30 September 2025.

⁷² Regional Comprehensive Economic Partnership Agreement (signed 15 November 2020, entered into force 1 January 2022) art. 10(1)(c) <<https://www.dfat.gov.au/trade/agreements/in-force/rcep/rcep-text>> accessed 30 September 2025.

⁷³ New Zealand–United Kingdom Free Trade Agreement (signed 22 February 2022, entered into force 31 May 2023) art. 14(2) <<https://www.mfat.govt.nz/assets/Trade-agreements/UK-NZ-FTA/NZ-UK-Free-Trade-Agreement.pdf>> accessed 30 September 2025.

⁷⁴ Hungary–Oman Bilateral Investment Treaty (signed 2 February 2022, entered into force 24 October 2022) art. 1(1) <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6443/>>

Within the sixth group, there were identified investment treaties, in which preambular references to sustainable development are accompanied by the definitions of investment entailing the expanded versions of the *Salini* test with the element of contribution to the economic development of the host state. Importantly, the element of contribution to the economic development is incorporated into the definitions of investment in its version developed as a part of the *Salini* test, without any indication that the development should be sustainable or should go beyond the economic aspects of development, including social or environmental development, which could be expected in light of the preambular references to sustainable development. An example of such a treaty is ECOWAS Common Investment Code (ECOWIC)⁷⁵, in which the elements of commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and a significant contribution to the host state's economic development constitute a part of the definition of investment with no reference to sustainable development. Although this is a relatively new phenomenon⁷⁶, it encompasses substantial number of investment treaties, including Iran–Slovakia BIT of 2016⁷⁷, Argentina–United Arab Emirates BIT of 2018⁷⁸ and two of three investment treaties concluded as of 2016 by India⁷⁹ (following Indian Model BIT of 2015, which also adopts this approach⁸⁰).

The last identified group encompasses these investment treaties, in which there has been achieved the highest to date level of incorporation of sustainable development into the definitions of investment. In these treaties preambular references to sustainable development have a direct bearing on the definitions of investment, within which the classical *Salini* element of contribution to the economic development has been modified into the contribution to sustainable development. The examples are Egypt–Mauritius BIT of 2014, which defines an investment as *'every kind of asset that has the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, the contribution to sustainable development'*⁸¹ and widely

download> accessed 30 September 2025.

⁷⁵ Economic Community of West African States (ECOWAS) Common Investment Code (ECOWIC) (signed and entered into force 22 December 2019) art. 1(h) <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6441/download>> accessed 30 September 2025.

⁷⁶ According to OLAOYE and SORNARAJAH (n 35) 121, clauses which state that investments must contribute to the economic development of the host state are the most striking change that has occurred in recent drafting of investment treaties.

⁷⁷ Iran–Slovakia BIT (n 47).

⁷⁸ Argentina–United Arab Emirates Bilateral Investment Treaty (signed 16 April 2018) art. 1 <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5761/download>> accessed 30 September 2025.

⁷⁹ Belarus–India BIT (n 47); India–Kyrgyzstan Bilateral Investment Treaty (signed 14 June 2019, entered into force 5 June 2025) art. 1(4) <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5993/download>> accessed 30 September 2025.

⁸⁰ Model text for the Indian Bilateral Investment Treaty (adopted 28 December 2015) art. 1(4) <http://dea.gov.in/files/other_reports_documents/ModelTextIndia_BIT.pdf> accessed 30 September 2025. Cf HANESSIAN, Grant, DUGGAL, Kabir, 'The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See?' (2017) 32 *ICSID Review* 216, 218; RANJAN, Prabhash, SINGH, Harsha Vardhana, JAMES, Kevin, SINGH, Ramandeep, 'India's Model Bilateral Investment Treaty. Is India Too Risk Averse?', (2018) Brookings India Impact Series < <https://www.brookings.edu/wp-content/uploads/2018/08/India%E2%80%99s-Model-Bilateral-Investment-Treaty-2018.pdf>> accessed 30 September 2025.

⁸¹ Egypt–Mauritius BIT (n 51) art. 1(1).

discussed Morocco–Nigeria BIT of 2016⁸², which defines investment as ‘*an enterprise (...) which contribute sustainable development of that Party and has the characteristics of an investment involving a commitment of capital or other similar resources, pending profit, risk-taking and certain duration*’⁸³. Interestingly, both BITs adopt different approaches to defining investment, namely as an asset and an enterprise, which do not constitute any obstacle in incorporation of references to sustainable development. The approach to defining investment adopted in both BITs has not been followed in BITs subsequently concluded by their state–parties, including Mauritius–United Arab Emirates BIT of 2015⁸⁴, Cabo Verde–Mauritius BIT of 2017⁸⁵, Congo–Morocco BIT of 2018⁸⁶, Brazil–Morocco BIT of 2019⁸⁷ and Japan–Morocco BIT of 2020⁸⁸, though it has been applied in the Moroccan Model BIT of 2019.⁸⁹ Consequently, the examined approach remains rather exceptional in a totality of investment treaties concluded in recent years, though it has been adopted in the Draft Investment Protocol to AfCFTA, in which it was specified that the contribution of an investment to the sustainable development of the host state should be significant.⁹⁰

For greater clarity and for comparison purposes, all of the identified groups of investment treaties have been presented in the table below.

