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CONTRIBUTION TO ECONOMIC DEVELOPMENT OF HOST STATE UNDER INTERNATIONAL INVESTMENT REGIME

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CONTENTS

Essay & Comments

CONTRIBUTION TO ECONOMIC DEVELOPMENT OF HOST STATE UNDER INTERNATIONAL INVESTMENT REGIME

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Abstract

This article critically examines the relevance of the economic development of the host state as an essential component in defining "investment" under international investment law. Central to this analysis is the Salini Test, derived from the landmark Salini v. Morocco decision, which outlines four objective criteria to determine whether a particular activity qualifies as an "investment" under the ICSID Convention. Among these, the requirement of contributing to the economic development of the host state has been the subject of significant debate and judicial divergence. The author explores how various tribunals have interpreted this development criterion inconsistently. In particular, recent decisions such as Quiborax v. Bolivia [ICSID Case No. ARB/06/2] have downplayed its importance, treating development as a mere consequence of investment rather than an independent condition. This article argues against this trend, positing that the development criterion is an integral part of the investment definition and is rooted in a proper understanding of Article 31 of the Vienna Convention on the Law of Treaties (VCLT). The author underscores the importance of good faith, textual integrity, and contextual interpretation, advocating for a holistic reading of the term "investment" based on its ordinary meaning, object, and purpose within the treaty framework.

Through detailed legal reasoning and interpretational analysis, the paper reaffirms the legitimacy of the Salini Test, asserting that excluding the development requirement undermines the original intent and systemic coherence of the ICSID Convention. The article concludes that contribution to host state development should not be treated as optional or incidental, but rather as a substantive and independent requirement, both under ICSID and broader international investment law.

Keywords: Investment Definition, Salini Test, VCLT, Contribution to the Economic Development, Host State, ICSID Convention.

I

Introduction

The international investment regime is primarily regulated by a combination of investment contracts and investment treaties. The primary purpose of investment

treaties is to protect the rights of investors belonging to contracting parties. Investment treaties provide additional standards to impose an obligation upon a host state. Such agreements confer jurisdiction to an international tribunal to further resolve disputes arising out of the covered set of investments. This allows the concerned investor to raise a dispute against the host state.[1] Moreover, the investor is not left with the sole option to rely upon municipal courts at the time of dispute and can take recourse under the international regime.

Contracting parties have the freedom to select the appropriate forum to resolve disputes. In this regard, an investment treaty would generally provide for a separate clause for dispute resolution. The parties have the freedom to either create an ad hoc mechanism to arbitrate the matter or take recourse to the International Centre for Settlement of Investment Disputes (hereinafter, "*Centre*")[2]. In general, an ad hoc arbitration is governed by various rules of arbitration propounded by the United Nations Commission on International Trade Law (hereinafter, "*UNCITRAL Rules")*.[3] UNCITRAL rules were framed with the sole objective of guiding international arbitration-related matters.

The term "*investment*" is used in several contexts in an investment agreement or treaty. It can be used to define the jurisdiction of a tribunal. As a matter of general rule, there is an obligation upon the parties to establish specific essential requirements to raise the jurisdiction of the tribunal in investment matters. Firstly, it must be proven that the parties are covered under the relevant agreement. This

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[1] This is a major departure from the conventional law on diplomatic protection. Diplomatic Protection was a useful tool to protect the assets of national. Customary international law as well as general principles of international law are major sources to govern diplomatic protections. A foreign national is left with no other option but to rely upon its state to raise a claim under international regime. On the other hand, investment treaties allow for the individual investor to raise a claim on its own accord. The only caveat being that such claims must arise out of investments that are covered under the agreement.

[2] Convention on the Settlement of Investment Disputes Between States and Nationals of other States, Article 1, Mar. 18, 1965, U.N.T.S 159 (hereinafter "*Convention*"). The Convention provide for the establishment of ICSID Centre. The main function of the Centre is to resolve dispute on the basis of substantive laws on investment protection. Thus, the convention mainly regulates the procedural aspect of the Centre. The convention was established for the purposes of developing state cooperation in private investment transactions. Most of the investment treaties take the recourse of Centre to resolve various investment related disputes.

