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The (mis)use of development in international investment law: understanding the jurist's limits to work with development issues

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Abstract: The decolonization period was characterized by the adoption of investment protection agreements with the objective of serving the purposes of both transnational corporations and newly decolonized States. These agreements are primarily meant to protect private international investments and, incidentally, they have been presented as instruments of development: protecting international investments to foster development. Many newly decolonized States signed and ratified such treaties with the aim of attracting foreign investors – but also to maintain existing ones; what was expected in return was a contribution to their development. This article studies the legal relationship which consequently exists between international investment law and development, but at the same time, it highlights the flagrant misuse of the concept of development in practice. In this law field, both the Global North and the Global South tend to envision development in a way which is deprived of all technical and scientific grounds. The paper firstly explains how the objective of development, rooted in such investment agreements, acquired a legal function. Bilateral investment agreements were a means to forge newly decolonized States' expectations and belief concerning the paramount necessity to protect foreign investments so as to benefit in terms of development. In the international investment legal practice, the contribution to the host State's development by the foreign investor has been frequently used as a criterion to identify an investment: to be protected by an investment agreement any activity must necessarily be identified as an investment. As the latter knows no definition some tribunals have considered that one of the criteria to identify an investment is a contribution to the development of the host State by the potential investor. Theoretically, this seems to consider the interests of developing States in their relationship with transnational corporations. However, and this is the second point, development has itself never really been defined – and still is not in this law field. It is hence used and applied as an undefined concept. Development is in fact referred to as an image, as a symbol, but never in its technical aspects. Accordingly, such reference made to the concept

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of development in international investment law is far from convincing and forges skepticism on its intrinsic necessity and use. In this vein, it raises the thorny question of the jurist's technical competence to assess what development is and how it can – technically – be used in law.

Keywords: development, investment, criterion, jurist

1 Introduction

There is often a common misunderstanding and a misuse of the concept of development by jurists. They tend to use it by neglecting its technical content and meanders, and by substituting a scientific definition of development by their subjective beliefs of what development is. This study argues that the majority of jurists are not technically prepared to work scientifically with development issues and uses the field of international investment law to illustrate this thesis, given that the concept of development has been frequently referred to therein. But before presenting the articulation between jurists and development in international investment law, the concept must in itself be explained.

Be it at a personal or at a State level, development is at the same time an objective and a belief – like a religion of modernity.¹ In the common language, the objective of development is tantamount to enrichment, to access to more wealth and well-being. This material enrichment is, since long, a systematic objective for the great majority of States, societies and people: the richest yearn for more wealth; the poorest deploy their best efforts to gain the ranks of the richest. It is believed that this is what should be strived for. Therefore, as a desired objective, development has become a state of normality and in the logic of every belief, it governs the path of all. This would however be a non-technical approach to understand the concept of development.

Economically speaking, the objective of development fuels the *homo oeconomicus*' mindset, inciting him/her to maximize his/her benefits and welfare by making an optimal use of his/her resources; the aim is to increase the national production by an optimal use of the available factors of production so as to generate a surplus whose purpose is to further maximize the production process for a wealthier State² and a better standard of living.³ As per Rostow's theory, a

1 G. Rist, *The History of Development. From Western Origins to Global Faith* (New Delhi: Academic Foundation, 2009), p. 21 *et seq.*

2 C. Furtado, *Teoria e política do desenvolvimento econômico* (São Paulo: Editora Nacional, 1967), pp. 116–119; C. Furtado, *Développement et sous-développement* (Paris: PUF, 1966), p. 79.

3 G.M. Meier and R.E. Baldwin, *Economic Development: Theory, History, Policy* (New York: John Wiley & Sons, 1963), p. 135.

country's development can be ideal-typically mapped in five steps: (i) initially, the society has a traditional living pattern and is poorly developed, with a weak entrepreneurship capacity; (ii) it then gathers the basic requirements – the exploitation of its natural resources and of its production capacity by the expansion of an entrepreneurship spirit, by having recourse to internal and external investments,⁴ to technology and to modern production techniques –, to ensure its take off; (iii) this engenders the development process, with the production of a surplus which can be reinvested; (iv) the country's economy boils to maturity which is characterized by the apparition of heavy industries and by an era of mass production of capital and of consumption goods; (v) this ultimately leads to a mass consumption period which is rendered possible by an increase not only of the general level of production but also of the general revenue.⁵ The economic equation of development is here expressed in material, monetary terms.

Philosophically speaking, a will for power lurks behind the will to develop: wealth, wrote Aristotle, is not, in itself, what we look for; it is just a useful means for other ends.⁶ Besides, what development intrinsically is also depends on the perspective from which it is examined. While it is a boon for some, other authors consider development as a myth which is imbricated in the occidental mindset and which has gradually been imposed on others as a normality.⁷ Development implies an idealization of a certain way of life which is often the one characterizing industrialized occidental States. Thus, through development, it is a way of life and a pattern of thinking which is transmitted as a fatality – from the more to the less powerful.⁸ The quest for development is often a quest for identity. Interestingly, some dictionaries still define developing States as those which have not yet reached the economic level of Occidental Europe or

⁴ See also: W. Brand, *Desenvolvimento e padrão de vida. O problema nas regiões subdesenvolvidas* (São Paulo: Editora Fundo de Cultura, 1964), p. 337.

⁵ W.W. Rostow, *Les étapes de la croissance économique* (Paris: Seuil, 1963), pp. 12–32, p. 117 *et seq.*

⁶ Aristotle, *Éthique à Nicomaque* (Paris: Librairie Philosophique J.Vrin, 1990), pp. 44–45.

⁷ A. Escobar, *The Invention of Development*, 98 *Current History* (1999), 383; C. McEwan, *Postcolonialism and Development* (Oxon: Routledge, 2009), pp. 84–85; M.J. Rabbani, *The Development and the Antidevelopment Debate. Critical Reflections on the Philosophical Foundations* (Surrey: Ashgate Publishing, 2011), p. 9; R.E. Gordon and J.H. Sylvester, *Deconstructing Development*, 2 *Wisconsin International Law Journal*, no. 1 (2004), 9 *et seq.*; V. Tucker, “The Myth of Development: A Critique of a Eurocentric Discourse”, in R. Munck, D. O’Hearn (eds.), *Critical Development Theory. Contributions to a New Paradigm* (New York: Zed Books, 1999), pp. 1–4.

⁸ Tucker (1999), *supra* note 7, p. 11; P. Achard, « *Sociologie du développement* » ou *sociologie du « développement* », 23 *Tiers Monde*, no. 90 (1982), 257–278.

of North America.⁹ For this reason, the critical doctrine considers development as an invention.¹⁰ And in a similar vein, the very necessity of development, of growth, of accumulation, can, to some extent be questioned. For example, the limits to growth theory have its proponents,¹¹ and this conundrum has already been the subject of much thought in ancient philosophy – whereby the necessity of wealthiness has been questioned by some.¹²

Still, in spite of all the criticisms which can be made about development, the latter does not cease to exist, be it in the mindsets or in practice: it is in the name of development that States embark on public policies, exchange, import, export, invest, build, destroy or take on debts.¹³ This study examines development as it is, as an existing phenomenon, in its articulation with law. The objective of this article is not to deconstruct the concept of development in moral terms or to state that its pursuit is desirable or not. Yet, the presentation of the above critical approach to development was paramount to explain the complex task of understanding the concept's real contours and substance.

Indeed, from a rigorous and technical standpoint, the concept of development is polymorphous. For this reason, understanding its meanders requires a study of development in its economical, sociological, historical, philosophical, political, anthropological, legal and critical aspects. This also explains the difficulty to coin a unanimous definition of what is intrinsically development.¹⁴ Some authors assert that there are as many as seven hundred possible definitions of the concept of development¹⁵, while others deplore that the existing definitions are vague and laconic, without any practical content.¹⁶ Its content vary temporally and geographically. Temporally, what was considered as development in the sixties is different from the ongoing meaning of development. Nowadays,

⁹ See: *Le Dictionnaire encyclopédique* (Paris: Hachette), vol. II, p. 433.

¹⁰ Escobar (1999), *supra* note 7, 382–386.

¹¹ D.H. Meadows, D.L. Meadows, J. Randers and W.W. Berhens III, *The Limits to Growth. Report of the Club of Rome's Project on the Predicament of Mankind* (New York: Universal Books, 1972), p. 205.