⁸² EJIMS, Okechukwu, ‘The 2016 Morocco–Nigeria Bilateral Investment Treaty: More Practical Reality in Providing a Balanced Investment Treaty?’ (2019) 34 *ICSID Review* 62; SAUVANT, Karl P., MANN, Howard, ‘Making FDI More Sustainable: Towards an Indicative List of FDI Sustainability Characteristics’ (2019) 20 *Journal of World Investment & Trade* 916, 926 and 950; DE BRABANDERE, Eric, ‘The 2019 Dutch Model Bilateral Investment Treaty: Navigating the Turbulent Ocean of Investment Treaty Reform’ (2021) 36 *ICSID Review* 319, 327; MCLAUGHLIN, (n 46) 132–133.

⁸³ Morocco–Nigeria Bilateral Investment Treaty (signed 3 December 2016) art. 1(3) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download> accessed 30 September 2025.

⁸⁴ Mauritius–United Arab Emirates Bilateral Investment Treaty (signed 20 September 2015, entered into force 28 December 2017) art. 1(2) <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5358/download>> accessed 30 September 2025.

⁸⁵ Cabo Verde–Mauritius Bilateral Investment Treaty (signed 13 April 2017, entered into force 7 March 2018) art. 1(1)(a) <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/7022/download>> accessed 30 September 2025.

⁸⁶ Congo–Morocco Bilateral Investment Treaty (signed 30 April 2018) art. 1(1) <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5809/download>> accessed 30 September 2025.

⁸⁷ Brazil–Morocco Bilateral Investment Treaty (signed 13 June 2019) art. 1(2) <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5889/download>> accessed 30 September 2025.

⁸⁸ Japan–Morocco Bilateral Investment Treaty (signed 8 January 2020, entered into force 23 April 2022) art. 1(a) <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5908/download>> accessed 30 September 2025.

⁸⁹ Morocco Model BIT (adopted 1 June 2019) art. 3(3) <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5895/download>> accessed 30 September 2025. See also, BANERJEE, Arpan, WEBER, Simon, ‘The 2019 Morocco Model BIT: Moving Forwards, Backwards or Roundabout in Circles?’ (2021) 36 *ICSID Review* 536, 538.

⁹⁰ Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment (AfCFTA) on Investment (adopted on 19 February 2023) art. 1 <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/8533/download>> accessed 30 September 2025. See also WEINIGER, Matthew, ZIADE, Roland, LAMPROU, Nefeli, ILUEZI-OGBAUDU, Efemena, ‘The AfCFTA Investment Protocol – A potential game changer for the African continent?’, Linklaters (16 May 2023) <<https://www.linklaters.com/en/insights/blogs/arbitrationlinks/2023/may/afcfta-investment-protocol>> accessed 30 September 2025, who remark that the Protocol defines the term investment more restrictively than older generation treaties.

Table 1. Comparison of the groups of investment treaties concluded between 2014 and 2023 as regards the references to sustainable development in preambles and definitions of investment

Group number	Examples of investment treaties	Preamble	Definition of investment		
		Reference to sustainable development	The 3-elementary Salini test	The Salini test with the element of contribution to economic development	The Salini test with the element of contribution to sustainable development
1.	Hungary–United Arab Emirates BIT (2021); Bahrain–Japan BIT (2022)	–	–	–	–
2.	JAIPA (2014); ASEAN–Hong Kong and China SAR Investment Agreement (2017)	–	+	–	–
3.	Jordan–Turkey BIT (2016); Türkiye–Uruguay BIT (2022)	–	–	+	–
4.	Brazil–Mexico BIT (2015); Central African Republic–Rwanda BIT (2019)	+	–	–	–
5.	USMCA (2018); the Netherlands Model BIT (2019); RCEP (2020); PACER Plus (2023)	+	+	–	–
6.	Indian Model BIT (2015); Iran–Slovakia BIT (2016); ECOWAS Common Investment Code (ECOWIC) (2019)	+	–	+	–
7.	Egypt–Mauritius BIT (2014); Morocco–Nigeria BIT (2016); Draft Protocol to AfCFTA (2023)	+	–	–	+

The outcome of the research enables the following conclusions.

First, the research has not evidenced the existence of any prevailing approach to the use of references to sustainable development in the texts of preambles to investment treaties and in the definitions of investment.