[3] U.N Commission on International Trade Law, UNCITRAL ARBITRATION RULES, U.N Doc A/31/98(1976), United Nations (2021) *available at-* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf (last visited- Feb. 25, 2025).

covers the *rationae personae* requirement of jurisdiction.[4] There is also a need to prove that the subject matter can be characterised as a matter of investment. This ensures that a dispute from the subject can be brought before the tribunal. This is also referred to as the *rationae materiae* part of the jurisdiction of a tribunal. Both these aspects are to be determined by the tribunal itself.

The term "*investment*" is also used to define the scope of various protection standards. Parties can determine the specific kind of "*standard of protection*" for investors. However, such standards are applied only when the investments are made. Thus, the precise scope of investment would also affect the scope of various standards enshrined under the investment treaty. There is another context within which the term investment is used under an investment treaty. It is also used to define the consent of the parties.

The ICSID Convention also uses the term "investment" to determine the jurisdiction of the Centre.[5] It states that the dispute must be legal, and "*directly arise out of an investment*" for it to be brought up before the Centre. However, the term is not further defined under the convention. The rationale was to provide some freedom to the relevant parties. The Centre has developed essential requirements for a particular activity to be considered a matter of investment under the convention. As a result, a party must follow a "double barrel" test proving that the matter falls under the investment treaty and the convention.

The Centre provided an objective meaning to the term "investment" in the Fedax judgment.[6] Subsequently, the Centre adopted an objective test in its Salini judgment to define investment.[7] The tribunal provided four grounds to determine the nature of the subject matter.[8] The centre has followed a similar approach in several

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[4] See, Jorun Baumgartner, *Jurisdiction Ratione Personae* in *TREATY SHOPPING IN INTERNATIONAL INVESTMENT LAW* 92 (Jorun Baumgartner, ed. 2017).

[5] Convention on the Settlement of Investment Disputes between States and Nationals of Other States art.25, Mar. 18, 1965, 575 U.N.T.S. 159.

[6] *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Award (Mar. 9,1977). (hereinafter, "*Fedax Judgment*").

[7] *Salini Construttori S.p.A and Italstrade S.p.A v. Kingdom of Morocco,* ICSID Case No. ARB/00/4, Award (July 23, 2001) (hereinafter, "*Salini Judgment").*

[8] Following is the list of considerations that the Tribunal have to look into-

a. Contribution (to be understood in terms of contribution of assets ot material resources
b. Risk (the nature of risk must be arising out the investment must be looked
c. Duration (it must be observed if the alleged transaction is of a specific duration. Such duration might vary from a minimum one to a five year duration.)
d. Contribution to the development of Host State. (This requirement was inferred out of the preamble of ICSID Convention).

subsequent decisions. Thus, a claimant must establish a double-barrelled test to raise the jurisdiction of the Centre.[9] Non-ICSID tribunals have also borrowed such grounds to ascertain the nature of investment.[10]

However, there has been a controversy over the precise scope of the Salini test. In particular, several tribunals have diluted the "contribution of development to the host state" requirement.[11] The tribunal in *Quiborax* v. *Bolivia [ICSID Case No. ARB/06/2]* further recognised this scepticism.[12] The present paper focuses on the relevance of the Salini Test. The author would specifically focus on the requirement of contribution to the development of host states. It is a humble plea of the author that the tribunals must further rely on the Salini Test to determine the nature of investment in a treaty. There is no need to exempt the development requirement from the host state.

The present paper is bifurcated into two parts. The first part explains the current conundrum around the application of the Salini Test. It would critically analyse those decisions that refuse to recognise "*host state's development*" as a separate ground. The subsequent section will delve into the specific arguments for relying on the objective grounds. In particular, the author would argue that the Centre's interpretation was based on the correct application of VCLT principles.

II

Contribution to the development as an Independent Requirement

The ICSID Convention refers to the term "*investment"* to determine the jurisdiction of the Centre. It explicitly states that only such legal disputes can be brought before the Centre and arise directly out of an investment.[13] However, the term "*investment*"

It is important to note that the Centre had revised the approach taken in its Fedax judgment. In particular, the criterion of profits and returns was not specifically mentioned by the Centre in the Salini case.

[9] The double barrel test requires a claimant to establish that the subject matter falls under the definition of investment under the relevant agreement as well as under the ICSID Convention. The jurisdiction is raised upon a successful determination of both these grounds.

[10] See, *Romak S.A v. The Republic of Uzbekistan PCA*, Case No. 2007-07/AA280, Award (Nov. 26, 2009).

