Building International Investment Law

The First 50 Years of ICSID

Edited by

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CHAPTER 8

The Long March towards a *Jurisprudence Constante* on the Notion of Investment

Salini v. Morocco, ICSID Case No. ARB/00/4[1]

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I. INTRODUCTION

Rarely has an arbitral award been as celebrated or criticized as *Salini v. Morocco*, not only in the history of the International Centre for Settlement of Investment Disputes ("ICSID"), but more generally in the context of investment law and public international law. In a system that is not based on precedent,[2] this has been a remarkable example of a case that is almost systematically referred to by every arbitral tribunal called upon to define the notion of "investment," either to follow or to depart from what has come to be known as the "*Salini* test." That *Salini*'s reach has gone beyond the ICSID system, and that – for good or bad reason – its definition of an investment has been relied on

1. *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001) (Briner, Cremades, Fadlallah) [hereinafter *Salini v. Morocco* or *Salini*]. The Decision was issued in French, with an English translation by the authors of this contribution in 42 ILM 609 (2003). *See also* Emmanuel Gaillard & Yas Banifatemi, *Introductory Note to ICSID: Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco (Proceeding on Jurisdiction)*, 42 ILM 606 (2003); Emmanuel Gaillard, *La Jurisprudence du CIRDI* 621-646 (Pedone 2004). The authors note that an exactly similar decision was rendered, in relation to the notion of investment, in the parallel arbitration *Consortium R.F.C.C. v. The Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision on Jurisdiction (16 July 2001) (Briner, Cremades, Fadlallah) [hereinafter *RFCC v. Morocco*], which, unlike *Salini*, resulted in a final Award in 2003.
2. On the notion of precedent in international arbitration, *see generally Precedent in International Arbitration* (Yas Banifatemi (ed.), Juris Publishing 2008).

in arbitrations unrelated to the ICSID Convention is telling of the significance and impact of the Decision.[3]

There may be two systemic reasons for this success. First, the existence of an investment is the very premise of the entire investor-State arbitration system and the protection which investors can find in their contracts, relevant investment laws or treaties, and the ICSID Convention itself. Being the first to truly define "investment" within the meaning of Article 25(1) of the ICSID Convention,[4] *Salini v. Morocco* set the record for future cases. Second, the ICSID Convention, which establishes the jurisdiction of ICSID tribunals, has intentionally left the notion of investment undefined, instead leaving it to the parties to determine what they consider to be an investment.[5] This absence of definition, which was noted by every tribunal before it but which was addressed differently by the *Salini* Tribunal, has made this case a key point of reference for arbitral tribunals having to assess their *ratione materiae* jurisdiction.

One should not overlook, in addition, the audacity of the *Salini* Tribunal as it chose to tackle the meaning and substance of the requirement of an investment under Article 25(1) of the ICSID Convention, while recognizing – as all tribunals had done before it – that the drafters of the Convention had chosen to not provide a definition. The Tribunal thus ruled with respect to two critical threshold issues: first, that the requirement of an investment under Article 25(1) is an objective one which has to be met regardless of any specific definition of an investment under the applicable investment treaty; second, that an investment within the meaning of Article 25(1) of the ICSID Convention can be defined, in all cases, by certain specific "conditions," "elements" or "criteria".[6] The *Salini* Tribunal found those criteria in the economic definition of an investment proposed in scholarly writings,[7] namely a contribution, a certain duration, and a participation in the risk of the transaction; to this economic definition – which could be said to be the ordinary meaning of the word "investment" – the Tribunal adjoined the contribution to the economic development of the host State as a criterion which it found in the Preamble of the ICSID Convention. These are the criteria that have been at the heart of almost every discussion on the existence of an investment and every debate on the notion of investment in the ICSID case law following *Salini v. Morocco*.

3. *See, e.g., Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, PCA Case No. AA280, Award (26 November 2009) (Mantilla-Serrano, Molfessis, Rubins).
4. *Salini v. Morocco, supra* n.1, ¶ 52 ("The Tribunal notes that there have been almost no cases where the notion of investment within the meaning of Article 25 of the Convention was raised.")
5. *See Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 1 ICSID Reports 28 (1993) ("No attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (art. 25(4)).").
6. *See Salini v. Morocco, supra* n.1, ¶ 52.
7. *Ibid.* ("The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction *(cf. commentary by E. Gaillard, cited above* [278 JDI (1999)], at 292).").

II. THE CASE

Salini v. Morocco was a classic construction dispute. It concerned the construction of a section of a highway joining Rabat to Fez by two Italian companies, Salini Costruttori S.p.A. and Italstrade S.p.A. The works were conducted pursuant to a contract concluded with the *Société Nationale des Autoroutes du Maroc*, a company in charge of building, maintaining and operating highways and road-works, under a concession agreement concluded with the Moroccan Minister of Infrastructure and Professional & Executive Training acting on behalf of the State.

The works were completed with a four-month additional delay, and the parties did not agree on the final taking over of the works and the final account. The final account, in particular, was the subject of a number of reservations by the Italian companies, all of which were rejected by the Head Engineer of *Société Nationale des Autoroutes du Maroc*. The Italian companies then sent a memorandum relating to the final account to the Minister of Infrastructure, in accordance with Article 51 of the *Cahier des Clauses Administratives Générales* (Book of General Administrative Clauses). In the absence of any response from the *Société Nationale des Autoroutes du Maroc* or the Minister of Infrastructure, the Italian companies initiated an arbitration on the basis of the Treaty between the Government of the Kingdom of Morocco and the Government of the Republic of Italy for the reciprocal promotion and protection of investments (the "BIT"), seeking damages in the amount of ITL 132,639,617,409.[8]

The Kingdom of Morocco raised three series of objections to the admissibility of the claims and the jurisdiction of the Arbitral Tribunal composed of Mr. Bernardo Cremades (appointed by the Claimants), Professor Ibrahim Fadlallah (appointed by the Respondent) and Dr. Robert Briner (appointed jointly by the co-arbitrators). The Respondent maintained that the claims were premature and therefore inadmissible,[9] and that the Tribunal had no jurisdiction to hear the claims, either because the Claimants had waived any forum other than the administrative courts of Rabat[10] or because the conditions *ratione personae*[11] and *ratione materiae* for the Tribunal's jurisdiction were not met. Although the Tribunal established a number of principles, in particular in relation to the structural and functional criteria according to which the degree of control and participation of a State in a company could be determined for purposes of a tribunal's *ratione personae* jurisdiction,[12] it is in relation to the latter