Second, as much as three of the identified seven groups of investment treaties still adopt a ‘traditional’ approach to defining investment, with or without the elements of the *Salini* test, but always without any reference to sustainable development.⁹¹ Nevertheless, a considerable number of the analysed investment treaties, belonging to four of the identified seven groups, contain preambular references to sustainable development.

Third, none of the identified treaties adopting a ‘traditional’ approach to defining investment contain any reference to sustainable development in the definition of investment, e.g. in the form of the criterion of the contribution of an investment to the sustainable development of the host state.

⁹¹ Cf OLAOYE and SORNARAJAH (n 35) 121, who point out that the larger majority of investment treaties in force do not make any express reference to ‘development’.

Fourth, investment treaties incorporating preambular references to sustainable development can be divided into as much as four groups as regards the use of the elements of the *Salini* test in the definitions of investment. This means that the introduction of references to sustainable development into the preambles to investment treaties does not have a bearing on defining investments in the definitions of investment. Specifically, no indication was found of any correlation between the frequency of references to sustainable development in the preambles of investment treaties and the use of specific elements of the *Salini* test in the definitions of investment, including the element of contribution of an investment to the economic development of the host state.

Fifth, although the presence of the *Salini* test has been detected in the five out of seven groups of investment treaties, the implementation of the *Salini* test into the definitions of investment does not constitute an overwhelming treaty practice. The *Salini* test is applied basically in its three-elementary version with the elements of contribution to investment, duration and risk (the last one often being replaced by the element of expectation of profit or return). Only two of the identified groups of investment treaties apply the *Salini* test with the element of contribution of an investment to the economic development of the host state.

Sixth, investment treaties in which the references to sustainable development are present both in the texts of preambles and in the definitions of investment represent a minor share of recently concluded investment treaties and are still rather an exception than a rule.⁹² In these treaties, the *Salini* element of contribution to the economic development of the host state is modified into the element of contribution to the sustainable development of the host state. Still, the overwhelming majority of the definitions of investment examined within the research do not adopt any express reference to sustainable development. Within the research, there have not been identified any more complex references to sustainable development in the definitions of investment, such as detailed characteristics of sustainable investments⁹³, e.g. by indicators of sustainable investment⁹⁴, or lists of covered investments contributing to sustainable development (e.g. investments in renewable energy and low-carbon technology)⁹⁵.

4. Is arbitral jurisprudence on the notion of investment becoming more akin to sustainable development?

The analysis of the texts of modern investment treaties undertaken within Section Three will now be complemented by the analysis of arbitral jurisprudence on the interpretation of the notion of investment. The aim of the present analysis is to identify the scope in which the *Salini* element of contribution of an investment to the economic development of the host state is applied in investment arbitration. The main question to be answered within this section of the article is whether there are some indications in arbitral jurisprudence that this

⁹² Even the Netherlands Model BIT (2019), heralded as a pioneering text aiming at a sustainable investment policy, does not incorporate sustainable development into its definition of investment. See DE BRABANDERE (n 82) 321.

⁹³ UNCTAD, 'Review of 2021 Investor–State Arbitration Decisions: Insights for IIA Reform' (2023) 1 UNCTAD International Investment Agreements Issues Note, 2.

⁹⁴ UNCTAD, 'The International Investment Treaty Regime and Climate Action' (2022) 3 UNCTAD International Investment Agreements Issues Note, 16.

⁹⁵ *Ibid.* Cf SAUVANT and MANN (n 82) 922–951.

element of the *Salini* test could be modified into the element of contribution to sustainable development.

Although the element of contribution of an investment to the economic development of the host state was present in the first lists of elements characterising investments, including *Fedax* and *Salini*⁹⁶ lists, it has been relatively rarely recognized in investment arbitration as a binding criterion for the existence of an investment.⁹⁷ Throughout the period of over two decades following the *Salini v. Morocco* Decision on jurisdiction, only arbitral decisions in *Mitchell v Democratic Republic of Congo*⁹⁸, *Joy Mining v Arab Republic of Egypt*⁹⁹ and *MHS v Malaysia*¹⁰⁰ recognized a mandatory character of this element of the *Salini* test¹⁰¹.

It would not be an overstatement to say that the element of contribution of an investment to the economic development of the host state has become the source of disagreement between arbitral tribunals¹⁰² as one of the most controversial elements of the *Salini* test.¹⁰³ Many arbitral tribunals refused to apply it.¹⁰⁴ The causes therefore are twofold.¹⁰⁵ First, the element of contribution to economic development is often perceived as vague¹⁰⁶ and impossible to ascertain due to diverging views on what constitutes ‘development’.¹⁰⁷ It is suggested that its adoption would make investment arbitration unpredictable and transform

⁹⁶ See n 3 and 9.

⁹⁷ CHAN and LAI (n 11) 82.

⁹⁸ *Partick Mitchell v. Democratic Republic of Congo*, ICSID Case No ARB/99/7, Decision on the Application for Annulment of the Award (1 November 2006) para 39.