¹² See the works of Seneca [L. Seneca, *Aprendendo a viver. Cartas a Lucílio* (Porto Alegre: L&PM Pocket, edition published in 2013), pp. 99–104 / Seneca, *Ad Lucilium Epistulae Morales* (Cambridge: Harvard University Press, 1979), p. 9] and of Diogenes Laertius on Diogenes of Sinope (D. Laërce, *Vie, doctrines et sentences des philosophes illustres II* (Paris: Flammarion, 1965), pp. 14–36.

¹³ Rist (2009), *supra* note 1, p. 11.

¹⁴ B. Knutsson, *The Intellectual History of Development. Towards a Widening Potential Repertoire*, Perspective, no. 13 (2009), 2–3.

¹⁵ M. Cowen and R. Shenton, “The Invention of Development”, in J. Crush (ed.), *Power of Development* (New York: Routledge, 1995), p. 28.

¹⁶ Rist (2009), *supra* note 1, pp. 10–11.

economic development has itself been englobed in the general concept of sustainable development¹⁷ and factors such as environmental protection, social structure, infrastructure, culture, gender, religion, institutions, biodiversity, education, corporate social responsibility, labor quality and treatment, governance, freedom,¹⁸ all these, amongst many others, must be taken into account for the purpose of a serious definition. Geographically, all these factors vary from one State to the other and in the same country, they potentially vary from one region to the other.¹⁹ Hence, what is development for some is not always the same for others.

Resultantly, defining development demands an immersion in various disciplines and a requires an inter-disciplinary method which the jurist does not always have. This explains why the concept of development is not always technically defined when used by jurists many of whom consider it as a self-explained concept. This is the case in international investment law. International investment law is the international law field which organizes the legal protection of private international investors – and of their investments – when they settle their activities abroad. A constellation of bilateral and multilateral investment protection agreements provide for the procedural and substantial protection of such investments.²⁰ These agreements originally had a double objective: the protection of international investments and also the promotion of development. Indeed, of the approximately 3,000 existing bilateral investment agreements, many relate investments to development in their preamble.²¹ For example, the United States

17 D. Ray, *Development Economics* (New Jersey: Princeton University Press, 1998), pp. 8–9; F. Zemeño, *Lecciones de desarrollo económico* (Mexico: Playa y Valdés, 2004), pp. 28–29; P. Hugon, *L'économie du développement et la pensée francophone* (Paris: Éditions de sarchives contemporaines, 2008), pp. 8–10.

18 A. Sen, *Development as Freedom* (New York: Anchor Books, 2000), p. 366.

19 N. Monebhurrin, “L’utilisation contemporaine du développement en droit international des investissements: la méconnaissance des réalités régionales”, in M.J. Aznar and M.E. Footer (eds.), *Select Proceedings of the European Society of International Law – 2012* (Oxford: Hart Publishing, 2015), p. 314.

20 These agreements have been compiled by the United Nations Conference for Trade and Development and are available at: <http://investmentpolicyhub.unctad.org/IIA>. The aim of this article is not to examine exhaustively all these procedural and substantial protections granted to foreign investors in international investment law. For such purposes, one can refer to: R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2012), p. 417; K. Miles, *The Origins of International Investment Law. Empire, Environment and the Safeguarding of Capital* (Cambridge: Cambridge University Press, 2013), p. 464.

21 See for instance, the bilateral investment agreements between: China and Egypt (21/04/2004); France and Albania (13/06/1995); Czech Republic and Algeria (22/09/2000); Argentina and the United States (14/11/1991); South Korea and The Democratic Republic of Congo (17/03/2005); Japan and Uzbekistan (15/08/2008); the United Kingdom and Mauritius (20/05/1986). These agreements are available at: <http://investmentpolicyhub.unctad.org/IIA>

investment treaty model, the Canadian model, the French model, the Agreements on Cooperation and Facilitation of Investments signed by Brazil, namely with Angola, Malawi, Mozambique, Chile, Colombia and Mexico,²² all establish an intrinsic link between investment protection and the promotion of development. The following logic is applied: a legal protection is granted to foreign investors to attract them to a given territory where their activities are expected to contribute to the host State's development.²³ In 1962 – period which marks the beginning of the bilateral investment agreements era –, the United Nations Secretary-General, U Thant, noted this fundamental relationship which is believed to exist between investment circulation and development.²⁴ By the mechanism of what economists call the multiplier effect, any investment in the economic circuit of a given State ultimately leads to a capital value which is higher than the one initially invested²⁵ for this reason, foreign investments potentially boost local economies as – *ceteris paribus* – the injection of external capital within the financial circuit of the host States ultimately generates more revenue for others, thereby increasing the general level of purchasing power, of demand and of reinvestment.²⁶ For many developing countries, the expectation of a contribution to development was one

22 These agreements are available at: <http://investmentpolicyhub.unctad.org/IIA>

23 K.J. Vandervelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 Columbia Journal of Transnational Law (1998), 503–504.

24 Report of the United Nations Secretary-General (U Thant), *Décennies des Nations Unies sur le développement. Mesures proposées*, E/3612 (22/05/1962), p. 144. See in a similar sense: M. Amadio, *Le contentieux international de l'investissement privé et la Convention de la Banque mondiale du 18 mars 1965* (Paris: LGDJ, 1967), p. 14; R.J. Dupuy, *Communauté internationale et disparités de développement: cours général de droit international public*, 165 R.C.A.D.I. (1979), 23; G. Gozard, *La convention de la B.I.R.D pour le règlement des différends relatifs aux investissements*, 24 Tiers-Monde, no. 6 (1965), 989; M. Bennouna, *Droit international du développement* (Paris: Berger Levrault, 1983), p. 235; J. Freyssinet, *Le concept de sous-développement* (Paris: Mouton & Cie, 1966), p. 58, p. 61; J. Stiglitz, *La grande désillusion* (Paris: Fayard, 2002), pp. 121–122; T. Harding and B.S. Javorcick, “Developing Countries and International Investors: Do Investment Promotion Agencies Bring Them Together?”, World Bank, Policy Research Working Paper (2007), pp. 2–50; Y.S. Lee, *Foreign Direct Investment and Regional Trade Liberalization: A Viable Answer for Economic Development*, 39 Journal of World Trade, no. 4 (2005), 701–703; G. Feuer, *Libéralisme, mondialisation et développement. A propos de quelques réalités ambiguës*, 45 Annuaire français de droit international (1999), 156–157.

25 J.M. Keynes, *The General Theory of Employment, Interest and Money* (New Delhi: Atlantic, 2008), pp. 102–110; A. Anderton, *Economics* (New Delhi: Dorling Kindersley, 2006), p. 215; D. Boleslaw and G. Kryzstof, *Multiplier Effect in Local and Regional Development*, 29 Quaestiones Geographicae, no. 2 (2010), 28–35; P. Hasan, *The Investment Multiplier in an Underdeveloped Economy*, 3 Economic Digest, no. 4 (1960), 21–29; R.F. Kahn, *Relation of Home Investment to Unemployment*, 40 Economic Journal, no. 162 (1931), 173–174.

26 Furtado (1967), *supra* note 2, p. 99.

of the reasons which justified their acceptance of the international investment law system which was at its origins and which, to a great extent, still is voluntarily imbalanced in favor of foreign investors who have mainly rights and very few obligations while the States have mostly obligations and few rights.²⁷ It can be claimed that this disequilibrium was initially accepted by developing States namely because of this expectation of a contribution to their development.²⁸

The articulation between investment protection and development became a legal conundrum in the context of investment arbitration. To claim the protection of an investment agreement, a potential investor must imperatively justify that his/her activity is an investment. Accordingly, an arbitral tribunal will be competent for a given case only if the latter is related to an investment activity; commercial activities are discarded. For instance, article 25 of the Washington Convention which instituted the International Centre for the Settlement of Investment Disputes (ICSID) – under the auspices of which about two third of investment arbitrations occur –, state that “[t]he jurisdiction of the Centre shall extend to any legal dispute **arising directly out of an investment**, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre²⁹”.