[11] See, *Saba Fakes v. Turkey* ICSID Case No. ARB/07/20, Award (July 14, 2010), *KT Asia Investment Group B.V v. Kazakathan* ICSID Case No. ARB/09/8 Award (Oct. 17, 2013).

[12] *Quiborax v. Bolivia S.A, Non Metallic Minerals S.A and Allan Fox Kapuln v. Plurinational State of* Bolivia ICSID Case No. ARB/06/2 Award (Sep. 16, 2015)

[13] *Supra* note 5, art. 21.

is not defined under the Convention. The term is used in an absolute sense with no further qualification.[14]

The centre has distinguished between the ordinary form of commercial activities and investments.[15] For this reason, an objective meaning of the term was carved out in the Fedax Judgment for the first time.[16] The centre further refined the objective grounds in the Salini Judgment. The Centre provided four criteria to define an investment. The four characteristics require that the subject matter (a) must result in some form of contribution (in terms of money or resource), (b) must inhere the element of risk (an investment related risk which is to be differentiated from a risk of non-performance inherent under any form of ordinary commercial transaction), (c) must be of specific duration and (d) must contribute to the development of host state.[17] In particular, the centre clarified that the fourth requirement (of contribution to the development of the host state) can be inferred from the preamble of the Convention. However, the Centre never clarified how the fourth requirement was inferred from the preamble. Thus, the scope and extent of the fourth requirement remain ambiguous.

Tribunals have further clarified that the objective interpretation of "investment" arises out of Article 31(1) of the Vienna Convention on the Law of Treaties (hereinafter, "*VCLT*").[18] Since the convention doesn't define "*investment*", the centre

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[14] It is important to note that the term "directly" doesn't qualify the nature of investment under ICSID Convention. Rather, the terms directly is used only to define the nature of legal dispute arising out of investment claim. Thus, there is nothing under the convention to limit the nature of investment to direct investments or there is nothing under the convention which explicitly excludes indirect form of investment.

[15] See *Joy Mining Mach. Ltd. V. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction (Aug. 6, 2004); *Nobel Energy Inc. v. Republic of Ecuador*, ICSID Case No. ARB/05/12, Decision on Jurisdiction (Mar. 5, 2008); *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award (May 8, 2008).

[16] See, Rudolf Dolzer & Christoph Scheuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 85 (2022).

[17] *Supra* note 7, Salini Judgment, at para 52.

[18] *Vienna Convention on Law of Treaties,* art. 31(1), May 23,1969, 1155 U.N.T.S 331. VCLT provides for the rules on treaty interpretation. In general, a treaty provision is binding only those states which are party to it. However, Article 31 and 32 have transformed into customary principles under international regime. Thus, the essence of such provisions are also binding upon those states which are not parties to the VCLT. Consequently, such provisions are also applicable upon such parties of the ICSID Convention which are not parties to VCLT.

has refused to ascribe a special meaning to the term.[19] This is why non-ICSID tribunals have also used the Salini Test to define investment.[20] Thus, it is essential to note that tribunals have often defined such objective grounds as the inherent meaning of the term "*investment*". However, the special meaning can also be culled out of the implicit terms of a treaty. Despite not having a special definition, the contracting parties could have intended to ascribe a special meaning through the general design of the convention. It is essential to observe that the tribunals never entertained this line of argument in their decision.

Though the Salini Test has often been used to define the nature of investment, tribunals have frequently debated the precise scope of such requirements. In particular, several tribunals have refused to recognise "contribution to the development of the host state" as a separate investment characteristic. In its Quiborax judgment, the centre declined to invoke it as an independent requirement. The centre observed that a host state's development can only be construed as a "*consequence*, " not an inherent foreign investment requirement.[21] The tribunal also took A similar approach in its *KV Asia* judgment.[22]

This argument is based on several assumptions. The first assumption is that "investment" has an ordinary meaning. The second assumption is that this ordinary meaning arises out of the component elements of the term or the inherent quality of the term. Finally, the assumption is that the component elements cannot be equated with the desired investment outcome. The author agrees with the first assumption. However, it is argued that the second and third assumptions do not necessarily hold. In particular, it is argued that properly constructing Article 31 of VCLT would debunk such assumptions. For this reason, the next section will specifically delve into the application of Article 31(1) of VCLT.