⁹⁹ *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No ARB/03/11, Award on Jurisdiction (6 April 2004) paras 53 and 57.

¹⁰⁰ *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No ARB/05/10, Judgment (17 May 2007) para 143.

¹⁰¹ Cf WAIBEL (n 4) 58.

¹⁰² OLAOYE and SORNARAJAH (n 35) 123.

¹⁰³ *Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania*, ICSID Case No ARB/15/41, Award (11 October 2019) para 240. Cf DOLZER and SCHREUER (n 4) 94. Against the application of this element of the *Salini* test, see: KRISHAN, Devashish, ‘A Notion of ICSID Investment’ (2009) 1 *Transnational Dispute Management* 1, 74; DUPONT (n 11) 260. In favour of its application, see ENDICOTT, Martin, ‘The Definition of Investment in ICSID Arbitration: Development Lessons for the WTO?’ in GEHRING, Markus W., CORDONIER SEGGER, Marie-Claire (eds), *Sustainable Development in World Trade Law* (Kluwer Law International 2005) 383, 409–410.

¹⁰⁴ *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (n 54) para 306; *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; *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) para 224; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay (formerly FTR Holding SA, 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) paras 207–208; *Muszynianka Spółka z ograniczoną odpowiedzialnością (formerly Spółdzielnia Pracy ‘Muszynianka’) v. Slovak Republic*, UNCITRAL, PCA Case No 2017-08, Award (7 October 2020) para 289; *Mabco Constructions v. Republic of Kosovo*, ICSID Case No ARB/17/25, Decision on Jurisdiction (30 October 2020) para 296.

¹⁰⁵ CHAN and LAI (n 11) 82–83.

¹⁰⁶ *Mercuria Energy Group Limited v. Republic of Poland*, SCC Case No 2019/126, Award (29 December 2022) para 537.

¹⁰⁷ *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009) para 85. Cf MONEBHURRUN, Nitish, ‘The Political Use of the Economic Development Criterion in Defining Investments in International Investment Arbitration’ (2012) 5 *Journal of International Arbitration* 567, 572–580.

arbitrators into policymakers.¹⁰⁸ Second, although the ICSID Convention's Preamble accentuates the '*the need for international cooperation for economic development, and the role of private international investment therein*' as one of the aims of the Convention¹⁰⁹, it is generally considered in ICSID arbitration that it cannot be inferred from this aim that every investment must make any measurable contribution to the economy of the host state.¹¹⁰ Contribution to the economic development of the host state is perceived rather as a desired consequence of a successful investment and not a condition for its existence.¹¹¹

If the element of contribution of an investment to the economic development of the host state is at all referred to in arbitral jurisprudence, it is perceived rather as a typical characteristic of an investment, which can serve as an additional confirmation of its existence.¹¹² It is sometimes examined along with the remaining elements of the *Salini* test, but without assessing the nature of this test.¹¹³ In some arbitral decisions, arbitral tribunals consider this element to be present without the examination of its legal nature¹¹⁴ or simply state that its presence should be presumed.¹¹⁵

While applying the element of contribution of an investment to the economic development of the host state, arbitral tribunals typically do not engage in any in-depth analyses of what constitutes economic development. The contribution of an investment to the economic development of the host state is acknowledged if the investment brings '*social*

¹⁰⁸ *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No ARB/07/21, Award (30 July 2009) para 43. Cf ACCONCI (n 47) 85.

¹⁰⁹ See n 33. Cf SCHREUER, Christoph, 'Commentary on the ICSID Convention' (1996) 11 *ICSID Review* 318, 358, who calls this formulation the only possible indication of an objective meaning of the notion of investment that can be gleaned from the ICSID Convention. Cf ICSID, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (18 March 1965) para 9, which emphasizes the '*desire to strengthen the partnership between countries in the cause of economic development*'.

¹¹⁰ *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No ARB/98/2, Award (8 May 2008) para 232; *İçale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No ARB/10/24, Award (6 March 2016) para 291.

¹¹¹ *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ibid) para 232; *Saba Fakes v. Republic of Turkey*, ICSID Case No ARB/07/20, Award (14 July 2010) para 111; *Electrabel S.A. v. Republic of Hungary* (n 104) para 5.43; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* (n 104) para 208; *KT Asia Investment Group B.V. v. Republic of Kazakhstan* (n 54) para 171; *Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon*, ICSID Case No ARB/15/18 (22 July 2017) para 422; *Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania* (n 103) para 241; *(DS)2, S.A., Peter de Sutter and Kristof De Sutter v. Republic of Madagascar*, ICSID Case No ARB/17/18, Award (17 April 2020) para 231; *Muszynianka Spółka z ograniczoną odpowiedzialnością v. Slovak Republic* (n 104) para 289; *Mabco Constructions v. Republic of Kosovo* (n 104) para 296; *Mercuria Energy Group Limited v. Republic of Poland* (n 106) para 546; *Rasia FZE and Joseph K. Borkowski v. Republic of Armenia* (n 54) para 378; *Rand Investments Ltd. and others v. Republic of Serbia*, ICSID Case No ARB/18/8, Award (29 June 2023) para 228.