8. *See ibid., supra* n.1, ¶¶ 1-6.
9. *See ibid.*, ¶¶ 11-23.
10. *See ibid.*, ¶¶ 25-27.
11. *See ibid.*, ¶¶ 28-35.
12. The *Salini* Tribunal considered that, for purposes of its *ratione personae* jurisdiction, such degree of control and participation of the host State should be determined in light of the international law rules governing the responsibility of States. *See Salini v. Morocco, supra* n.1, ¶ 31. For a different approach, namely the inapplicability of the international law rules governing State responsibility to determine an issue of jurisdiction in the context of umbrella clauses, *see Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (22 April 2005) (Guillaume, Cremades, Landau), ¶ 210. *See also Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (14 December 2012) (Kaufmann-Kohler, Orrego Vicuña, Stern), ¶¶ 228-234.

objection that the *Salini v. Morocco* Decision has become a landmark case, in particular as regards the existence of an investment.[13]

The Tribunal's jurisdiction was sought on the basis of Article 25(1) of the ICSID Convention and Article 1 of the BIT. The Tribunal conducted an analysis under each of these provisions, emphasizing that it had the obligation to establish its jurisdiction under both instruments:

> [I]nsofar as the option of jurisdiction has been exercised in favour of ICSID, the rights in dispute must also constitute an investment pursuant to Article 25 of the Washington Convention. The Arbitral Tribunal, therefore, is of the opinion that its jurisdiction depends upon the existence of an investment within the meaning of the Bilateral Treaty as well as that of the Convention, in accordance with the case law.[14]

The Tribunal further emphasized, later in its Award, the importance of establishing the objective condition of an investment under Article 25 of the ICSID Convention, which it held cannot be diluted by the consent of the State parties to the investment treaty:

> The Tribunal notes that there have been almost no cases where the notion of investment within the meaning of Article 25 of the Convention was raised. However, it would be inaccurate to consider that the requirement that a dispute be '*in direct relation to an investment*' is diluted by the consent of the Contracting Parties. To the contrary, ICSID case law and legal authors agree that the investment requirement must be respected as an objective condition of the jurisdiction of the Centre (*cf.* in particular, the commentary by *E. Gaillard, in JDI 1999, p. 278 et seq.*, who cites the award rendered in 1975 in the *Alcoa Minerals vs. Jamaica* case as well as several other authors).[15]

As regards, specifically, the requirement of an investment under Article 1 of the BIT,[16] the Claimants relied on Articles 1(c) and 1(e), which protect "rights to any contractual benefit having an economic value" and "any right of an economic nature

13. The other objection to the Tribunal's jurisdiction *ratione materiae* concerned the question whether the Tribunal could determine issues of contract whereas it had been constituted on the basis of an investment treaty. *See Salini v. Morocco, supra* n.1, ¶¶ 41-42, 59-63.
14. *Ibid., supra* n.1, ¶ 44.
15. *Ibid.*, ¶ 52.
16. Art. 1 of the Morocco-Italy BIT provides:

> Pursuant to the present Agreement,
>
> 1. the term 'investment' designates all categories of assets invested, after the coming into force of the present agreement, by a natural or legal person, including the Government of a Contracting Party, on the territory of the other Contracting Party, in accordance with the laws and regulations of the aforementioned party. In particular, but in no way exclusively, the term 'investment' includes:
>   a) chattels and real estate, as well as any other property rights such as mortgages, privileges, pledges, usufructs, related to the investment;
>   b) shares, securities and bonds or other rights or interests and securities of the State or public entities;
>   c) capitalised debts, including reinvested income, as well as rights to any contractual benefit having an economic value;

conferred by law or by contract," and maintained that their contract gave them a right of an economic nature, the right to damages. The Respondent, on the other hand, alleged that these provisions could not be read in isolation, but in conjunction with the chapeau of Article 1, which refers to investments made "in accordance with the laws and regulations of the aforementioned party"; according to the Respondent, this reference meant that Moroccan law should define the notion of investment, and took the view that under that law the transaction would be described as a service contract and not an investment contract.

The Tribunal was convinced by the Claimants' view that their construction contract created, pursuant to Article 1 of the BIT, a right to a contractual benefit having an economic value and a right of an economic nature. As regards the Respondent's argument based on the applicability of Moroccan law to the definition of an investment, the Tribunal found that this was a requirement going to the investment's legality rather than its definition:

> [T]his provision refers to the validity of the investment and not to its definition. More specifically, it seeks to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal.[17]

On that basis, the Tribunal determined that the Claimants' investment had been made and performed in accordance with Moroccan law, as they had taken part in the tender process and had concluded their contract in conformity with the applicable rules.[18]

It is in relation to the requirement of an investment under Article 25(1) of the ICSID Convention that the *Salini* case is the most groundbreaking. First, the Tribunal noted that the notion of investment had never, until then, truly been defined. Adopting a precedential approach, it observed that "[t]he criteria to be used for the definition of an investment pursuant to the Convention would be easier to define if there were awards denying the Centre's jurisdiction on the basis of the transaction giving rise to the dispute. ... The criteria for characterization are ... derived from cases in which the

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d) copyright, trademark, patents, technical methods and other intellectual and industrial property rights, know-how, commercial secrets, commercial brands and goodwill;
e) any right of an economic nature conferred by law, or by contract, and any licence or concession granted in compliance with the laws and regulations in force, including the right of prospecting, extraction and exploitation of natural resources;
f) capital and additional contributions of capital used for the maintenance and/or the accretion of the investment;
g) the elements mentioned in (c), (d) and (e) above must be the object of contracts approved by the competent authority.

17. *Salini v. Morocco*, *supra* n.1, ¶ 46. On the distinction between the existence and legality of an investment, *see* the comments below on the award in *Phoenix v. Czech Republic*, *infra* III.B.2(iii).
18. The Tribunal further determined whether, under Art. 1(g) of the BIT, the rights enumerated under Arts. 1(c) and 1(e) had been approved by the competent authority. *See Salini v. Morocco*, *supra* n.1, ¶¶ 47-49.

transaction giving rise to the dispute was considered to be an investment without there ever being a real discussion of the issue in almost all the cases."[19]

Interestingly, when *Salini v. Morocco* was initiated in 2000, twenty-four ICSID cases had already been registered under both the ICSID Convention and an investment treaty. Of those cases, eighteen were concluded prior to the *Salini v. Morocco* Decision on Jurisdiction, thirteen of which resulted in a decision on jurisdiction or an award.[20] However, as observed by the *Salini* Tribunal, none of those cases truly attempted to define the concept of investment within the meaning of Article 25 of the ICSID Convention.[21]

Not finding assistance in the ICSID case law or in the practice of the ICSID Secretary-General relating to the screening of requests for arbitration under Article 36(3) of the Convention, the Tribunal turned to the doctrine to determine whether it had identified any criteria that define an investment:

19. *Ibid.*, ¶ 52.
20. Excluding the *RFCC v. Morocco* case, which was decided shortly before *Salini v. Morocco* by the same Tribunal, the 13 cases that led to a decision before the *Salini* Decision on Jurisdiction were: *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (27 June 1990) (El-Kosheri, Asante, Goldman) [hereinafter *AAPL v. Sri Lanka*]; *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction (24 December 1996) (Böckstiegel, Fielding, Giardina) [hereinafter *Tradex v. Albania*]; *American Manufacturing & Trading, Inc. v. Democratic Republic of the Congo*, ICSID Case No. ARB/93/1, Award (21 February 1997) (Sucharitkul, Golsong, Mbaye), ¶¶ 5.14-5.15 [hereinafter *AMT v. Congo*]; *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (11 July 1997) (Orrego Vicuña, Heth, Owen), ¶¶ 21-25 [hereinafter *Fedax v. Venezuela*]; *Lanco International, Inc. v. Argentine Republic*, ICSID Case No. ARB/97/6, Jurisdiction of the Arbitral Tribunal (8 December 1998) (Cremades, Aguilar-Alvarez, Baptista), ¶ 48 [hereinafter *Lanco v. Argentina*]; *Antoine Goetz et al. v. Republic of Burundi*, ICSID Case No. ARB/95/3, Award (10 February 1999) (Weil, Bedjaoui, Bredin), ¶ 83 [hereinafter *Goetz v. Burundi*]; *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction (24 May 1999) (Buergenthal, Bernardini, Bucher), ¶¶ 62-64, 66-91 [hereinafter *CSOB v. Slovakia*]; *Eudoro A. Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Decision on Jurisdiction (8 August 2000) (Oreamuno, Mayora-Alvarado, Rezek), ¶ 28 [hereinafter *Olguín v. Paraguay*]; *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (13 November 2000) (Orrego Vicuña, Buergenthal, Wolf), ¶¶ 67-68 [hereinafter *Maffezini v. Spain*]; *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (21 November 2000) (Rezek, Buergenthal, Trooboff), ¶ 45 [hereinafter *Vivendi v. Argentina*]; *Philippe Gruslin v. Malaysia*, ICSID Case No. ARB/99/3, Award (27 November 2000) (Gavan Griffith), ¶¶ 13.6-13.7, 14.1, 26.1 [hereinafter *Gruslin v. Malaysia*]; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award (8 December 2000) (Leigh, Fadlallah, Wallace), ¶ 5 [hereinafter *Wena v. Egypt*]; *Alex Genin et al. v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award (25 June 2001) (Fortier, Heth, van den Berg), ¶ 324 [hereinafter *Genin v. Estonia*].
21. On the pre-*Salini* case law on the notion of investment, *see infra* III. *See also* Gaillard & Banifatemi, *supra* n.1, at 607 ("Before this case was decided, precedents relating to certain types of contracts had resulted in the refusal of the registration of a request based on a sales contract by the Secretary-General of the Centre in *Asian Express v. Greater Colombo Economic Commission* (ICSID Annual Report for 1985, p. 6) or, to the contrary, to the admission of a loan contract as an investment in both *Fedax v. Republic of Venezuela* (37 ILM 1387 (1998)) and in *CSOB v. Slovak Republic* (14 ICSID Review 251 (1999)), although in the latter case the loan resulted in no contributions in the host country but consisted fundamentally in the sharing of debts between the Czech Republic and the Slovak Republic in the context of the partition of Czechoslovakia.").

> The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction (*cf commentary by E. Gaillard, cited above, p. 292*). 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 condition.[22]

The latter reference to the Convention's Preamble may show a desire for the *Salini* Tribunal to find some textual support that is specific to the Convention. The first paragraph of the Preamble refers to the Contracting States' consideration of "the need for international cooperation for economic development, and the role of private international investment therein." In reality, one may question whether the "need for international cooperation for economic development" is the same as a specific investor's contribution to the economic development of the host State as a requirement for the protection of that investor's investment under the ICSID Convention.[23] The Tribunal added a nuance to this addition to the criteria constituting an economic definition of investment by holding that the assessment of all four elements should be made *in toto*, given that they operate interdependently:

> In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract. As a result, these various criteria should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here.[24]

This observation, to a certain extent, anticipates the future debates over the question whether these criteria must be assessed individually or in combination, and the question whether some or all them need to be met for an investment to exist.[25]

On this basis, and having assessed each of these four criteria, the Tribunal determined that the Claimants had made an investment in Morocco within the meaning of Article 25(1) of the ICSID Convention. The Tribunal also provided further guidance on the manner in which it deemed that these individual criteria should be applied. First, as regards the contribution to the economic development of the host State, the Tribunal provided an indication that such contribution is expected to be made to the host State as such, as opposed, more generally, to the economy of the host State:

> [T]he contribution of the contract to the economic development of the Moroccan State cannot seriously be questioned. In most countries, the construction of infrastructure falls under the *tasks to be carried out by the State or by other public*

22. *Salini v. Morocco, supra* n.1, ¶ 52. *See also* Emmanuel Gaillard, *Centre International Pour Le Règlement Des Différends Relatifs aux Investissements (CIRDI), Chronique Des Sentences Arbitrales*, 278 JDI 292 (1999) (*"Trois éléments sont donc requis: l'apport, la durée et le fait que l'investisseur supporte, au moins en partie, les aléas de l'entreprise (sur l'adoption de critères analogues par la Convention de Seoul du 11 octobre 1985 créant l'Agence Multilatérale de Garantie des Investissements (AMGI). - V. D. Carreau et P. Juillard, op. cit., n° 1079)."*).
23. On the "contribution to the economic development of the host State" *see infra* III.B.2(i) and (ii).
24. *Salini v. Morocco, supra* n.1, ¶ 52.
25. *See infra* III.B.

> *authorities*. It cannot be seriously contested that the highway in question shall serve the public interest. Finally, the Italian companies were also able *to provide the host State* of the investment with know-how in relation to the work to be accomplished.[26]

Second, as regards the duration of the investment, the Tribunal referred to the scholarly writings and noted that the extended thirty-six months in the case "complie[d] with the minimal length of time upheld by the doctrine, which is from two to five years (*D. Carreau, Th. Flory, P. Juillard, Droit International Economique: 3rd ed., Paris, LGDJ, 1990, p. 558-578. – C. Schreurer, Commentary on the ICSID Convention: ICSID Review-FILJ, vol. 11, 1996, 2, p. 318-493*)."[27] This was problematic, however, as requiring a two-year minimal duration for a transaction to qualify as an investment meant transforming into a legally binding test what had in reality been presented in the literature as a mere description of the typical duration of mid-term investments.[28]

These questions would also become relevant, although to a lesser extent, in the subsequent ICSID case law.

III. IMPACT AND CONTRIBUTION OF *SALINI V. MOROCCO* TO THE DEVELOPMENT OF INVESTMENT LAW

The impact of *Salini v. Morocco* on the investment case law is two-fold, and is particularly significant in relation to arbitrations initiated on the basis of investment treaties which provide a definition of "investment." First, *Salini* fully gave effect to the requirement of investment under Article 25(1) of the ICSID Convention as an *objective condition* which must be determined independently of the satisfaction of the condition of investment under the relevant investment treaty (A.). Second, it proposed a true *definition* of the notion of investment within the meaning of Article 25(1), which is now known as the "*Salini* test." Although this definition has come with certain ambiguities which have generated further uncertainties in the subsequent case law, *Salini v. Morocco* has had the great merit of identifying the factors constituting an investment (B.).