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[19] *Id*. Article 31(4) of VCLT allows a tribunal to infer a special meaning when the same can be inferred out of the specific intention of the parties.

[20] *Supra* Note 10. The tribunal had determined the matter on the basis of UNCLITRAL rules. Herein the tribunal clarified that the objective characteristics could be referred to infer the ordinary meaning of investment. Further, the tribunal also stated that such objective characteristics could also be read into the special definition provided under a particular investment treaty. However, it is also important to note that the particular treaty had provided for an inclusive meaning of investment. If the definition would have been exhaustive to the categories enumenrated therein then it wouldn't have been possible for the tribunal to read into such objective characteristics.

[21] *Supra* note 12.

[22] *Supra* note 11.

Article 31(1) of VCLT

Article 31 of VCLT enshrines the basic principles of treaty interpretation. The article is segmented into four limbs. The first paragraph provides the basis for textual interpretation. It states that the ordinary meaning of a treaty provision is to be interpreted along with its context, purpose and object. The first limb carves out the principle of good faith obligation while interpreting a treaty provision. The second limb provides a list of instruments that can be considered as providing the context of a treaty.[23] Preamble is also to be used as an instrument to infer the context of a treaty provision.

The first paragraph clarifies that the interpreter must refer to the ordinary meaning as the starting point for interpreting a treaty. The context helps us in selecting an appropriate meaning. Such interpretation is in line with the overall object of the concerned agreement. The text must always be given primary importance. The text functions as evidence of the intent of the concerned parties. Thus, further analysis of the obligation of good faith is needed. In that regard, it is essential to investigate further the precise scope of the ordinary meaning of a term.

Ordinary Meaning of a Term

Interpreting the ordinary meaning of a term is one of the most daunting tasks of treaty interpretation. The precise contour of such ordinary meaning is quite ambiguous. Despite such complications, understanding a treaty provision by its ordinary meaning remains a widely accepted practice under international law.[24]

Interpreting a text by ordinary meaning is also a constituent of the good faith obligation under International law. The principle has also been crystallised into a customary norm of the international regime.[25] However, there is a dearth of a coherent theory to expound upon the context of such ordinary interpretation. This has also led the tribunals to oversimplify the standard of ordinary meaning.

Developing a coherent theory of ordinary meaning is essential to scrutinise the objective meaning of investments under investment treaties. At this juncture, we first appreciate the interpretational appeal of the ordinary meaning standard. Interpretation of treaty provisions by the ordinary meaning is quite intuitive in its

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[23] See Vienna Convention on Law of Treaties, art. 31(2), May 23, 1969, 1155 U.N.T.S. 331.S

[24] See, Brian G. Slocum, ORDINARY MEANING: A THEORY OF THE MOST FUNDAMENTAL PRINCIPLE OF LEGAL INTERPRETATION 3 (2015).

[25] See, Kenneth J. Vandevelde, *Treaty Interpretation from a Negotiator's perspective*, 21 VJTL 281 (1998).

appeal. It allows for the interpretation to be more accessible to the general members of the international community. Further, it infuses a sense of predictability and certainty within international transactions.[26] Another aspect of its appeal is that it allows the legal text to align with the term's common usage. However, this has also led to confusion among various tribunals. Tribunals have often confused the same with the task of semantically defining the relevant term.[27] A systemised perusal of the ordinary meaning would help the tribunals identify an integrated interpretation of treaty provisions.[28]

The traditional view asserts that VCLT provides an obvious and simplistic way of interpreting treaties. It assumes that the ordinary meaning should be construed as the most apparent meaning of a term.[29] It states that the court must first try to identify the natural meaning of the term. Then the court must examine whether the observed natural meaning can be identified with the context of the concerned provision.

Thus, the traditional view assumes that treaty terms have a determined meaning of their own and that it is the tribunal's task to identify and fit them into the general design of the concerned treaty or convention. However, such assumptions are often proved incorrect in international disputes. The ordinary term at times is too general to provide a helpful guide to the interpreter.[30] Further complications can arise if there is a diverse set of conventions. Such diverse usages render it extremely difficult for an interpreter to identify a unique and natural meaning of a term.[31] Further, VCLT doesn't provide a distinct criterion to ascertain the context of the ordinary standard.[32]

Another form of misunderstanding has further complicated the task of finding a coherent point of interpretation. It is often assumed that the main point of

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[26] See, Herman Cappelan, *Semantics and Pragmatics: Some Central Issues* in *CONTEXT SENSITIVITY AND SEMANTIC MINIMALISM: NEW ESSAYS ON SEMANTICS AND PRAGMATICS 17* (Gerhard Preyer & Georg Peter, eds. 2007).