¹¹² *Joy Mining Machinery Limited v. Arab Republic of Egypt* (n 99) par 53; *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction (17 October 2006) para 77.

¹¹³ *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No ARB/14/32, Decision on Jurisdiction (29 June 2018) para 191; *Strabag SE v. Libya*, ICSID Case No ARB(AF)/15/1, Award (29 June 2020) para 110; *Leopoldo Castillo Bozo v. Republic of Panama*, PCA 2019-40, Decision on merits (8 November 2022) para 223.

¹¹⁴ *Hope Services LLC v. Republic of Cameroon*, ICSID Case No ARB/20/223, Award (23 December 2021) para 160.

¹¹⁵ *Phoenix Action, Ltd. v. The Czech Republic* (n 107) para 85. KRISHAN (n 103) 16, suggests that an economic transaction constituting an investment, by definition, contributes to economic development, which is an assumption that arbitral tribunals must adopt, unless the contrary is proved in a particular case.

benefit’ for the host state¹¹⁶, serves the ‘*public interest*’¹¹⁷ or is made in the economic sector, which is ‘*an essential sector for any host State*’.¹¹⁸

The threshold for establishing the presence of this element of the *Salini* test is additionally lowered in these arbitral decisions, in which arbitral tribunals assume that investment should contribute only to the ‘development’ and not to the ‘economic development’ of the host state.¹¹⁹ However, arbitral jurisprudence that apply this lowered threshold brings no evidence that the word ‘development’ should be understood as ‘sustainable development’.

So far, the developments in investment treaty making identified within Section Three of the present article, consisting in more frequent preambular references to sustainable development, have not had a noticeable impact on arbitral jurisprudence. Interpretation of the *Salini* element of contribution to the economic development typically does not take into account the texts of preambles to investment treaties. The exceptions in this respect are *Fynerdale v. Czech Republic* Award of April 2021¹²⁰ and *Gramercy v. Republic of Peru* Award of December 2022¹²¹, in which arbitral tribunals applied the element of contribution to the economic development of the host state while relying on the preambular references in relevant investment treaties to the promotion of economic development of contracting states.

5. Possible interpretative grounds for ascribing to the notion of investment the meaning incorporating sustainable development

The outcomes of the research conducted within Sections Three and Four allow to conclude that despite frequent references to sustainable development in preambles to investment treaties, sustainable development neither has generally become a part of the definitions of investment nor has it become generally utilised by arbitral tribunals while interpreting these definitions, e.g. as the element of the *Salini* test. Considering these conclusions, the aim of the present section of the article is to examine whether there are any interpretative grounds for arbitral tribunals to ascribe a ‘sustainable’ meaning to the notion of investment.

Despite unproven assumptions about the arbitrators’ inability to make a sophisticated assessment of a notion of sustainable development, due to its peculiarity as a unique concept that combines economic, social and environmental elements¹²², arbitral jurisprudence fails to ascribe to the notion of investment the meaning incorporating sustainable development simply because it does not consider it necessary. International investment law is generally perceived as not aimed at promoting sustainable development.¹²³ Consequently, it is

¹¹⁶ *Strabag SE v. Libya* (n 113) para 110.

¹¹⁷ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (n 3) para 57.

¹¹⁸ *Addiko Bank AG v. Montenegro* (n 5) para 346.

¹¹⁹ As noticed by MONEBHURRUN (n 107) p. 569, arbitral tribunals tend to mix up ‘development’ and ‘economic development’, often substituting one for the other.

¹²⁰ *Fynerdale Holdings BV v. The Czech Republic*, PCA Case No 2018-18, Award (29 April 2021) paras 541–542.

¹²¹ *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No UNCT/18/2, Award (6 December 2022) paras 240–242.

¹²² MASUMY, Naimeh, HOURANI, Sara, ‘The Implementation of Sustainable Development as a Requirement by ICSID Tribunals: A Proposal for Sustainability Standard’ (2022) 16 *Romanian Arbitration Journal* 44, 57.