However, the concept of investment is not clearly defined in the investment agreements. Investment agreements provide examples of investment activities but do not give a conceptual definition thereof. If the presence of an investment is a *ratione materiae* condition for the tribunals’ jurisdiction under the Washington Convention,³⁰ the latter does not – even tentatively – define the concept. Some

27 P. Juillard, “Le système actuel est-il déséquilibré en faveur de l’investisseur privé étranger et au détriment de l’État d’accueil? (Table ronde), in C. Leben (ed.), *Le contentieux arbitral transnational relatif à l’investissement. Nouveaux développements* (Paris: LGDJ, 2006), pp. 190–191; M. Sornarajah, *Power and Justice: Third World Resistance in International Law*, 10 Singapore Yearbook of International Law (2006), p. 32; A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Alpehn Aan Den Rijn: Kluwer Law International, 2009), p. 43; P. Muchlinski, “Corporate Social Responsibility”, in P. Muchlinski, F. Ortino and C. Schreuer (eds.), *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008), p. 638.

28 N. Monebhurrin, *La fonction du développement dans le droit international des investissements* (Paris: L’Harmattan, 2016), p. 76 *et seq.*

29 Convention of Washington (instituting the ICSID) [19/03/1965], article 25, available at: https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf [highlighted by the author].

30 E.C. Schlemmer, “Investment, Investor, Nationality and Shareholders”, in P. Muchlinski, F. Ortino and C. Schreuer (eds.), *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008), p. 62.

arbitral tribunals therefore coined a methodology to identify an investment: they elaborated a series of criteria for such purposes. In a landmark *Salini v. Morocco* case, the arbitral tribunal, drawing on the legal doctrine,³¹ stated:

The doctrine generally considers that investment infers: contribution, certain duration of performance of the contract and a participation in the risks of the transaction [...]. In reading the Convention's Preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition³²

From this point on, the contribution to the host State's development has been considered as a criterion to identify an investment.³³ The four criteria are generally referred to as the *Salini* test or as the *Salini dictum* and have been extensively used by subsequent arbitral tribunals in defining an investment.³⁴

31 For some doctrinal reference on this question see: C. Schreuer, *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press, 2009), § 128. Professor Schreuer referred to these criteria in the first edition of his book published in 2001. See also: G.R. Delaume, *Le Centre international pour le règlement des différends relatifs aux investissements*, 4 *Journal du droit international* (1982), 801.

32 *Salini Construtorri S.p.A. and Iralstrade S.p.A v Morocco*, ICSID no. ARB/00/4, Decision on Jurisdiction (23/07/2001), § 52.

33 See for instance: *Patrick Mitchell v. Democratic Republic of Congo*, ICSID no. ARB/99/7, Decision on annulment (01/11/2006), § 30, § 33; *Phoenix Action Ltd. v. Czech Republic*, ICSID no. ARB/06/5, Award (15/04/2009), § 84; *Joy Mining Machinery Limited v. Egypt*, ICSID no. ARB/03/11, Decision on Jurisdiction (06/08/2004), § 53; *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID no. ARB/05/10, Decision on Jurisdiction (17/05/2007), § 78; *Toto Costruzioni Generali S.p.A. v. Lebanon*, ICSID no. ARB/07/12, Decision on Jurisdiction (11/09/2009), § 69; *Mytilineos Holdings SA v. Serbia and Montenegro*, UNCITRAL, Decision on Jurisdiction (08/09/2006), § 115; *Pantehniki S.A. Contractors & Engineers v. Albania*, ICSID no. ARB/07/21, Award (30/07/2009), § 36; *Noble Energy, Inc. and Machalapower CIA. LTDA v. Ecuador and 'Consejo Nacional de Electricidad'*, ICSID no. ARB/05/12, Decision on Jurisdiction (05/03/2008), § 128; *Jan de Nul N.C. and Dredging International N.C. v. Egypt*, ICSID no. ARB/04/13, Decision on Jurisdiction (16/06/2006), § 91; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan*, ICSID no. ARB/03/29, Decision on Jurisdiction (14/11/2005), § 130; *Saipem v. Bangladesh*, ICSID no. ARB/05/07, Decision on Jurisdiction (21/03/2007), §§99–111.

34 For example: *Patrick Mitchell v. Democratic Republic of Congo*, ICSID no. ARB/99/7, Decision on annulment (01/11/2006), § 30; *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID no. ARB/05/10, Decision on Jurisdiction (17/05/2007), § 74; *Pantehniki S.A. Contractors & Engineers v. Albania*, ICSID no. ARB/07/21, Award (30/07/2009), § 36; *Helnan International Hotels A/S v. Egypt*, ICSID no. ARB/05/19, Decision on objection to Jurisdiction (17/10/2006), § 59; *Jan de Nul N.C. and Dredging International N.C. v. Egypt*, ICSID no. ARB/04/13, Decision on Jurisdiction (16/06/2006), § 91; *Joy Mining Machinery Limited v. Egypt*, ICSID no. ARB/03/11, Decision on Jurisdiction (06/08/2004), § 62; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan*, ICSID no. ARB/03/29, Decision on Jurisdiction (14/11/2005), § 130; *Toto Costruzioni Generali S.p.A. v. Lebanon*, ICSID no. ARB/07/12, Decision on Jurisdiction (11/09/2009), § 69; *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID no. ARB/05/22, Award (24/07/2008), § 310.

This said, other tribunals have expressed a serious skepticism regarding these criteria.³⁵ The contribution to development criterion is the most controversial one³⁶ and the main issue remains that both categories of tribunals never define development. One group of tribunals use an undefined concept (development) to define investment so as to determine their jurisdiction; the other group rejects the development criterion but without showing a full technical command in the construction of its arguments.

The stakes in such arbitral procedures are important: depending on the criteria used or not to define an investment, a given activity will be granted (or not) a legal protection by the application of an investment agreement. Therefore, to assert that a contribution to the development of the host State is or not a means to identify an investment, arbitrators must master the concept's technical aspects; they should not give in to the common understanding one might have of development. Unfortunately, this is what is revealed by many awards and decisions. This raises the question of the jurist's real technical competences and capacity – at least, in this law field –, to deal seriously with development issues.

On this basis, this article asserts that there is a flagrant misuse of development by arbitral tribunals in international investment law. To some extent, this reveals the arbitrators' and the jurist's limits when it comes to give a scientific opinion on development issues. This limit twofolds: it is firstly expressed by an absence of technical definition of development when used by arbitrators (Section 2) and is secondly confirmed by the lack of technical consolidation of the development criterion in the arbitral practice (Section 3).

2 The jurist's limits expressed by the absence of technical definition of development by arbitral tribunals

If the concept of development can be approached technically, it also has an ideological load.³⁷ And knowing that their *dicta* are often used in future cases,

³⁵ This will be studied in detail *infra*.

³⁶ *Philip Morris Brands SARL, Philip Morris Products A.A. and Abal Hermanos S.A. v. Uruguay*, ICSID case no. ARB/10/7, Decision on Jurisdiction (02/07/2013), § 207.

³⁷ M. Flory, "Introduction Générale", in M. Flory *et al.*, *La formation des normes en droit international du développement*, Centre de recherches et d'études sur les sociétés méditerranéennes, Table Ronde franco-maghrébine (Aix-en-Provence: Editions du CNRS, 1982), p. 9; I. Alechina, « The Contribution of the United Nations System to Formulating Development Concepts », in *Different Theories and Practices of Development* (Paris: UNESCO, 1982), p. 10.

many tribunals surely do not want to bear a kind of responsibility by choosing a given definition of development. Arguably, the will to avoid a politically tainted dispute resolution could explain the tribunals' silence when it comes to defining the development criterion. However, a close scrutiny of the arbitral awards and decisions shows that this is not the main reason explaining the lack of definitions. In the arbitral jurisprudence, many tribunals have given a fundamental role and function to the development criterion but still, they often use their subjective 'impression' of what development could be instead of considering what development is, in its technical reality. Impressionism is preferred to technicity.³⁸ Consequently, arbitral tribunals adopt and apply a symbolical definition of development (Section 2.1) and this is surely the case because they lack the technical means to give a purposeful effect to the concept in practice (Section 2.2.).

2.1 The adoption of a symbolical definition of development by arbitral tribunals

The use of the development criterion to identify an investment and to, indirectly, construe the jurisdictional limits of arbitral tribunals is not convincing given that the concept of development is considered under an over-simplified form. Its presence is more symbolical than technical because many arbitrators tend to consider that development is a self-defined concept. Indeed, the arbitral jurisprudence reveals that tribunals conclude on what is or not a contribution to development by merely reading and examining the facts of a given case – without indulging into a concrete technical study. In other words, what seems to be a contribution to the host State's development is validated as an effective contribution.