[27] *Id*.

[28] See, David Mellinkoff, LANGUAGE OF THE LAW 34 (1963).

[29] Jean Marc Sorel & Valerie Bore, *Article 31* in *THE VIENNA CONVENTION ON LAW OF TREATIES: A COMMENTARY 3* (Oliver Corten & Pierra Klein, eds. 2011).

[30] At times this forces the concerned tribunal to deviate from the ordinary meaning of the term and take recourse in some other tool of interpretation.

[31] See, Stefan, Griess & Brian G. Slocun, *Ordinary meaning and Corpus Linguistics*, 2017 BYU l. Rev. 1417 (2017)

[32] Julian Wyatt, INTERTEMPORAL LINGUISTICS IN INTERNATIONAL LAW: BEYOND CONTEMPORANEOUS AND EVOLUTIONARY TREATY INTERPRETATION 124 (2019).

interpretation is to communicate the primary intent of the concerned author of the text.[33] However, this is also not necessarily true. Several times, the interpreter is required to find the relevant meaning of the term within the evolving nature of the international realm. This approach would fail to consider terms that need to change with the evolving nature of the international realm.

Thus, the abovementioned approaches do not provide a comprehensive and clear picture of interpretational provisions. The author would further reflect upon the implications of such an ordinary standard in defining investments. However, the author would first provide a brief historical account of ordinary meaning and its application within the international realm.

III

Application of Ordinary Meaning under VCLT

Articles 31 and 32 represent the international standards of treaty interpretation.[34] Such principles are applied to a wide range of agreements. The application of such provisions is not limited to treaties between states. Such principles are also used to construct international agreements or contracts.[35] They are also applied to interpret specific resolutions and declarations passed under an international organisation's auspices and other legally recognised instruments.[36]

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[33] See, Brian G. Slocum and Jarrod Wong, *The Vienna Convention and Ordinary Meaning in International Law*, 46 Yale J. Int'l L. 191 (2021).

[34] See, Arbitration Regarding the Iron Rhine, Award on 24 May 2005, XXVII R.I.A.A 35; United States Standard for Reformulated and Conventional Gasoline, adopted on 20 May 1996, WT/DS2/AB/R at 17. Articles 31 and 32 have also been widely recognized as a part of customary international law for treaty interpretation. Thus, even such nations which are not the members of VCLT are generally bound by the principles enshrined under the two articles.

[35] See, RSM Production Co. v. Grenada ICSID Case No. ARB/05/14 at 383 (March 13, 2009). The tribunal decided to apply upon VCLT principles to interpret the terms of contract that was entered into between an investor and a state.

[36] See, Prosecutor v. Ayyash Case No. STL 11-01/1, Interlocutory Decisions on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, (award by Special Tribunal for Lebanon on Feb 16, 2011). The Special Tribunal had observed, " *the general provisions of VCLT can very well be applied upon any form of instrument that is legally recognized under international framework…. the said principles form the basic core of interpretation in international realm*".

Such provisions on treaty interpretation were initially incorporated in the draft article prepared by the International Law Commission.[37] The report highlighted the importance of ordinary and natural meaning in interpreting treaty provisions and considered it an essential part of textual interpretation.[38] However, it fails to explain a text's ordinary meaning comprehensively. The ILC Commentary provides some assistance by stating that the court must consider the ordinary meaning as the starting point of interpretation. It also states that the same cannot be construed as the sole test for inferring the specific intention.[39] However, the commentary also doesn't explain the constituent elements of the ordinary meaning test.

VCLT provides some valuable guidelines to expand the scope of ordinary meaning further. The first paragraph clarifies that a treaty provision must be interpreted in good faith. It also states that the ordinary meaning is to be assigned by the context and the object of the text. Further, the second paragraph provides an illustrative list of elements that can make up for the general context of the text. The third paragraph provides specific external sources that could be supplemented along with the identified context of the text. The fourth paragraph clarifies that the general meaning can be deviated from if the particular intention of the parties demands the same. Article 32 allows the court to take recourse to specific additional or supplementary sources to affirm the meaning culled out of Article 31 or infer a new interpretation when the ordinary meaning leads to obscurity.