¹²³ SCHACHERER, Stefanie, HOFFMANN, Rhea Tamara, ‘International investment law and sustainable

considered that investments do not need to contribute to sustainable development to be protected under respective investment treaties.¹²⁴

In future, the approach of arbitral tribunals will most likely change as a result of the anticipated wider presence of sustainable development in investment treaties¹²⁵, including incorporation of references to sustainable development into the definitions of investment¹²⁶. Nevertheless, even today, during the transitional period of the current reform of investment treaties, there appear some possibilities for arbitral tribunals to ascribe a 'sustainable' meaning to the notion of investment. Preambular references to sustainable development, which are present in constantly rising number of investment treaties, may be utilised for this purpose. Undoubtedly, preambles to investment treaties constitute the element of context of interpretation of the notion of investment in light of its ordinary meaning.¹²⁷ Moreover, they should be perceived as a part of the 'object and purpose' of investment treaties¹²⁸, though interpretation of the notion of investment in light of the investment treaty's object and purpose has its limitations.

First, as noticed by *R. Gardiner*, the object or purpose established in the preamble of the treaty cannot be used to alter the clear meaning of an operational term of a treaty¹²⁹. This means that ascribing a 'sustainable' meaning to the notion of investment could be problematic in case of investment treaties that contain preambular references to sustainable development, but, simultaneously, adopt a broad approach to defining investment, without the *Salini* element of contribution to the economic development of the host state¹³⁰ or even without any elements of the *Salini* test (such as duration or risk)¹³¹. In case of these treaties, a question arises of whether the preambular reference to sustainable development can be used to ascribe to the notion of investment the meaning that the parties to the treaty could have ascribed to it in the definition of investment, but they supposedly did not.

Second, the interpretation of investment treaties in light of their object and purpose, identified on the grounds of the preambular references to sustainable development, could lead to more pro-state approach and to denial of investment protection of investments that do not comply with generally high standards of sustainable development¹³².

development', in KRAJEWSKI, Marcus, HOFFMANN, Rhea Tamara (eds), *Research Handbook on Foreign Direct Investment* (Edward Elgar Publishing 2019) 563, 564.

¹²⁴ FEIGERLOVÁ, Monika, 'Integrating Climate Change Elements into International Investment Treaties: Definition of "Green" Investment' (2022) 13 *Czech Yearbook of Public & Private International Law* 333, 339.

¹²⁵ CHI (n 31) 180–182.

¹²⁶ On the possible directions of such modifications of the definitions of investment, see n 93–95.

¹²⁷ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 United Nations Treaty Series 331, art. 31(2). Cf VILLIGER, Mark E., *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill Nijhoff 2009) 427; GARDINER, Richard K., *Treaty Interpretation* (2nd OUP 2015) 205–206.

¹²⁸ GROSSE RUSE-KHAN, Henning, 'A Real Partnership for Development? Sustainable Development as Treaty Objective in European Economic Agreement Partnerships and beyond' (2010) 13 *Journal of International Economic Law* 139, 158–162; CORDONIER SEGGER (n 43) 112.

¹²⁹ GARDINER (n 127) 219. Cf CORDONIER SEGGER (n 43) 112.

¹³⁰ Cf the fifth group of investment treaties identified within Section Three.

¹³¹ Cf the fourth group of investment treaties identified within Section Three, being the largest from all the groups of investment treaties with preambular references to sustainable development.

¹³² WÄLDE, Thomas W., 'Interpreting Investment Treaties: Experiences and Examples' in BINDER, Christina, KRIEBAUM, Ursula, REINISCH, August, WITTICH, Stephan (eds), *International Investment Law for the 21st Century* (OUP 2009) 724, 732.

The possibilities of ascribing a ‘sustainable’ meaning to the notion of investment are obviously more remote in case of these, still numerous, investment treaties that do not contain express preambular references to sustainable development.¹³³ Nevertheless, it could be argued that the ordinary meaning of the notion of ‘economic development’, commonly used in preambles to investment treaties¹³⁴ and present in the preamble to the ICSID Convention¹³⁵, implies that the economic development should be sustainable. The proposed approach to the interpretation of preambular references to ‘economic development’ could have a bearing on the interpretation of the notion of investment in relevant definitions of investment and in Article 25 of the ICSID Convention, since preambular references to ‘economic development’ constitute interpretative context for the notion of investment as the part of the object and purpose of the treaty¹³⁶. While interpreting the notion of ‘economic development’, it might be argued that, in the long-time perspective, economic development is not possible without sustainability, since unsustainable economic development leads to running out of natural resources, degradation of the environment, worsening of labour and health conditions, etc. If assumed that investment protection is designed to protect long-term engagement of investors in host states, which appears to be warranted by the ‘duration’ requirement, present as a constitutive feature of an investment in many definitions of investment in investment treaties¹³⁷ and in arbitral jurisprudence, which increasingly often adopts the three-elementary version of the *Salini* test¹³⁸, it could be plausible to require from an investment that it lasts for a specific period of time, within which it contributes to the sustainable economic development of the host state.