In a *Jan de Nul N.C. And Dredging International N.C. v. Egypt* case, the investor and the State had signed a contract whereby the former was expected to drag some parts of the Suez Canal. The investor however considered that Egypt – via the Suez Canal Authority – had dissimulated some important information concerning the quality and the quantity of soil to be dragged; this, according to Jan de Nul, was tantamount to a contractual violation. The case was referred to the Egyptian administrative tribunals and was later on submitted to an ICSID tribunal on the claim that Egypt's actions had also infringed the applicable bilateral investment agreement between Belgium/Luxembourg and Egypt. As per the

³⁸ N. Monebhurrin, *The Political Use of the Economic Development Criterion in Defining Investments in International Investment Arbitration*, 29 *Journal of International Arbitration* (2012), 570.

above-mentioned article 25 of the Washington Convention, the tribunal had to establish its competence before analyzing the demand on the merits. By applying the *Salini* criteria,³⁹ the arbitral tribunal considered that it was competent and by examining more specifically the development criterion, it stated that “one cannot seriously deny that the operation of the Suez Canal is of paramount significance for Egypt’s economy and development⁴⁰”. The statement and the conclusion are both categorical, the problem being that the arbitrators do not explain and justify their reasoning; the methodology employed, the relevant and expected calculations, the thorough study revealing how and why the activity has effectively contributed to the host State’s development, these are all absent. There is an impression or a belief that such activities contribute to development. And, as such, impressions and beliefs are converted into scientific conclusions. We do not claim that dragging activities do not have an impact on development. Nonetheless, in order to draw a directly proportional relationship between one and the other, the very concept of development must, first of all, be defined and its criteria must be known and justified.

In a *Helnan v. Egypt* case, the dispute arose in the context of a hotel’s management. The Danish company, Helnan, had signed a contract with the *Egyptian Company for Tourism and Hotels* (EGOTH) for the management of the *Shepherd hotel*. The latter was later on downgraded from a five to a four stars and, resultantly, the EGOTH started an arbitral procedure against Helnan before a local arbitral center which ruled that the hotel should be handed back to the Egyptian authorities. As Helnan could not seek the award’s annulment on a national level, it started an arbitral proceeding before an ICSID tribunal, claiming that Egypt had breached the bilateral investment agreement signed with Denmark. Amongst other things, the investor considered that Egypt had indirectly expropriated its activities and had failed to provide it a fair and equitable treatment.⁴¹ Before considering the merits, the arbitral tribunal found that it had jurisdiction over the case: as per *Salini*, it determined that the criteria of an investment were all present and when it came to the development criterion, it highlighted that “as for the contribution of Egypt’s development, the importance of the tourism industry in the Egyptian economy makes it obvious⁴²”. The

³⁹ *Jan de Nul N.C. And Dredging International N.C. v. Egypt*, ICSID ARB/04/13, Decision on Jurisdiction (16/06/2006), § 91.

⁴⁰ *Jan de Nul N.C. And Dredging International N.C. v. Egypt*, ICSID ARB/04/13, Decision on Jurisdiction (16/06/2006), § 91.

⁴¹ On these investment protection standards, see: Dolzer and Schreuer (2012), *supra* note 20, pp. 98, 130.

⁴² *Helnan International Hotels A/S v/ Egypt*, ICSID no. ARB/05/19, Decision on Jurisdiction (17/10/2006), § 77.

language is, once again, categorical. The following syllogism is followed: the tourism sector is important for a country's development; Helnan's activities were related to tourism; consequently, the foreign company contributed to the host State's development. This reasoning is technically not convincing because it must be shown how and why a given touristic activity has effectively and concretely contributed to development. The methodological steps of the tribunal are incomplete and it is the image of development which governs their mindset, thereby taking precedence over the reality of development. It is not certain that a touristic activity which is detrimental to environmental and safety norms, to the welfare of the local population or which helps to exacerbate a state of social inequality – as this sometimes happens⁴³ – contributes to development.⁴⁴ Some consider that there is a potential but not a systematic relationship between tourism and local development.⁴⁵ And arbitrators tend to virtually sucralose the concept without exploring its real technical content.

This is, furthermore, revealed in the *Malaysian Historical Salvors* case. The concerned activity was the dredging of a ship undertaken in Malaysia by a British company under a “no finds – no pay” contract. The dispute arose due to a payment problem on the part of the State and an ICSID tribunal – composed of a unique arbitrator – was nominated to rule on the case. The arbitrator first of all had to determine if a dredging activity is an investment as per the applicable investment agreement and as per the ICSID convention. By applying the *Salini* test, he decided that the British company's activities – a usual service contract-based business⁴⁶ – could not be characterized as an investment. He attributed a determining value to the development criterion⁴⁷ as per his understanding, a given business is an investment only if it contributes to the host State's development. Besides, according to the arbitrator, only activities related to heavy

⁴³ E. Grégoire, *Développement touristique et reproduction sociale à l'île Maurice*, 57 *Civilisations – Revue internationale d'antropologie et de sciences humaines* (2008), 91–106.

⁴⁴ M. Sornarajah, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2004), p. 263.

⁴⁵ Y. Del Tisco Yera, I. Munfet and L. Cerdan, *El turismo como estrategia del desarrollo en Cuba*, 66 *Estudios Geográficos* (2005), 293–318; J.A. Puppim de Oliveira, *Governmental Responses to Tourism Development: Three Brazilian Case Studies*, 24 *Tourism Management* (2003), 97–110; R. Suntoo, *The Impact and Influence of Tourism in Mauritius: The Case of Flic en Flac*, 1 *The International Journal's Research Journal of Economics and Business Studies* (2012), 22–29.

⁴⁶ *Malaysian Historical Salvors v. Malaysia*, ICSID no. ARB/05/10, Decision on Jurisdiction (15/05/2007), § 131, §§144–146.

⁴⁷ *Malaysian Historical Salvors v. Malaysia*, ICSID no. ARB/05/10, Decision on Jurisdiction (15/05/2007), § 135.

infrastructure or to banking services can contribute to a State's development.⁴⁸ The company had put forward about twenty-seven arguments to justify its contribution to the development of Malaysia: for instance, the employment of local people or the transfer of know-how in terms of dredging.⁴⁹ These were ignored by the arbitrator who discussed the concept of development in abstract, and to some extent, fictitious, terms. There are no explanations to argue why only investments in infrastructure or in banking activities are favorable to development. The arbitrator's conception of development is a preconceived one. This decision was later on annulled by an annulment committee which considered, amongst other things, that the arbitrator had accorded a predominant value to the development criterion whereas this was not justified legally. It also stated that the arbitrator had excluded low value activities from the ambit of investments, while the negotiators of the Washington Convention had purposefully refused to attach a given value to an activity for it to be considered as an investment.⁵⁰ If all tribunals abided to the arbitrator's logic by making development the fundamental *condition* of an investment, they would reject their competence in many cases. The annulment award is interesting in that it is accompanied by a dissenting opinion of Judge Shuhabuddeen who reiterated – as had done the sole arbitrator –, the importance of the development criterion.⁵¹ The latter, according to the dissenting opinion, must imperatively be used to define investments. Furthermore, the contribution to development, for Judge Shuhabuddeen, must be substantial,⁵² and this, he says, is just a question of common sense. He understands that ICSID's operational expenses are supported by member States and that the latter have not accepted to incur such costs for the Centre's jurisdiction to be opened to those business activities which do not contribute in some way to their development.⁵³ But again, development is used as an image, without any definitions. The concept is considered as a self-explained, as a self-defined, as an evident one. Arbitrators refer to it in a

48 *Malaysian Historical Salvors v. Malaysia*, ICSID no. ARB/05/10, Decision on Jurisdiction (15/05/2007), § 131, § 142.

49 *Malaysian Historical Salvors v. Malaysia*, ICSID no. ARB/05/10, Decision on Jurisdiction (15/05/2007), §§132–136.

50 *Malaysian Historical Salvors v. Malaysia*, ICSID no. ARB/05/10, Decision on Annulment (16/04/2009), § 80 (c).

51 *Malaysian Historical Salvors v. Malaysia*, ICSID no. ARB/05/10, Decision on Annulment (16/04/2009), Dissenting Opinion of Judge Shuhabuddeen, § 4.

52 *Malaysian Historical Salvors v. Malaysia*, ICSID no. ARB/05/10, Decision on Annulment (16/04/2009), Dissenting Opinion of Judge Shuhabuddeen, §§33–38.