The overarching point of Article 31 is to impose a good faith obligation to ensure that the text is interpreted within the overall context and object of the relevant instrument. Thus, the three elements (good faith, context, and object) guide the culling out of the ordinary meaning. The concept of good faith is a direct reference to the international principle of pacta sunt servanda. The specific object and purpose can be culled out of the preamble of the concerned treaty.[40] This approach gives effect to the general principle that a treaty is to be interpreted to provide a full effect to its provisions.[41] Further, the requirement of contextual interpretation ensures that each provision is read along with the entire structure of the concerned treaty. Thus,

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[37] Humphery Waldock (Special Rapporteur on the Law of Treaties), *Third Report on the Laws of Treaties*, U.N Doc. A/CN/4/167 (July 7, 1964).
[38] *Id*.
[39] *Int'l Law Comm'n*, *Report of the International Law Commission on the Work of its 18th Session*, UN Doc. A/CN.4/191 (1966).
[40] See, Richard Gardiner, TREATY INTERPRETATION 18 (2015).
[41] *Id*. This principle gives rise to a general interpretative axiom that whenever the interpreter is confounded with two possible interpretation and in which only one gives full effect to the treaty then the interpreter must chose or opt for such interpretation.

the ordinary meaning is not confined to defining a particular term or a treaty provision.

Article 31(2) helps identify the treaty's relevant context. There is a specific reason that the concerned sources were not covered in the third paragraph of the article. It shows that the concerned sources are a constitutive part of the context and should not be relegated to a matter of evidentiary value.[42]

Integrated Notion of Ordinary Meaning

While drafting the text, the commission wanted to reduce the differences in interpreting treaty provisions. The main aim was to provide an objective basis to guide the interpreter. The purpose was to limit the role of discretion in interpreting treaty provisions. It was essential to limit judicial discretion because it couldn't allow the courts to revise the text in the name of interpretation.[43] It is in this regard that the general text was given primary importance. The commission gave equal importance to various sources while emphasising the importance of text. This is to assert that multiple elements of interpretation are to be taken in complement to one another.[44]

Identification of the ordinary meaning of a term is not to be construed as a matter of independent exercise. Ordinary meaning is very intricately connected with the context of the term. It is impossible to segregate the ordinary meaning from the general context of the term.[45] Thus, the first paragraph provides a single integrated process to interpret treaty provisions.[46]

At the outset, there is a need to recognise the difference between the first and the fourth paragraph of Article 31. Under the fourth paragraph, it is clarified that a term can be provided with a special meaning when the same arises out of the specific

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[42] Supra 41 at 219.
[43] See, Thomas R Lee & Stephen Mouritsen, *Judging Ordinary Meaning*, 127 Yale L.J 788(2018).
[44] See, Julian Davis Mortenson, *The Travaux of Travaux: Is Vienna Convention Hostile to Drafting History?*, 107 Am. J. Int'l L. 780 (2013).
[45] See, Antonin Scalia & Bryan Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, WEST GROUP 87 (2012).
[46] Cf. Roberto Castro de Figueiredo, *The ICSID Convention and the VCLT: Interpreting the term "Investment"* in The Vienna Convention on the Law of Treaties in INVESTOR- STATE DISPUTES: HISTORY, EVOLUTION AND FUTURE (Esme Shirlow & Kiran Nasir Gore, eds., 2022). The author seems to suggest that the ordinary meaning of a term is to be given primary importance and cannot be departed from by referring to the object and purpose of the treaty. However, the author has failed to further define the scope of ordinary meaning itself.

intention of the parties. The ordinary meaning of a term has to be different from the special meaning ascribed under the fourth paragraph. However, this doesn't mean that the ordinary meaning has an independent meaning. The fourth paragraph states that the interpreter can deviate from the ordinary meaning if a special meaning is ascribed to a term.

It is also essential to analyse the relation between the ordinary meaning of a term and the textual meaning of a term. The purpose of Article 31 was to emphasise the importance of textual interpretation. If the textual reading is unambiguous, it is unnecessary to further deviate from it.[47] The textual meaning is inferred from a combination of the ordinary sense, contextual meaning and the treaty's object.[48] Each constitutive element informs the substantive scope of the other. Article 31(1) provides a coherent and integrated term interpretation. As it has been observed, the ordinary meaning of a term is to be interpreted along with the object and purpose of a treaty. However, the same cannot be confounded with a teleological approach of identifying the meaning of a term.