26. *Salini v. Morocco*, *supra* n.1, ¶ 57 (emphasis added). For a similar application of the criterion, *see Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award (1 November 2006) (Dimolitsa, Dossou, Giardina) [hereinafter *Patrick Mitchell v. Congo*]. For a criticism of this approach, *see infra* III.B.2(iii).
27. *Salini v. Morocco*, *supra* n.1, ¶ 54.
28. *See* Emmanuel Gaillard, "Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice" in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* 403, 404-405 (Christina Binder, Ursula Kriebaum, August Reinisch & Stephan Wittich (eds.), OUP 2009), showing that the authors cited by the Tribunal only took the view that an "investment is ... a mid-term or long-term transaction – that is to say, according to the most generally accepted definition, a transaction whose duration is not less than three years (mid-term) or seven years (long-term)"). *See* Dominique Carreau, Thiébaut Flory & Patrick Juillard, *Droit International Économique*, ¶ 940 (3rd ed., LGDJ 1990).

A. Investment as an Objective Requirement under the ICSID Convention: The Dissociation by *Salini* of the Requirement of Investment under Article 25(1) from Party Consent under the Applicable Investment Treaty

Although *Salini v. Morocco* is generally referred to for its definition of the notion of investment under Article 25(1) of the ICSID Convention, one of its other major contributions to the ICSID case law is that it recognized that the requirement of investment under the ICSID Convention is an objective one and fully gave effect to it.

Prior to the *Salini v. Morocco* Decision, the case law had essentially tackled the requirement of investment in two ways: either arbitral tribunals did not consider the issue at all, because no jurisdictional objections had been raised in relation to the requirement of investment,[29] or they did consider the requirement of investment under Article 25(1) of the ICSID Convention but equated it with the definition of investment as defined under the applicable treaty. Of the eight decisions falling within the latter category, six did not really explore the notion of investment and simply referred to the definition of investment under the applicable treaty;[30] only in the remaining two cases, namely *Fedax v. Venezuela* – which is the first case in which an objection had been raised on the basis of the requirement of an investment – and *CSOB v. Slovak Republic*, did the tribunals analyze the meaning of investment. In both cases, the tribunals recognized the need to address the notion of investment under Article 25(1).

In *Fedax v. Venezuela*, although the tribunal recognized that is should "first examine the meaning of the term 'investment' under Article 25 (1) of the Convention,"[31] it did not truly explore that meaning. The rationale for the *Fedax* tribunal was that the attempts to define investment under the ICSID Convention did not result in a definition, the drafters instead deciding "to leave any definition of the 'investment' to the consent of the parties." On that basis, the tribunal concluded that "this indicates that the requirement that the dispute must have arisen out of an 'investment' may be merged into the requirement of consent to jurisdiction."[32] The tribunal also found comfort in the writings of commentators who favored a broad approach to the notion of investment.[33] For the *Fedax* tribunal, it is because of this broad approach that the definition of investment had never been an issue before:

29. *See AAPL v. Sri Lanka, supra* n.20; *Tradex v. Albania, supra* n.20; *AMT v. Congo, supra* n.20; *Goetz v. Burundi, supra* n.20, ¶ 83; *Wena v. Egypt, supra* n.20, ¶ 5.
30. *See Lanco v. Argentina, supra* n.20, ¶ 48; *Maffezini v. Spain, supra* n.20, ¶¶ 67-68; *Olguín v. Paraguay, supra* n.20, ¶ 28; *Vivendi v. Argentina, supra* n.20, ¶ 45; *Gruslin v. Malaysia, supra* n.20, ¶¶ 13.6-13.7 and 26.1; *Genin v. Estonia, supra* n.20, ¶¶ 321-324.
31. *Fedax v. Venezuela, supra* n.20, ¶ 21.
32. *Ibid.* (quoting Aron Broches, *The Convention on The Settlement of Investment Disputes: Some Observations on Jurisdiction*, 5 Columbia Journal of Transnational Law 261, 268 (1966)).
33. *Fedax v. Venezuela, supra* n.20, ¶ 22 ("In light of the above, distinguished commentators of the Convention have concluded that 'a broad approach to the interpretation of this term in Article 25 is warranted,' that it 'is within the sole discretion of each Contracting State to determine the type of investment disputes that it considers arbitrable in the context of ICSID,' or that the parties 'thus have a large measure of discretion to determine for themselves whether their transaction constitutes an investment for the purposes of the Convention.'"). Referring to Chittharanjan F.

> Precisely because the term "investment" has been broadly understood in the ICSID practice and decisions, as well as in scholarly writings, it has never before been a major source of contention before ICSID Tribunals. This is the first ICSID case in which the jurisdiction of the Centre has been objected to on the ground that the underlying transaction does not meet the requirements of an investment under the Convention.[34]

Thus, the *Fedax* tribunal's holding that the requirement of an investment under Article 25(1) of the ICSID Convention may be "merged into the requirement of consent" under the applicable investment treaty did not give effect to Article 25(1), although the tribunal appeared to accept the two as being distinct.

The decision in *CSOB v. Slovakia* followed the same reasoning, equating in substance the requirement of investment under Article 25(1) with the definition of investment in the investment treaty between Slovakia and the Czech Republic, based on its understanding that "an important element in determining whether a dispute qualifies as an investment under the Convention in any given case is the specific consent given by the Parties."[35]

This subjectivist approach is even more surprising in that the tribunal clearly dissociated the requirement under Article 25(1) from that under the Slovak-Czech bilateral investment treaty. Indeed, addressing the requirement of investment under Article 25(1), while the *CSOB* tribunal held that it "should be interpreted broadly,"[36] it also emphasized its objective nature:

> The Slovak Republic is correct in pointing out, however, that an agreement of the parties describing their transaction as an investment is not, as such, conclusive in resolving the question whether the dispute involves an investment under Article 25(1) of the Convention. The concept of an investment as spelled out in that provision is *objective in nature* in that the parties may agree on a more precise or restrictive definition of their acceptance of the Centre's jurisdiction, but they may not choose to submit disputes to the Centre that are not related to an investment. A two-fold test must therefore be applied in determining whether this Tribunal has the competence to consider the merits of the claim: *whether the dispute arises out of an investment within the meaning of the Convention* and, if so, whether the dispute relates to an investment as defined in the Parties' consent to ICSID arbitration, in their reference to the BIT and the pertinent definitions contained in Article 1 of the BIT.[37]

In that case, the tribunal was called upon to determine whether a loan could be defined as an investment. It responded in the affirmative, adopting a broad approach to the notion and looking at the transaction as an "integrated whole," which it held

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Amerasinghe, *The Jurisdiction of the International Centre for the Settlement of Investment Disputes*, 19 Indian Journal of International Law 166, 181 (1979); Georges R. Delaume, *ICSID and the Transnational Financial Community*, 1 ICSID Rev. F.I.L.J. 237, 239-240 (1986); Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID Rev. F.I.L.J. 4 (1986); Carolyn B. Lamm & Abby Cohen Smutny, *The Implementation of ICSID Arbitration Agreements*, 11 ICSID Rev. F.I.L.J. 64, 80 (1996).