53 *Malaysian Historical Salvors v. Malaysia*, ICSID no. ARB/05/10, Decision on Annulment (16/04/2009), Dissenting Opinion of Judge Shuhabuddeen, §§20–21.

tautological fashion and define development as ... ‘development’.⁵⁴ The debate in the case law is not technical and, interestingly, the States’ understanding of development seldom appears in the awards and decisions. It can, after all, be claimed that States are in a better position to define what they consider as a contribution to *their* development. Arbitral tribunals do not have the standing and competence to decide what a host State’s development should be. It can be claimed that considering development issues is a means of maintaining developing States’ confidence in the investment arbitration system. Howbeit, this would only be a matter of appearance as invoking development considerations generously in an arbitral procedure does not mean that development is concretely taking place – whatever the definition adopted.

If the arbitral jurisprudence, in general, shows this lack of technicity in working with the development criterion, it surely means that arbitrators lack – or, at least, do not employ –, the required techniques and methods to make an appropriate use of the concept.

2.2 The jurist’s limits justified by the lack of technical means to define development

The introduction of this study explained that a scientific definition of development would require a technical command of many scientific fields. Development is not only an economical matter⁵⁵ and if there might be a consensus on development as an objective, there is no common line when it comes to its content. It is not commonly agreed that a foreign company which benefits in a certain way to the host State but which kills local competition, which destroys the local population’s living habits, culture or environment or which has practices of corruption can still be considered as ‘development-friendly’.⁵⁶ But the arbitral tribunals do not scrutinize the impacts which a foreign business might have locally: they do not check the employment level and the salary rates, the respect of domestic labor and environmental laws, the transfer of know-how, the corporate social responsibility, the formation of local labor, the contribution to economic diversification, the

⁵⁴ In a similar sense, see: *Millicom International Operations B.V and Sentel GSM S.A v. Senegal*, ICSID no. ARB/08/20, Decision on Jurisdiction (16/07/2010), § 80.

⁵⁵ J.W. Kindt, *Providing for Environmental Safeguards in the Development Loans Given By the World Bank Group to the Developing Countries*, 5 Georgia Journal of International and Comparative Law (1975), 540–557,

⁵⁶ B. Stern, *The Contours of the Notion of Protected Investments*, 24 ICSID Review, Foreign Investment Law Journal (2009), 543; W. Ben Hamida, *La notion d’investissement: la notion maudite du système CIRDI?*, 349 Gazette du Palais (2007), 36.

respect of local customs and traditions. And even if these factors were duly taken into account, the arbitrators would have to delimitate a period of reference to examine each of these. Indeed, some activities can contribute to a State's development for a certain time period and be unproductive after that.⁵⁷ Adopting the right methodology for such a study is a complex technical question which cannot be solved by mere legal means and competences.

This problem concerning the very understanding of the concept of development is further illustrated by the confusion which exists before arbitral tribunals between development and economic development. The preamble of the Washington Convention to which arbitral tribunals refer to establish the fundamental link between foreign investment and development in fact states:

Considering the need for international cooperation for economic development, and the role of private international investment therein [...]⁵⁸

According to the interpretation techniques in international law, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose⁵⁹”. The terms are deliberately chosen, discussed and negotiated and should be accorded their purposeful value. And in this sense, the ordinary meaning of “economic development”, as referred to in the preamble, is different from that of “development”. Economic development is entrenched in the concept of development but is not limited to the latter. A contribution to the economic development of a country does not always imply a systematic contribution to its global development. If economic development⁶⁰ is mostly measured in terms of production, revenue, capital or gross domestic product, other parameters and other values are usually taken into consideration to measure development⁶¹; in other words, development is not defined only in economic terms.⁶² The World Bank has, for example, changed the lenses through which it mapped development: it had initially adopted a purely

57 S. Manciaux, *Investissements étrangers et arbitrage entre États et ressortissants d'autres États. Trente années d'activité du CIRDI* (Dijon: Litec-CREDIMI, 2004), p. 71.

58 Convention of Washington instituting the ICSID (18/03/1965), preamble.

59 Vienna Convention on the Law of Treaties (23/05/1969), article 31 (1).

60 See definition in the introduction.

61 J.E. Stiglitz, A. Sen and J.P. Fitoussi, *Report by the Commission on the Measurement of Economic Performance and Social Progress* (2009), see namely the first chapter, p. 23 *et seq.* [available at: http://www.insee.fr/fr/publications-et-services/dossiers_web/stiglitz/doc-commission/RAPPORT_anglais.pdf]. See also: H.W. Hinder, *La création de la CNUCED et l'évolution de la pensée contemporaine sur le développement*, 35 *Revue Tiers Monde* (1994), 490.

62 I. Nechifor, “Culture, développement et tiers-monde”, UNESCO, *Etudes et rapports de l'Unité de recherche et de gestion culturelle* – No. 6, Document CLT/CIC/CRM/98/033 (1998), p. 6; J.

economic perspective of development⁶³ and has gradually evolved to a more panoramic understanding, especially in terms of sustainability.⁶⁴ The distinction between the various possible forms of development is not made by arbitrators who often use ‘development’ and ‘economic development’ in an indifferent manner: this confusion is visible in many decisions and awards⁶⁵ and this bears testimony of the arbitrators’ technical limits when it comes to dealing practically with the concept of development. For example, in the same decision, arbitral tribunals indifferently

Austry, *Le scandale du développement* (Geneva: Slatkine, 1987), p. 74; G. Azoulay, *Les théories du développement. Du rattrapage des retards à l’exception des inégalités* (Rennes: Presses Universitaires de Rennes, 2002), p. 34; A. Barrière, *Le développement divergent. Essai sur la richesse et la pauvreté des nations* (Paris: Economica, 1978), p. 4, J.H. Hyde, *Economic Development Agreements*, 105 R.C.A.D.I. (1962), p. 277; G.M. Meier, *The International Economics of Development: Theory and Policy* (New York: Harper & Row, 1968), p. 14.

63 See for instance, article 1 of the Status of the International Development association of the World Bank (<http://siteresources.worldbank.org/EXTIDAFRENCH/Resources/STATUTS.pdf>). See also: Alechina (1982), *supra* note 37, p. 10; A. Broches, “International Legal Aspects of the Operations of the World Bank”, 98 R.C.A.D.I. (1959), p. 337.

64 See: World Bank, “Piloting the Use of Borrower Systems to Address Environmental and Social Safeguard Issues in Bank Supported Projects”, in *Operational Policies of the World Bank*, OP 4.00 (2005) (available at: http://siteresources.worldbank.org/OPSMANUAL/Resources/EntireOM_External.pdf); D.D. Bradlow, *The World Bank, the IMF and Human Rights*, 6 Transnational Law & Contemporary Problems (1996), p. 56; J.N. Weidner, *World Bank Study*, 7 Buffalo Human Rights Law Review (2001), p. 199; I. Shihata, *The World Bank and the Environment: A Legal Perspective*, 16 Maryland Journal of International Law and Trade (1992), 1–2; D.B. Hunter, *Civil Society Networks and the Development of Environmental Standards at International Financial Institutions*, 8 Chicago Journal of International Law (2008), 437–438; Miles (2013), *supra* note 20, p. 273; N. Monebhurrin, “Répondre de l’avenir par les normes de performance de la Société financière internationale”, in K. Martin-Chenut, René de Quenaudon, *La RSE saisie par le droit. Perspective interne et internationale* (Paris: Pédone, 2016), pp. 497–499.