Interpretation of the notion of investment in light of preambular references to ‘economic development’, understood as ‘sustainable economic development’, could bring substantial benefits to investment arbitration. Typical preambular formulations of investment treaties concentrate rather on increased inflow of investments to host states. Economic development, despite its frequent preambular application, is perceived rather as the subsidiary purpose of investment treaties, while the increased flow of investments and promotion of investment remain the primary purposes, which seems to favour the interests of investors rather than host states.¹³⁹ Rejection in arbitral jurisprudence of the *Salini* element of contribution to

¹³³ See groups 1–3 of the groups of treaties identified within Section Three.

¹³⁴ See n 41.

¹³⁵ See n 33.

¹³⁶ See n 128.

¹³⁷ See the second group of investment treaties identified within Section Three, which merges no preambular reference to sustainable development with the use of *Salini* test, including the element of duration of an investment. Cf the 5–7 groups of investment treaties, which apply both preambular references to sustainable development and the *Salini* test, including the element of duration of an investment.

¹³⁸ See n 54.

¹³⁹ DOLZER, Rudolf, ‘The notion of investment in recent practice’, in CHARNOVITZ, Steve, STEGER, Debra P., VAN DEN BOSSCHE, Peter (eds), *Law in the Service of Human Dignity Essays in Honour of Florentino Feliciano* (CUP 2005) 261, 272. Cf ASCENSIO, Hervé, ‘Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law’ (2016) 31 *ICSID Review* 366, 370: ‘*In this regard, an often-repeated criticism addressed to investment tribunals is an overvaluation of the protection of foreign investment as the main purpose of investment treaties, leading to a pro-investor bias when interpreting a vague term or expression*’. See, however, BALTAG and DAUTAJ (n 40) 48, who asserts that in reality of investment arbitration, investor-bias is unsubstantiated, since investors do not at all come out as huge winners in the vast majority of investment disputes. Cf MCLACHLAN, Campbell, ‘Investment Treaties and General International Law’ (2008) 2 *International and Comparative Law Quarterly* 361, 371.

economic development,¹⁴⁰ together with refusal to acknowledge the impact of the ICSID Convention's preambular reference to economic development on the interpretation of the notion of investment in Article 25 of the Convention¹⁴¹ appear to be symptomatic for this approach. The concept of 'sustainable development', if relied on while interpreting the preambular references to 'economic development', could help to restore the balance between the interests of investors and states, which would remain in line with *quid pro quo* of investment arbitration.¹⁴² Contrary to the concept of 'economic development'¹⁴³, the idea of 'sustainable economic development' is less dependent on economic policy considerations of governing authorities of a host state. Although there is no universally accepted definition of sustainable development, the existing definitions provide for sufficient guidelines in this respect.¹⁴⁴

It could also be contended that the notion of 'economic development' used in preambles to investment treaties and the ICSID Convention is not static, but evolutionary – similarly to the notions of 'natural resources', which was confirmed by the WTO Appellate Body in *U.S.–Shrimps Case*.¹⁴⁵ The use of the 'evolutionary' language in the preambles to investment treaties could allow the conclusion that state-parties to these treaties have committed themselves to a progressive development of investment protection.¹⁴⁶ If assumed that the notion of an 'economic development' constitutes an 'evolutionary' term, it might be considered that the underlying purpose of investment treaties has evolved from economic prosperity to sustainable development¹⁴⁷, which is not necessarily in conflict with investment protection¹⁴⁸.

For these reasons, the notion of 'economic development' used in preambles to investment treaties and the ICSID Convention could be construed as 'sustainable economic development' and could serve as a source of interpretation of the notion of investment.

¹⁴⁰ See Section Four.

¹⁴¹ See n 110.

¹⁴² MANN, Howard, 'Reconceptualizing International Investment Law: its Role in Sustainable Development' (2013) 17 *Lewis & Clark Law Review* 521, 537.

¹⁴³ On the political considerations of arbitrators applying the economic development criterion, see MONEBHURRUN (n 107) 572–575.

¹⁴⁴ According to CORDONIER SEGGER, Marie-Claire, 'Commitments to sustainable development through international law and policy' in CORDONIER SEGGER, Marie-Claire, WEERAMANTRY, Christopher Gregory (eds) *Sustainable Development Principles in the Decisions of International Courts and Tribunals 1992–2012* (Routledge 2017) 29, 30, international concept of sustainable development is briefly described and analysed and international consensus on this concept is emerging through global policy debates. The most comprehensive initiative that seeks to specify the content of the concept of sustainable development is *2030 Agenda for Sustainable Development*. See United Nations General Assembly, 'Transforming our world: the 2030 Agenda for Sustainable Development', A/RES/70/1, 21 October 2015.

¹⁴⁵ *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Report of the Appellate Body (12 October 1998) paras 129–130. Cf WAIBEL, Michael, 'International Investment Law and Treaty Interpretation' in HOFMANN, Rainer, TAMS, Christian J. (eds), *International Investment Law and General International Law. From Clinical Isolation to Systemic Integration?* (Nomos 2011) 29, 36.