34. *Fedax v. Venezuela, supra* n.20, ¶ 25.
35. *CSOB v. Slovakia, supra* n.20, ¶ 66.
36. *Ibid.*, ¶ 64.
37. *Ibid.*, ¶ 68 (emphasis added).

meant that "individual transactions comprising it may still meet the requirements of an investment under the Convention, provided the overall operation for the consolidation of CSOB, to which it is closely connected, qualifies as an investment."[38] However, that integrated whole was not defined for the purposes of Article 25(1) of the ICSID Convention, other than through the tribunal's indication that "the broad meaning which must be given to the notion of an investment under Article 25(1) of the Convention is opposed to the conclusion that a transaction is not an investment merely because, as a matter of law, it is a loan. This is so, if only because under certain circumstances a loan may contribute substantially to a State's economic development. In this connection, Claimant correctly points out that other ICSID Tribunals have affirmed their competence to deal with the merits of claims based on loan agreements."[39]

This is where the *Salini* Tribunal went an important step beyond, not only recognizing that the "investment requirement must be respected as an objective condition of the jurisdiction of the Centre,"[40] but fully giving effect to the distinction by verifying that the condition of an investment was met under the Italy-Morocco investment treaty and examining separately the conditions under which the requirement of Article 25(1) would be met.[41]

Salini v. Morocco thus truly introduced the objectivist approach, according to which the requirement of Article 25(1) must be satisfied independently of party consent. Although the subjectivist approach – which existed prior to *Salini*, according to which the notion of investment under Article 25(1) should be diluted in the definition of investment as provided by the contracting States under the applicable treaty (or any other instrument on the basis of which a tribunal is constituted) – would persist following *Salini*, it would in time become more isolated.

The expression of these two trends – the subjectivist and the objectivist – has not given rise to extensive case law, given that most of the debate has crystallized over the substance of the definition of investment under Article 25(1).[42] However, one case, *MHS v. Malaysia*, has exposed in the clearest terms the split between the objectivist and the subjectivist approaches to the requirement of investment in Article 25(1). In the award on jurisdiction rendered in May 2007, the sole arbitrator in that case dismissed the claims for lack of jurisdiction.[43] On the requirement of investment under the ICSID Convention, the sole arbitrator referred to *Salini v. Morocco* to lay emphasis on "the investment requirement under Article 25(1) [as] an objective condition of the jurisdiction of the Centre."[44] Thus, a claimant in an ICSID arbitration should:

38. *Ibid.*, ¶ 82.
39. *Ibid.*, ¶ 76.
40. *Salini v. Morocco*, *supra* n.1, ¶ 52.
41. *See* the description of the case, *supra* II.
42. On this debate, *see infra* III.B.2.
43. *Malaysian Historical Salvors Sdn, Bhd v. Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction (17 May 2007) (Hwang) [hereinafter *MHS v. Malaysia*, Award]. On the factors used by the sole arbitrator to define an investment, *see infra*, III.B.2(iii).
44. *Ibid.*, ¶ 54.

> [S]atisfy the tribunal that: a) the dispute between the parties concerns an 'investment' within the definition provided under the relevant bilateral investment treaty; and b) the objective criterion of an 'investment' within the meaning of Article 25(1) has been met. Under the double-barreled test, a finding that the Contract satisfied the definition of 'investment' under the BIT would not be sufficient for this Tribunal to assume jurisdiction, if the Contract failed to satisfy the objective criterion of an 'investment' within the meaning of Article 25.[45]

This approach was harshly criticized by the *ad hoc* committee constituted following the claimant's request for annulment,[46] on the basis that during the negotiation of the ICSID Convention the term "investment" had been deliberately left undefined.[47] The *ad hoc* committee annulled the award on jurisdiction for manifest excess of powers in that the sole arbitrator had only examined whether there was an investment within the meaning of Article 25(1), and finding that there was not, had found it unnecessary to discuss whether there was an investment under the UK-Malaysia investment treaty and thus not given effect to the intention of the contracting States under that treaty.[48]

The *MHS ad hoc* committee did the reverse: focusing on the – broad – definition of investment under the UK-Malaysia investment treaty, as diluting the requirement of investment under Article 25(1) – which is in turn perceived as broad because it has not been defined by the drafters of the Convention. Thus, adopting a purely subjectivist view,[49] it did not deem it necessary to assess the condition of investment under the Convention as such:

> It appears to have been assumed by the Convention's drafters that use of the term 'investment' excluded a simple sale and like transient commercial transactions from the jurisdiction of the Centre. *Judicial or arbitral construction going further in*

45. *Ibid.*, ¶ 55; *see also* ¶ 78.
46. *Malaysian Historical Salvors Sdn, Bhd v. Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment (16 April 2009) (Schwebel, Shahabuddeen, Tomka) [hereinafter *MHS v. Malaysia*, Decision on Annulment].
47. *Ibid.*, ¶ 63.
48. *Ibid.*, ¶ 62 ("It cannot be accepted that the Governments of Malaysia and the United Kingdom concluded a treaty providing for arbitration of disputes arising under it in respect of investments so comprehensively described, with the intention that the only arbitral recourse provided between a Contracting State and a national of another Contracting State, that of ICSID, could be rendered nugatory by a restrictive definition of a deliberately undefined term of the ICSID Convention, namely, 'investment,' as it is found in the provision of Article 25(1). It follows that the Award of the Sole Arbitrator is incompatible with the intentions and specifications of the States immediately concerned, Malaysia and the United Kingdom."). *Ibid.*, ¶ 74 ("In the light of this history of the preparation of the ICSID Convention and of the foregoing analysis of the Report of the Executive Directors in adopting it, the Committee finds that the failure of the Sole Arbitrator even to consider, let alone apply, the definition of investment as it is contained in the Agreement to be a gross error that gave rise to a manifest failure to exercise jurisdiction.").
49. Other arbitrators have adopted the same view. *See, e.g., CMS Gas Transmission company v. Argentine Republic*, ICSID Case No ARB/01/8, Decision of the *ad hoc* Committee on the Application for Annulment (25 September 2007) (Guillaume, Elaraby, Crawford), ¶ 71 ("Article 25 of the ICSID Convention did not attempt to define 'investment'. Instead this task was left largely to the terms of bilateral investment treaties or other instruments on which jurisdiction is based.").