A teleological interpretation requires the interpreter first to identify a term's telos (purpose) and then to define a concept in terms of its purpose. It assumes the existence of an independent "purpose". Further, it also believes that the telos is separate and external to the constitutive elements of a term. Such assumptions are not made under Article 31(1). The object and purpose are to be used to infer the context of a term. The context of a term is not external to the term. Instead, it is internal to a treaty provision's general design and structure. Further, this context doesn't have an independent existence, which could have a separate and distinct identification.

Further, the ordinary meaning of a term must not be confused with the inherent meaning of a term. An inherent meaning refers to the natural quality of a term. The assumption is that a concept can have an a priori meaning. Article 31 requires a term to be understood in terms of its context. The ordinary meaning must be read in line with the context and purpose. An interpreter is not necessarily required to refer to the natural meaning of a term. Instead, the interpreter is to be more concerned about how the term is placed under a particular text. A correct interpretation can only be arrived at by first delineating the general structure of an agreement. The same term can have a different meaning under a distinct agreement.

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[47] See, Ian Sinclair, THE VIENNA CONVENTION ON LAW OF TREATIES 87 (1984).
[48] See, Yearbook of the International Law Commission, vol. II, at 220 (1966).

Properly analysing Article 31 requires us first to appreciate the true meaning of interpreting a text. Interpretation is not a value-independent exercise. It constantly requires the interpreter to fit the general set of facts into a value structure provided by a legal framework. Thus, the interpretation of the term "investment" cannot be independent of the value we assign to foreign investments in the international realm.

IV

Implications of Article 31 on Investment Regime

The author has already established that the general principles of interpretation do not necessarily require the interpreter to infer the inherent meaning of a term. While defining the term "investment", the tribunal must focus on the desired sense of the term. Indeed, the centre inquired into the definition that the drafters intended to provide in their Salini decision. For this purpose, the centre took recourse to the convention's preamble. This is in furtherance of Article 31 of VCLT. On the other hand, the tribunal differentiated between the consequences of investing in the natural components of investment in its Quiborax decision. This was based on an assumption that the ordinary meaning of a term can only be confined to those elements that compose a term. This assumption is incorrect on two counts. Firstly, the tribunal failed to show how the concept of development is not inherent to the notion of foreign investment. Secondly (and more importantly), the tribunal was wrong in equating the ordinary meaning with the intrinsic sense of a term.

Thus, the author thinks there is no need to segregate the development requirement from the other investment components. A similar approach can also be taken in non-ICSID cases. In a non-ICSID case, the ordinary meaning of the term investment would be understood in the context of general principles of international law. Such a definition can then provide an outer limit to the term "investment" in non-ICSID cases. The centre took this approach in its Romak decision.[49]

V

Conclusion

Several bilateral investment treaties largely govern the international Investment regime. Each treaty provides a unique set of terms to govern the specific relationship between parties. Several such treaties offer their definition of investment. This raises

[49] *Supra* note 10.

a fundamental question on whether there can be an objective way to determine the nature of investment under an investment regime.

The ICSID Tribunal provided an objective criterion in Salini v. Morocco. This is also popularly considered the Salini Test. The Tribunal relied upon the general structure of the ICSID Convention to provide for four basic requirements of investments. According to the tribunal, such considerations were to be construed as the objective grounds of investment. Such grounds had to be established in addition to the specific requirements provided under the agreement between the concerned parties.

Recently, several tribunals decided to deviate from the objective grounds provided under the Salini Test. In particular, several tribunals disagreed with the requirement to prove the contribution to the host state's development. They stated that this is not an inherent quality of an investment.

The author has concluded that there is no need to adhere to an inherent meaning of the term. The only obligation is to interpret the ordinary meaning of a term in good faith and consonance with the treaty's context, object, and purpose. The ordinary meaning so inferred can very well be different from the inherent meaning of the term. The ordinary and contextual meanings are placed on an equal footing under VCLT. Thus, the tribunal aligned with the general principles of treaty interpretation when it provided for four distinct requirements under the Salini Test.