65 *Ambiente Ufficio S.p.A. v. Argentina*, ICSID no. Decision on Jurisdiction (08/02/2013), § 487; *Patrick Mitchell v. Democratic Republic of Congo*, ICSID no. ARB/99/7, Decision on Annulment (01/11/2006), compare § 27, § 29 and § 30; *Noble Energy, Inc. and Machalapower CIA. LTDA v. Ecuador and ‘Consejo Nacional de Electricidad’*, ICSID no. ARB/05/12, Decision on Jurisdiction (05/03/08), compare § 128, § 132, § 161; *Helnan International Hotels A/S v. Egypt*, ICSID no. ARB/05/19, Decision on Jurisdiction (17/10/06), compare § 58, § 59, § 60 and § 77 et § 88; *Joy Mining Machinery Limited v. Egypt*, ICSID no. ARB/03/11, Decision on Jurisdiction (06/08/04), compare § 40, § 53, §§62–63; *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID no. ARB/05/10, Decision on Jurisdiction (17/05/07), compare § 44, § 47, § 66, § 67, § 68, § 78, § 111, § 117, § 122, § 130, § 136, § 136, § 142, § 143, § 144; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan*, ICSID no. ARB/03/29, Decision on Jurisdiction (14/11/05), § 130, § 137; *Mytilineos Holdings SA v. Serbie and Monténégro and Serbian Republic*, UNCITRAL, Decision on Jurisdiction (08/09/06), compare § 116, § 124; *Abaclat et autres a. Argentina*, ICSID no. ARB/07/5, Decision on Jurisdiction (04/08/2011), Dissenting Opinion of Professor George Abi-Saab (28/10/2011)§49, § 50, § 111, § 114, § 115; *Ambiente Ufficio S. p.A. v. Argentina*, ICSID no.ARB/08/9, Decision on Jurisdiction (08/02/2013), § 487.

refer – in a sequence of paragraphs –, to ‘development’ and to ‘economic development’ as a criterion of investment. They read the concepts as synonyms. This confusion is also made by the parties to the disputes.⁶⁶

Curbing this conceptual problem of definition is technically possible. Indeed, under ICSID’s institutional rules of arbitration, arbitral tribunals can ask the parties to produce experts’ opinions of given technical issues.⁶⁷ If the arbitrators deem the development criterion to be of utmost relevance and importance, an expert in matters of development can be appointed in order to enlighten them on the concept’s real contours and substance. This would, at least, have the merit of bringing more objectivity to the debate and would inform on the technical possibility of using or not the development criterion to identify an investment.

Unfortunately and surprisingly, this is not a common practice, the problem being that, not only has concept not been technically defined, but its technical consolidation as an investment criterion in the arbitral jurisprudence is also highly questionable.

3 The jurist’s limits corroborated by the lack of technical consolidation of the concept of development by arbitral tribunals

The evolution of the development criterion before arbitral tribunals shows that it has not been technically consolidated. It could have been expected that, over the years, the arbitral practice would have indulged in a better scrutiny of the concept so as to make it more acceptable or so as to reject it definitely and thereby put an end to the debate. However, practice reveals that the development criterion has not (yet) been technically consolidated be it on the part of those tribunals which use the concept (Section 3.1) or on the part of those which reject it (Section 3.2.).

3.1 The lack of technical consolidation by tribunals which use the development criterion to identify an investment

The arbitral tribunals which consider that a contribution to the host State’s development is a means to identify an investment have consolidated the

⁶⁶ See for example: *Phoenix Action, Ltd. v. Czech Republic*, ICSID no. ARB/06/5, Award (15/04/09), § 39, § 50.

⁶⁷ See rule 34(2) (b) of the Institutional rules (available at: https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf)

criterion's use but not its technical application and understanding. This increases the skepticism about the criterion. The latter has known a certain evolution in the arbitral practice: a quantitative and a functional evolution. There has been a quantitative evolution in the sense that some tribunals consider that a mere contribution to the host State's development is not enough: the contribution to development has to be substantial. There has been a functional evolution because other tribunals have considered the contribution to development as the most important criterion of the *Salini* test: it is this criterion which ultimately informs about the existence of an investment when there lurks a doubt about the substance of the other criteria. This said, the quantitative consolidation is unjustified (Section 3.1.1.) while the functional evolution is questionable (Section 3.1.2.) given that at no moment arbitral tribunals intrinsically seek for a technical meaning of development.

3.1.1 An unjustified quantitative consolidation of the development criterion

By trying to consolidate the development criterion, some tribunals have construed its meaning in a quantitative sense by considering that the contribution to the host State's development should be significant⁶⁸: a mere contribution is not sufficient; the company has to prove that its activities have contributed significantly to the State's development. In the *Ceskoslovenska Obchodni Banka* case, the arbitral tribunal stated – about a loan granted by the foreign company to Slovakia:

This undertaking involved a significant contribution by CSOB to the economic development of the Slovak Republic; it qualified CSOB as an investor and the entire process as an investment in the Slovak Republic within the meaning of the Convention. This is evident from the fact that CSOB's undertakings include the spending or outlays of resources in the Slovak Republic in response to the need for the development of the Republic's banking infrastructure⁶⁹

⁶⁸ *Joy Mining Machinery Limited v. Egypt*, ICSID case no. ARB/3/11, Award on Jurisdiction (06/08/2004), § 53; *Ceskoslovenska Obchodni Banka a.s. v. Slovakia*, ICSID case no. ARB/97/4, Decision on Jurisdiction (24/05/1999), § 76; *Patrick Mitchell v. Democratic Republic of Congo*, ICSID no. ARB/99/7, Decision on Annulment (01/11/2006), 30; *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID no. ARB/05/10, Decision on Jurisdiction (17/05/07), § 123; *Ambiente Ufficio S.p.A. v. Argentina*, ICSID no.ARB/08/9, Decision on Jurisdiction (08/02/2013), § 487.

⁶⁹ *Ceskoslovenska Obchodni Banka a.s. v. Slovakia*, ICSID case no. ARB/97/4, Decision on Jurisdiction (24/05/1999), § 188.

Similarly, the tribunal in the *Joy Mining* case noted that the concerned activity “should constitute a significant contribution to the host State’s development⁷⁰”. The *Malaysian Historical Salvors* tribunal added:

the weight of the authorities (...) swings in favour of requiring a significant contribution to be made to the host State’s economy.⁷¹ Were there not the requirement of significance, any contract which enhances the Gross Domestic Product of an economy by any amount, however small, would qualify as an “investment”⁷²

These tribunals established a critical point, a minimum standard, for an activity to be qualified as an investment. The idea is that not all activities contribute to development and not all activities contribute sufficiently enough to be called an investment. Another tribunal grounded this reasoning by referring to the Washington Convention’s preamble even if the latter is silent on this topic.⁷³

Moreover, once more, the arbitrators give way to prejudice and build up a concept of development which is all but scientific. First of all, it is very clear that the said preamble does not mention the condition of ‘significance’. Besides, the arbitrators never explain – with the expected arguments – what is a significant contribution to development and how to measure it. If the very concept of development is not duly defined, it is *a fortiori* even more challenging to understand what is a significant contribution to development. At no time do the arbitrators establish and present the methodology used to mark the frontier between a mere contribution and a significant contribution. There is a strong will to use the concept but a minimum effort to make it technically acceptable.

The legal reasons behind such activism is hard to understand. This said, an analysis of the arbitral awards brings some explanations while confirming the lack of technical command of development issues. The *Joy Mining* tribunal used this notion of ‘significance’ by referring to the legal doctrine, namely Professor Schreuer’s book “The ICSID Convention: A Commentary”. The author, while explaining the criteria to identify an investment writes that the business must

⁷⁰ *Joy Mining Machinery Limited v. Egypt*, ICSID case no. ARB/3/11, Award on Jurisdiction (06/08/2004), § 53.

⁷¹ *Malaysian Historical Salvors, SDN, BHD c. Malaysia*, CIRDI n°. ARB/05/10, Décision sur la compétence (17/05/07), § 123.

⁷² *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID no. ARB/05/10, Decision on Jurisdiction (17/05/07), § 123. See also: *Malaysian Historical Salvors v. Malaysia*, ICSID no. ARB/05/10, Decision on Annulment (16/04/2009), Dissenting Opinion of Judge Shuhabuddeen, § 38.

⁷³ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan*, ICSID no. ARB/03/29, Decision on Jurisdiction (14/11/05), § 137.

have a “significance for the host State’s development⁷⁴”. This assertion has been translated by the *Joy Mining* tribunal as “a significant contribution to development”. Yet, there is an important difference between significance for a State’s development and significant contribution to development, given that the first is not tantamount to the second. An activity can have a significance for a State’s development but might not necessarily contribute significantly to the latter. For this reason, the evolution of the development criterion is based on an erroneous interpretation which only contributes to strengthen the line of criticism of this article. It shows that the symbolism attached to the development criterion is never substantially followed by a technical consolidation. And the criticism herein addressed also applies to the functional evolution of the criterion.

3.1.2 A questionable functional consolidation of the development criterion

Arbitral tribunals attributed a functional value to the development criterion in two cases. Firstly and arguably, some tribunals have considered that there exists an investment *per se*: this means that some investments are “immediately recognizable”⁷⁵; by their very nature, some activities are *ipso facto* and *ipso jure* investments. For instance, a law firm⁷⁶ or a dredging activity⁷⁷ would not qualify as an investment *per se*, while the production and distribution of energy would.⁷⁸ Of course, this reasoning has many flaws because there is nothing as an “immediately recognizable investment” in international investment law. The term has no legal foundation and it is namely because there are no immediate

⁷⁴ Schreuer (2009), *supra* note 31, p. 128, § 153. See also the 2001 edition: C. Schreuer, *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press, 2001), p. 140, § 122.