> *interpretation of the meaning of 'investment'* by the establishment of criteria or hallmarks may or may not be regarded as plausible, but the intentions of the draftsmen of the ICSID Convention, as the travaux show them to have been, lend those criteria (and still less, conditions) scant support.[50]

The assessment of the sole arbitrator's reasoning – and the outcome of the annulment process – may not have been fundamentally different under the objectivist approach. What this would have required was determining whether the investment under consideration was covered by the UK-Malaysia investment treaty, which indeed provided a broad definition of investments as noted by the *ad hoc* committee, and whether it was also covered by Article 25(1) of the ICSID Convention. The only difference with the *MHS ad hoc* committee's approach is that the latter analysis would have been conducted separately, by interpreting and giving *effet utile* to the wording of Article 25(1). In that regard, it bears noting that the *Salini* test is ultimately based on nothing more than the economic definition of an investment or, in other terms, the ordinary meaning of the word. It is the introduction by the *MHS v. Malaysia* award of qualitative and quantitative requirements into the definition of investment under Article 25(1) that truly raised difficulty and warranted annulment.[51]

In other cases, the tribunals have clearly pointed to the objective nature of the requirement of investment under Article 25(1) of the ICSID Convention. In *Joy Mining v. Egypt*, for example, the tribunal held that:

> The parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the *objective requirements of Article 25 of the Convention*. Otherwise Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision.[52]

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50. *MHS v. Malaysia*, Decision on Annulment, *supra* n.46, ¶ 69 (emphasis added). Specifically referring to *Salini v. Morocco*, the *MHS ad hoc* committee noted *ibid.*, ¶ 78: "[w]hile this Committee's majority has every respect for the authors of the *Salini v. Morocco* Award and those that have followed it, ... it gives precedence to awards and analyses that are consistent with its approach, which it finds consonant with the intentions of the Parties to the ICSID Convention"; *ibid.*, ¶ 72: "'the nature of the dispute' appears to refer to the dispute being a legal dispute. The reference to 'the parties thereto' merely means that for a dispute to be within the Centre's jurisdiction, the parties must be a Contracting State and a national of another Contracting State. These fundaments, and the equally fundamental assumption that the term 'investment' does not mean 'sale,' appear to comprise 'the outer limits,' *the inner content of which is defined by the terms of the consent of the parties* to ICSID jurisdiction." (emphasis added). *See also* the dispositive part of the decision at *ibid.*, ¶ 80: "(a) it altogether failed to take account of and apply the Agreement between Malaysia and the United Kingdom defining 'investment' in broad and encompassing terms but rather limited itself to its analysis of criteria which it found to bear upon the interpretation of Article 25(1) of the ICSID Convention; (b) its analysis of these criteria elevated them to jurisdictional conditions, and exigently interpreted the alleged condition of a contribution to the economic development of the host State so as to exclude small contributions, and contributions of a cultural and historical nature ... ."
51. For a criticism of the criteria as applied by the sole arbitrator in *MHS v. Malaysia*, *see infra* II.B.2(iii).
52. *Joy Mining Machinery Ltd v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction (6 August 2004) (Orrego Vicuña, Craig, Weeramantry), ¶ 50 (emphasis added).

Similarly, the tribunal in *Global Trading v. Ukraine* held that:

> It seems to the Tribunal that what the drafters of the Convention had in mind was an *objective and autonomous definition* of the term 'investment' in Article 25, without which an essential component of Article 25 itself would have been stripped of its meaning. As the Tribunal in *Victor Pey Casado v. Chile* observed: '... a definition of investment does exist within the meaning of the ICSID Convention and it does not suffice to note the existence of certain of the usual 'characteristics' of an investment to satisfy this objective requirement of the Centre's jurisdiction. Such an interpretation would result in depriving certain terms of Article 25 of the ICSID Convention of any meaning ...'.[53]

This objective approach has been adopted in a number of cases, for example *RSM v. Grenada*,[54] *Bureau Veritas v. Paraguay*,[55] or *Saba Fakes v. Turkey*.[56] Interestingly, the importance of the objective requirement of investment under Article 25(1) of the ICSID Convention has been noted even by tribunals not constituted under the ICSID Convention.[57]

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53. *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award (1 December 2010) (Berman, Gaillard, Thomas), ¶ 45 (emphasis added). *See also Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award (8 May 2008) (Lalive, Gaillard, Chemloul), ¶ 232 [hereinafter *Pey Casado v. Chile*].
54. *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Award (11 March 2009) (Veeder, Audit, Berry), ¶¶ 235-236 [hereinafter *RSM v. Grenada*] ("This Tribunal, however, like several earlier ICSID tribunals, subscribes to the concept that a private party and a state contracting with each other are *not at liberty to create their own definition of an investment under the ICSID Convention* with the effect of bringing a dispute under the jurisdiction of ICSID even where their operation is clearly not an investment. There are certain *objective elements* to an investment which must be present; and it is the duty of this Tribunal to ensure that they are present, lest its assertion of jurisdiction be false and amount to an abuse of power. ..." (emphasis added)).
55. *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction (29 May 2009) (Knieper, Fortier, Sands), ¶ 78 ("... The parties cannot adopt a definition of 'investment' that relates to activities that manifestly fall outside the scope of what the drafters of the ICSID Convention intended. The meaning of 'investment' is subject to *objective appreciation*, having regard to the objectives of the ICSID Convention, which seeks to promote international cooperation for economic development and the role of private international investment (see the preamble to the ICSID Convention).").
56. *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award (14 July 2010) (Gaillard, Lévy, van Houtte), ¶ 108 [hereinafter *Saba Fakes v. Turkey*] ("First, the Tribunal considers that the notion of investment, which is one of the conditions to be satisfied for the Centre to have jurisdiction, cannot be defined simply through a reference to the parties' consent, which is a distinct condition for the Centre's jurisdiction. The Tribunal believes that an *objective definition* of the notion of investment was contemplated within the framework of the ICSID Convention, since certain terms of Article 25 would otherwise be devoid of any meaning" (emphasis added)).
57. *See, e.g., Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction (8 September 2006) (Reinisch, Koussoulis, Mitrović), ¶¶ 113-118 ("It is indeed not very easy to precisely define the concept of 'investment' which is seen as an *objective jurisdictional requirement* under the ICSID Convention, and *separate and additional to the consent of the parties to arbitrate*. ICSID tribunals have in fact accepted a broad range of economic activities under the notion of investment. ICSID tribunals have to satisfy themselves that a Claimant has made an 'investment' under both the applicable BIT (or other instrument containing consent) and the ICSID Convention. This double jurisdictional requirement for ICSID cases was confirmed in *Salini v. Morocco* ... . However, this latter

B. Investment Defined: The Introduction of a True Definition by *Salini*

In addition to establishing the objective nature of the requirement of investment under Article 25(1) of the ICSID Convention, *Salini v. Morocco* introduced a true definition of the notion of investment. Other attempts at such definition had unsuccessfully been made before, in *CSOB v. Slovakia*:[58]

> Finally, applying the definition of an investment proffered by the Slovak Republic (para. 78, *supra*), it would seem that the resources provided through CSOB's banking activities in the Slovak Republic were designed to produce a benefit and to offer CSOB a return in the future, subject to an element of risk that is implicit in most economic activities. The Tribunal notes, however, that *these elements* of the suggested definition, while they tend as a rule to be present in most investments, *are not a formal prerequisite for the finding that a transaction constitutes an investment as that concept is understood under the Convention.*[59]

Thus, while the *CSOB* tribunal, adopting an impressionist approach,[60] recognized certain of the "elements" present in most investments but refused to recognize them as true conditions, the *Salini* Tribunal used these very elements for a true definition of the notion of investment within the meaning of Article 25(1).[61] One cannot fully appreciate the ICSID case law on the notion of investment without identifying each of these two competing methodologies: the intuitive and the deductive approach to the definition of investment (1.). Only then the significance of the factors that are taken into account to assess an investment becomes apparent (2.).