¹⁴⁶ See also International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Analytical Report of the Study Group of the ILC, Finalized by Martti Koskenniemi, UN Doc A/CN.4/L.682, 58th Session, Geneva, 1 May–9 June and 3 July–11 August 2006, 242.

¹⁴⁷ ORTINO (n 1) 75.

¹⁴⁸ CHI (n 31) 20.

Regrettably, the proposed approach to the interpretation of the notion of investment is not free from considerable shortcomings. First, the literal meaning of the term ‘economic development’ cannot be ignored, which indicates that what should be sustainable is only the ‘economic development’ and not ‘development’ in general. For this reason, the idea of interpreting the notion of ‘economic development’ as ‘sustainable economic development’ would lead to the exclusion of other than economic (social, environmental) aspects of development. Consequently, the notion of investment would not be transformed into the fully ‘sustainable’ one.

Second, interpretation of the notion of investment in light of preambular references to economic development understood as ‘sustainable economic development’ would in fact constitute a return to the *Salini* element of contribution to economic development, which was rejected by the overwhelming number of arbitral decisions. The majority of possible justifications for the application of the ‘contribution to economic development’ element of the *Salini* test, including the arguments raised up by its proponents¹⁴⁹, were rejected in arbitral jurisprudence¹⁵⁰.

Third, the application of the concept of ‘sustainable economic development’ raises almost the same interpretative problems as the application of the ‘contribution to the economic development of the host state’ element of the *Salini* test. Whether contribution of an investment to sustainable economic development must be continuous, actual or can be potential and include only expected or promised future contributions¹⁵¹, and whether it must be substantial¹⁵² or can be only minimal.¹⁵³

6. Conclusion

The analysis of the recently concluded investment treaties performed within this article has evidenced the existence of two distinct development paths, which do not seem compatible with each other. To date, increased presence of the references to sustainable development in the preambles to investment treaties have not been accompanied by even comparable presence of the references to sustainable development in the definitions of investment. Essentially, preambular references to sustainable development do not have any direct bearing on the

¹⁴⁹ See SHAHABUDDEN, Mohamed, Dissenting Opinion to Award on jurisdiction in *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia* (n 100) paras 14–32; ABI-SAAB, Georges, Dissenting Opinion to Decision on Jurisdiction and Admissibility in *Abaclat and Others v. Argentine Republic*, ICSID Case No ARB/07/5 (4 August 2011) para 48–50. More on this issue see: BECHKY, Pery S., ‘Salini’s Nature: Arbitrators’ Duty of Jurisdictional Policing’ 2018 (17) *The Law and Practice of International Courts and Tribunals* 145, 152–153.

¹⁵⁰ See n 110–111.

¹⁵¹ MAHMUTAJ, Klentiana, ‘Will the Morocco-Nigeria Bilateral Investment Treaty Transform Sustainable Development into Hard Law?’, *EJIL:Talk! Blog of the European Journal of International Law* (27 January 2022) <<https://www.ejiltalk.org/will-the-morocco-nigeria-bilateral-investment-treaty-transform-sustainable-development-into-hard-law/>> accessed 30 September 2025.

¹⁵² Cf the definition of investment in Article 1(4) of Indian Model BIT (n 80) that enumerates significance for the development of the Party in whose territory the investment is made among the characteristics of an investment. On the arguments for the substantial contribution to the economic development see SHAHABUDDEN (n 149) paras 33–38.

¹⁵³ OKPE, Felix K., ‘Endangered Element of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment, and the Promise of Economic Development in Host States’ (2014) 13 *Richmond Journal of Global Law and Business* 217, 259–260.

wording of the definitions of investment. The latter appear to have their own developmental path, following the emerging *jurisprudence constante* on the notion of investment, within which the three-elementary version of the *Salini* test is becoming increasingly present. It is significant for this development that definitions of investment remain extremely reluctant in incorporating the *Salini* element of contribution of an investment to the economic development of the host state. This element has been generally rejected both in investment treaty making and arbitral jurisprudence. States-parties to investment treaties seem to not notice the potential of this element in fulfilling the objectives of sustainable development as the purpose of investment treaties. Consequently, in modern investment treaty making there exist a discrepancy between the openness on sustainable development in preambles to investment treaties and the closeness of definitions of investment.

The possibilities of ascribing a 'sustainable' meaning to the notion of investment through its interpretation in investment arbitration, identified within this article, cannot constitute a plausible solution to the discrepancies present in the modern investment treaty making. Apart from interpretative deficiencies, the proposed requirement for investments to contribute to sustainable development of host states, regrettably, so close resembles the rejected requirement of contribution to economic development to be accepted in arbitral jurisprudence. It appears that arbitral jurisprudence will rather await the 'new *Salini*' decision, which could constitute a milestone for the modified, 'sustainable' *jurisprudence constante* on the notion of investment, than try to ascribe a 'sustainable' meaning to the notion of investment.