⁷⁵ The term was first coined by Mr Aaron Broches: A. Broches, *The Center for the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 R.C.A.D.I. (1972), 362. See: *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Uretim ve Ticaret Limited Sirketi v. Turkey*, ICSID no. ARB/02/5, Decision on Jurisdiction (04/06/2004), § 19; *M.C.I. Power Group L.C. and New Turbine, Inc. v. Ecuador*, ICSID no. ARB/03/6, Award (31/07/2007), § 165; *Patrick Mitchell v. Democratic Republic of Congo*, ICSID no. ARB/99/7, Decision on Annulment (01/11/2006), § 34; *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID no. ARB/05/10, Decision on Jurisdiction (17/05/07), § 129. See also: Schreuer (2009), *supra* note 31, p. 116.

⁷⁶ *Patrick Mitchell v. Democratic Republic of Congo*, ICSID no. ARB/99/7, Decision on Annulment (01/11/2006), § 34.

⁷⁷ *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID no. ARB/05/10, Decision on Jurisdiction (17/05/07), § 129.

⁷⁸ *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Uretim ve Ticaret Limited Sirketi v. Turkey*, ICSID no. ARB/02/5, Decision on Jurisdiction (04/06/2004), § 19; *M.C.I. Power Group L.C. and New Turbine, Inc. v. Ecuador*, ICSID no. ARB/03/6, Award (31/07/2007), § 165.

definitions of ‘investment’ that arbitral tribunals have elaborated a list of criteria to identify investment activities. Still, under the logic of those tribunals who have referred to “immediately recognizable” investments, the development criterion would be cardinal when there is a doubt about a given activity’s nature: this criterion acts as the key to dissociate investment and other commercial activity in case of doubts. In other words, when a tribunal is unsure about the qualification to give to an activity which does not *naturally* fit in the “immediately recognizable” category, it will be considered as an investment only if it has contributed to the host State’s development. In the *Patrick Mitchell case*, the tribunal considered that a law firm was not an “immediately recognizable” investment and to qualify as such, it should have contributed to the host State’s development.⁷⁹

Similarly, other arbitrators have provided a consolidated value to the development criterion in cases where, as per their understanding, the other criteria of an investment – a contribution, a certain duration and the existence of a risk –, were insufficiently or uncertainly present. The development criterion acts, in this context, as a barometer of an investment. In fact, it acts as a quasi-oracle: it must be consulted when there exists a doubt about the existence or the content of the other criteria. In the *Malaysian Historical Salvors case*, the tribunal considered that the dredging of a ship was unusual in the world of investments and expressed a doubt concerning the existence of the other criteria which were, in its opinion, superficially present.⁸⁰ It accordingly stated that only the development criterion could *in fine* qualify the activity as an investment – and in the case in hand, it ruled that there were no substantial contribution to the State’s development.⁸¹ Part of the legal doctrine is in consonance with this position.⁸²

As in all of the above-mentioned examples, the arbitrators never define the concept of development in their legal construction. And it is therefore eminently questionable that the undefined development criterion be accorded such a chief function. There is a debatable parallelism between the existing complexity of

⁷⁹ *Patrick Mitchell v. Democratic Republic of Congo*, ICSID no. ARB/99/7, Decision on Annulment (01/11/2006), § 39.

⁸⁰ *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID no. ARB/05/10, Decision on Jurisdiction (17/05/07), § 130; see also: *Fedax N.C. v. Venezuela*, ICSID case no. ARB/96/3, Decision on Jurisdiction (11/07/97), § 43.

⁸¹ *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID no. ARB/05/10, Decision on Jurisdiction (17/05/07), §§143–144.

⁸² M. Jezewski, “Development Considerations in Defining Investment”, in M.C. Cordonier Segger, M.W. Gehring and A. Newcombe (eds.), *Sustainable Development in World Investment Law* (Alphen aan den Rijn: Kluwer Law International, 2011), pp. 228–229; Sornarajah (2004), *supra* note 44, p. 181.

synthesizing development and the easiness with which it is used by jurists. Indeed, as per some arbitrators' reasoning, the very concept of investment is reduced to the concept of development.

Notwithstanding this jurisprudential tendency, another group of arbitral tribunals have shown a greater skepticism regarding the development criterion which they have consequently rejected as a benchmark to identify an investment. However, an analysis of their reasoning shows that, like those tribunals favorable to the development criterion, they also minimize the technical aspects of the concept while rejecting it.

3.2 The minimization of the development criterion's technical content by skeptical tribunals

Even though some skeptical arbitral tribunals do show some prudence when reflecting on the development criterion (3.2.1), their reasoning can sometimes be questioned as they reject or discard it with fragile arguments, thereby minimizing its true technical content (3.2.2).

3.2.1 The development criterion rightly rejected by some prudent skeptical tribunals

These tribunals acknowledge that it is a difficult task to provide evidence of an investment's contribution to the development of a State.⁸³ The tribunal in the *Phoenix* case stated that this is namely the case because there is no unique understanding of what development is.⁸⁴ Interestingly, the arbitrators in a *Deutsche Bank v. Sri Lanka* case underscored that:

It is generally considered that this criterion is unworkable owing to its subjective nature. Indeed, whether or not a commitment of capital and resources ultimately proves to have contributed to the economic development of the host State can often be a matter of appreciation and can generate a wide spectrum of reasonable opinions. Moreover, some transactions may undoubtedly be qualified as investments, even though they do not result

⁸³ See for instance: *Nova Scotia Power Incorporated v. Venezuela*, ICSID no. ARB(AF)/11/1, Award (30/04/2014), § 130; *Pantehniki S.A. Contractors & Engineers v. Albania*, ICSID no. ARB/07/21, Award (30/07/2009), § 36 & § 43; *L.E.S.I. S.p.A. et ASTALDI S.p.A. v. Algeria*, ICSID no. ARB/05/3, Award (12/11/08), § 13 (iv); *Phoenix Action, Ltd. v. Czech Republic*, ICSID no. ARB/06/5, Award (15/04/09), § 85; *Victor Pey Casado and Foundation President Allende v. Chile*, ICSID no. ARB/98/2, Award (08/05/08), § 232.

⁸⁴ *Phoenix Action, Ltd. v. Czech Republic*, ICSID no. ARB/06/5, Award (15/04/09), § 85.

in a significant contribution to economic development in a post hoc evaluation of the claimant's activities. This is for example the case of mergers and acquisitions or of failed construction projects⁸⁵.

These tribunals consider the development criterion as heavily loaded with each and every arbitrator's subjectivity.⁸⁶ The latter no doubt invites a legal uncertainty⁸⁷ and an unpredictability.⁸⁸ Besides, as said, it is surely not for arbitrators to decide what contributes or not to the development of a country⁸⁹ – even if they deploy all the expected technicity for such purposes. This task exceeds their mandate and jurisdiction and is solely incumbent upon the internal policies and choices of each and every State. Deciding upon one's development is, in principle, an act of sovereignty. Indeed, many internationally planned development programs have failed because the policymakers were unaware or were disconnected from the local reality, from the local culture and nevertheless coined universalist, one-size-fits-all policies.⁹⁰ The prudence concept therefore commands not to venture on such sloppy grounds whereby development is treated in a purely idealistic and abstract way, and those tribunals which maintain a skeptical distance adopt a scientifically laudable position. Still, some of these reject the development criterion for other unconvincing reasons.

3.2.2 The development criterion's rejection based on technically unconvincing reasons

The reasons to reject the development criterion are unconvincing because the contribution to development is considered as an expected and normal consequence of an investment (i). To illustrate this, some tribunals assert that a contribution to the host State's development is implied by the presence of the three other *Salini* criteria (ii).

(i) The contribution to the host State's development unconvincingly presented as an expected consequence of any investment

Some arbitrators state that it is the investment activity which leads to development; it is not development which allows the identification of an

⁸⁵ *Deutsche Bank AG v. Sri Lanka*, ICSID no. ARB/09/2, Award (31/10/2012), § 306.