1. The Competing Methodologies for the Determination of an Investment

It is not sufficient to discuss in isolation each of the possible elements of the notion of investment – namely contribution, duration, risk and, potentially, contribution to the development of the host State – without specifying which type of reasoning these

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ratione materiae test for the existence of an investment in the sense of Article of the 25 ICSID Convention is one *specific to the ICSID Convention* and does not apply in the context of *ad hoc* arbitration provided for in BITs as an alternative to ICSID. ... In the present *ad hoc* arbitration under the UNCITRAL Rules one would therefore have to conclude that the *only requirements* that have to be fulfilled in order to confer *ratione materiae* jurisdiction on this Tribunal are those *under the BIT*." (emphasis added)).

58. In *CSOB v. Slovakia*, the respondent had proposed a definition of investment within the meaning of Art. 25, which bore resemblance to the definition later adopted in *Salini v. Morocco*. *See CSOB v. Slovakia*, *supra* n.20, ¶ 78 ("The Slovak Republic contends that the CSOB loan does not constitute an investment. It defines an investment essentially as the acquisition of property or assets through the expenditure of resources by one party (the 'investor') in the territory of a foreign country (the 'host State'), which is expected to produce a benefit on both sides and to offer a return in the future, subject to the uncertainties of the risk involved. While the Slovak Republic argues that the CSOB loan does not meet any elements of the above definition, CSOB submits that its loan qualifies as an investment thereunder. ...").
59. *Ibid.*, ¶ 90 (emphasis added).
60. On the impressionist approach, *see* Gaillard, *supra* n.28. The developments that follow borrow from that contribution.
61. *Salini v. Morocco*, *supra* n.1, ¶ 52. *See supra* II.

elements are rooted in. Depending on the context, each of these individual components takes a very different meaning.

a. The Intuitive Approach

The first methodology, which can be called intuitive, is that followed by tribunals which consider the presence of certain "characteristics" of an investment sufficient to satisfy the requirement of the Convention, even if all such "characteristics" are not present in the case at hand. Avoiding all generalizations, it merely *identifies* features which have already been observed in scholarly writings or in prior arbitral decisions that have accepted the existence of an investment.[62]

In case law, the first proponent of the intuitive method was *CSOB v. Slovakia*.[63] Following *Salini v. Morocco*, other tribunals have adopted the same approach. *MCI v. Ecuador*, for example, considered that "the requirements that were taken into account in some arbitral precedents for purposes of denoting the existence of an investment protected by a treaty (such as the duration and risk of the alleged investment) *must be considered as mere examples and not necessarily as elements that are required for its existence.*"[64]

One of the most archetypal examples of the intuitive method is perhaps the award rendered in *Biwater v. Tanzania*.[65] In relation to a renovation project for water and sewage infrastructures, the tribunal in that case recalled the four elements of the *Salini* test and supplemented them with a fifth characteristic, that of the magnitude of the investment:

> In the Tribunal's view, there is no basis for a rote, or overly strict, application of the five *Salini* criteria in every case. These criteria are not fixed or mandatory as a matter of law. They do not appear in the ICSID Convention. ...
>
> Further, the *Salini Test* itself is problematic if, as some tribunals have found, the 'typical characteristics' of an investment as identified in that decision are *elevated into a fixed and inflexible test*, and if transactions are to be presumed excluded from the ICSID Convention unless each of the five criteria are satisfied. ...
>
> The Arbitral Tribunal therefore considers that a more flexible and pragmatic approach to the meaning of 'investment' is appropriate, which takes into account the *features identified* in *Salini*, but along with all the circumstances of the case, including the nature of the instrument containing the relevant consent to ICSID.[66]

62. For scholarly writings in favor of this approach, *see, e.g.*, Christoph Schreuer, *The ICSID Convention: A Commentary* 128, ¶ 153 (Cambridge Univ. Press 2009); Christoph Schreuer, "Panel Discussion: Are the ICSID Rules Governing Nationality & Investment Working?" in *Investment Treaty Arbitration and International Law* 119-141 (Todd Weiler (ed.), Juris Publishing 2008), *see especially ibid.*, at 124-127. *See also* Ibrahim Fadlallah, "La notion d'investissement: vers une restriction à la compétence du CIRDI?" in *Liber Amicorum Robert Briner* 259, 267, ¶ 15 (ICC Publishing 2005).
63. *See supra*, introduction of III.B.
64. *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No ARB/03/6, Award (31 July 2007) (Vinuesa, Greenberg, Irarrázabal), ¶ 165 (emphasis added).
65. *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No ARB/05/22, Award (24 July 2008) (Hanotiau, Born, Landau).
66. *Ibid.*, ¶¶ 312-316 (emphasis added).

More recently, this approach has been adopted vehemently by the tribunals in *Philip Morris v. Uruguay*[67] and *Abaclat v. Argentina*,[68] based on the same notion that *Salini* does no more than provide "features" or "characteristics" for the identification of an investment and that the absence of a definition of the word "investment" in Article 25(1) assumes that the word must be interpreted broadly.

b. The Deductive Approach

The second methodology, which can be called deductive, is that followed by *Salini v. Morocco*. Those tribunals adhering to this approach have based their assessment on the presumption that there exists a true definition of an investment, and that such definition is based on constitutive elements or criteria. Under this approach, a tribunal whose jurisdiction is challenged must ensure that all the constitutive elements are present, or that all the criteria are fulfilled, in order to conclude that an investment exists for the purposes of its jurisdiction under the Convention. This method is one of *defining*, which entails determining in the abstract the factors that are of the *essence* of an investment in order to then proceed in each case to a process of characterization. It follows the classic methodology associating one or several constitutive elements with a legal consequence.