⁸⁶ *Pantechniki S.A. Contractors & Engineers v. Albania*, ICSID no. ARB/07/21, Award (30/07/2009), § 36 & § 43. See also: Stern (2009), *supra* note 56, 542; Manciaux (2004), *supra* note 57, p. 71.

⁸⁷ D. Carreau, "Investissements", *Répertoire de droit international*, Dalloz (2008), p. 13.

⁸⁸ *Pantechniki S.A. Contractors & Engineers v. Albania*, ICSID no. ARB/07/21, Award (30/07/2009), § 43.

⁸⁹ Stern (2009), *supra* note 56, 542.

⁹⁰ Nechifor (1998), *supra* note 62, pp. 4–5.

investment.⁹¹ As per this reasoning, a contribution to the development of the host is an expected consequence – and not a criterion – of an investment.⁹² What is entrenched in the Washington Convention's and in the investment agreements' preambles only reveal that States consider investments to engender development and nothing more.⁹³ Some investors also use this argument.⁹⁴ Moreover, under this line of thought, an investment does not cease to be an investment if it does not contribute to a State's development: unsuccessful investments are still investments and must still be protected by investment agreements.⁹⁵ This is how one tribunal understands the issue:

The Tribunal appreciates that the element of contribution to the development of the host State is generally regarded as part of the well-known four-prong Salini test. Yet, such contribution may well be the consequence of a successful investment; it does not appear as a requirement. If the investment fails, it may end up having made no contribution to the host State development. This does not mean that it is not an investment. For this reason and others, tribunals have excluded this element from the definition of investment⁹⁶.

If the legal construction is interesting, one may notice that these tribunals' methodology regarding the concept of development is as questionable as the one of the first group of tribunals which uphold it as a criterion of investments. There is, in fact, no real methodology. The skeptical tribunals do not explain and illustrate how and why a contribution to development is an expected consequence of foreign investments.⁹⁷ They do not refer to the methods, theories and calculations to reach such conclusions. There is only an assumption that this is the case. This assumption is however not translated in technical terms through

⁹¹ *Quiborax S.A., Non Metallic Minerals SA & Allan Fosk Kaplún v. Bolivia*, ICSID no. ARB/06/2, Decision on Jurisdiction (27/09/2012), § 220.

⁹² *Mr Saba Fakes v. Turkey*, ICSID no. ARB/07/20, Sentence (14/07/2010), § 111; *Victor Pey Casado and Foundation Presidente Allende v. Chile*, ICSID no. ARB/98/2, Award (08/05/08), § 232; *Electrabel S.A. v. Hungary*, ICSID no. ARB/07/19, Decision on Jurisdiction (30/11/2012), § 5.43.

⁹³ *Compania de Aguas del Aconquija S.A & Vivendi Universal v. Argentina*, ICSID no. ARB/97/3, Award (20/08/2007), § 7.4.4; *Mr Saba Fakes v. Turkey*, ICSID no. ARB/07/20, Sentence (14/07/2010), § 111.

⁹⁴ *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID no. ARB/05/10, Decision on Jurisdiction (17/05/2007), § 30.

⁹⁵ *Mr Saba Fakes v. Turkey*, ICSID no. ARB/07/20, Sentence (14/07/2010), § 111.

⁹⁶ *Quiborax S.A., Non Metallic Minerals SA & Allan Fosk Kaplún v. Bolivia*, ICSID no. ARB/06/2, Decision on Jurisdiction (27/09/2012), § 220.

⁹⁷ M.L. Jaime, *L'apport des traités régionaux et multilatéraux à l'évolution du droit de l'arbitrage et du droit international des investissements*, PhD Thesis, Paris II (2008), p. 446; J.M. Loncle, *La notion d'investissement dans les décisions du CIRDI*, 3 *Revue de droit des affaires internationales* (2006), 328.

due studies and is considered as being a clear-cut reflection of reality. Once again, at no time do they define what is a contribution to development, which makes it easy to state that it is not a criterion of an investment. The development criterion is here categorically discarded. This position is not necessarily helpful to build up developing State's – some of which have already denounced their investment agreements⁹⁸ – confidence in international investment law and may only tarnish the latter's image as an imbalanced system. This conclusion also applies to the reasoning of those tribunals which infer that the contribution to development is, anyway, nested in the other *Salini* criteria.

(ii) The contribution to the host State's development arguably inferred from the combination of the other investment's criteria

From the combination of a contribution, a certain duration and a risk – the three other *Salini* criteria –, some tribunals have deduced the existence of a contribution to development: if a given activity fulfills these three criteria, it is implicitly contributing to the host State's development according to this deduction. The *LESI DIPENTA* tribunal has, in this vein, emphasized that the contribution to development criterion is something difficult to prove and is, in any case, implicitly covered by the other three criteria.⁹⁹ Other tribunals have followed suit by establishing a causal link between these same criteria and a contribution to development.¹⁰⁰ Therefore, according to this school of thought, an investment will always make a contribution to development and the method used to corroborate this assumption is to ensure that a business has made a contribution over a certain time period while assuming business risks.

Having said that, the above deduction is highly contradictory. On one hand, these tribunals consider that it is difficult to evaluate a contribution to development and on the other hand, they specify that development is implicitly present in the other criteria fulfillment. First, if development is automatically inferred

98 K. Fach Gomez, *Latin America and ICSID: David versus Goliath*, 17 Law and Business Review of the Americas (2011), 219–220; D. Machado, Ecuador y “la denuncia de los Tratados Bilaterales de Inversión”, CATDM (07/12/2009) [available at: <http://www.cadtm.org/Ecuador-y-la-denuncia-de-los>].

99 *L.E.S.I. S.p.A. et ASTALDI S.p.A. v. Algeria*, ICSID no. ARB/05/3, Award (12/11/2008), § 13.

100 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan*, ICSID no. ARB/03/29, Decision on Jurisdiction (14/11/05), § 137; *Victor Pey Casado and Foundation President Allende v. Chile*, ICSID no. ARB/98/2, Award (08/05/08), § 232; *Antoine Abou Lahoud and Leila Bounafteh-Abou Lahoud v. Democratic Republic of Congo*, ICSID no. ARB/10/4, Award (07/02/2014), § 325; *Alpha Projektholding GmbH v. Ukraine*, ICSID no. ARB/07/16, Award (08/11/2010), § 312; *RSM Production Corporation v. Central African Republic*, ICSID no. ARB07/02, Decision on Jurisdiction (07/12/2010), § 56; *Inmaris Perestroika Sailing Maritime Services GMBH and Others v. Ukraine*, ICSID no. ARB/08/8, Decision on Jurisdiction (08/03/2010), § 126.

from the presence of the other criteria, this, by definition, means that it is not difficult to prove such a contribution to development. It becomes, contrariwise, rather easy to reach this conclusion. Secondly, the tribunals do not explain why, in technical terms, the three criteria mathematically lead to an increase in development. They do not quote scientific studies which could help to infer such a reasoning. Their assumptions are built on self-made theories, simplified to the minimum and utterly far from the minimum expected technicality.

This entanglement of contradictions only confirms how the concept of development is treated in its most simplistic and symbolical approach and how the latter has become a common practice, but how it is, meanwhile, deprived of all practical content. The arbitral practice is, for this reason, governed by preconceived ideas about the concept of development.

4 Conclusion

This study was a means to explain the jurist's technical limits when it comes to work with the concept of development. As shown, these limits are clearly visible in international investment law and arbitration. If the arbitrators have here been the object of much criticism, the latter can be enlarged to include the States, the investors and their counsels, but also the legal doctrine. It has become customary and complacent to repeat the previous arbitral tribunals' reasoning so as to use or to reject the development criterion, and very few are those who go beyond the established dichotomy, with new arguments, with real technical research and with enough critical distance to affirm that the jurists are not always prepared to work seriously with development issues. There are two means to solve the conundrum. Firstly, if the development criterion is to be maintained, – there must be a permanent recourse to development specialists and experts who are best suited to inform and advise arbitral tribunals. In this same vein, States should have a margin of appreciation to state what they consider as part of their development and at the same time, they must be prepared to prove – with facts, figures, studies, methods and good faith – why and how a given activity has or not been beneficial to their development. Investors would, hence, be able to produce counter evidence. The arbitral tribunals – and its experts – would only have to examine the validity of such evidence from the States and the investors. Secondly, absent this technical framework as is the case today, it would be more prudent and more rigorous to discard the development criterion instead of using it in a loose, unscientific and abstract manner.