Other than *Salini*, this approach has been followed by a number of tribunals, for example in *LESI-Dipenta v. Algeria*,[69] *Bayindir v. Pakistan*,[70] *Jan de Nul v. Egypt*,[71]

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67. *Philip Morris Brand Sàrl et al. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (2 July 2013) (Bernardini, Born, Crawford), ¶ 206 ("The *Salini* test has received varied applications by investment treaty tribunals and doctrinal writings. In the Tribunal's view, the four constitutive elements of the *Salini* list do not constitute jurisdictional requirements to the effect that the absence of one or the other of these elements would imply a lack of jurisdiction. They are *typical features of investments* under the ICSID Convention, not 'a set of mandatory legal requirements'. As such, they may assist in *identifying* or excluding in extreme cases the presence of an investment but they cannot defeat the broad and flexible concept of investment under the ICSID Convention to the extent it is not limited by the relevant treaty, as in the present case." (emphasis added)).
68. *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) (Tercier, van den Berg, Abi Saab), ¶ 364 ("Considering that these criteria were never included in the ICSID Convention, while being controversial and having been applied by tribunals in varying manners and degrees, the Tribunal does not see any merit in following and copying the Salini criteria. The Salini criteria may be useful to further describe what characteristics contributions may or should have. They should, however, not serve to create a limit, which the Convention itself nor the Contracting Parties to a specific BIT intended to create.").
69. *Consortium Groupement L.E.S.I.-Dipenta v. People's Democratic Republic of Algeria*, ICSID Case No ARB/03/8, Award (10 January 2005) (Tercier, Gaillard, Faurès), ¶ 13 (iv) [hereinafter *LESI-Dipenta v. Algeria*]; *see also LESI, SpA and Astaldi, SpA v. People's Democratic Republic of Algeria*, ICSID Case No ARB/05/3, Decision on Jurisdiction (12 July 2006) (Tercier Gaillard, Faurès), ¶ 72 (iv).
70. *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction (14 November 2005) (Kaufmann-Kohler, Böckstiegel, Berman), ¶ 130 [hereinafter *Bayindir v. Pakistan*].
71. *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No ARB/04/13, Decision on Jurisdiction (16 June 2006) (Kaufmann-Kohler, Mayer, Stern), ¶ 91 [hereinafter *Jan de Nul v. Egypt*].

Saipem v. Bangladesh,[72] or *Kardassopoulos v. Georgia*.[73] In *Pey Casado v. Chile*, the tribunal observed:

> This Tribunal considers that a definition of investment does exist within the meaning of the ICSID Convention and that it does not suffice to note the existence of certain 'characteristics' which are typical of an investment to satisfy this objective requirement of the Centre's jurisdiction. Such an interpretation would result in depriving certain terms of Article 25 of the ICSID Convention of any meaning, something that would be incompatible with the obligation to interpret the terms of the Convention in accordance with the *effet utile* principle, as was rightly stated by the award rendered in the *Joy Mining Machinery Limited v. Arab Republic of Egypt* case on August 6, 2004.[74]

Likewise, the tribunal in *Quiborax v. Bolivia* has forcefully adopted the same approach:

> The Tribunal agrees with the Parties that a contribution of money or assets (that is, a commitment of resources), risk and duration are all three part of the *ordinary definition of investment*. It understands risk to include the expectation of a commercial return. By contrast, the Tribunal is of the view that the additional elements upon which the Respondent relies are not part of such definition.[75]

The deductive approach thus assumes that the notion of investment within the meaning of Article 25(1) can be interpreted based on the ordinary meaning of the word, and independently of any definition given to it in the instrument on which the tribunal's jurisdiction is based – contract, law or treaty. To some extent, this approach is based on the idea that the intuitive approach is in reality nothing but another iteration of the subjectivist theory, which merges the requisite of investment with that of consent.[76]

2. The Factors to be Taken into Account to Assess an Investment

The nature and number of factors to be taken into consideration when assessing the existence of an investment take on a very different meaning depending on whether they are applied in the context of a deductive method relying on a true definition or that of an intuitive approach based on typical characteristics. In the former case, the more numerous the factors, the more difficult it is to satisfy the investment requirement and

72. *Saipem S.p.A v. The People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007) (Kaufmann-Kohler, Schreuer, Otton), ¶ 99 [hereinafter *Saipem v. Bangladesh*].
73. *Ioannis Kardassopoulos v. Georgia*, ICSID Case No ARB/05/18, Decision on Jurisdiction (6 July 2007) (Fortier, Orrego Vicuña, Watts), ¶ 116 [hereinafter *Kardassopoulos v. Georgia*].
74. *Pey Casado v. Chile*, *supra* n.53, ¶ 232 (author's translation from French original).
75. *Quiborax S.A. et al. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction (27 September 2012) (Kaufmann-Kohler, Lalonde, Stern), ¶ 219 [hereinafter *Quiborax v. Bolivia*] (emphasis added).
76. On the subjectivist theory, *see supra* III.A.

the narrower the jurisdiction of the Centre becomes. In the latter case, the addition of new "characteristics" facilitates the recognition of an investment as this methodology accepts that an investment be recognized on the basis of some, but not all, of the said characteristics. In this logic, the addition of a new characteristic may well serve as a substitute for the lack of another, more traditional, feature. In other words, in a true definition, the accumulation of constitutive elements stems from a restrictive approach, whereas in an impressionist approach, increasing the number of characteristics of what might be considered as an investment denotes a liberal stand.[77]

It is in this context that one must understand the introduction by *Salini v. Morocco* of the contribution to the economic development of the host State into the definition of investment (i.). It is also in this context that one must understand, in the subsequent case law, the debate over this fourth criterion (ii.) and the addition of further criteria to characterize an investment (iii.).

a. The *Salini* Test: The Reason for Four Criteria

In order to better understand the groping evolution of the case law on the notion of investment, it is key to appreciate that the justification of the four-fold *Salini* test is based on the combination of two fundamentally diverging approaches – the deductive and the intuitive methods.

The first – deductive – approach was put forward by Professors Carreau, Flory and Juillard and by the first author of this contribution. While discussing developments of the "concept of investment" in a section entitled "search for criteria," the former explained that:

> These criteria are based on three ideas. First, there can be no investment without a contribution – whatever the form of that contribution. Second, there can be no investment within a short period of time: an investment transaction is characterized by a 'durability' that can only be satisfied by a mid to long term contribution. Third, there can be no investment without risk, which means that the deferred compensation of the investor must be dependent upon the loss and profit of the company. These three criteria are to be applied cumulatively.[78]

However, in the subsequent developments focusing on the "legal notion of investment" and no longer the "economic notion,"[79] the authors insisted that "there exists not a singular but a multiplicity of legal translations for the economic notion of investment,"[80] and that the absence of any definition of investment in the ICSID Convention is due to the:

77. Thus, when Georges Delaume, seeking flexibility, presented the idea of the "expected – if not always actual" contribution to the economic development of the host State, he was proposing a substitution for the traditional test, not the addition of a criterion to a system that he already considered to be excessively formalistic. George Delaume, *Le Centre International Pour le Règlement des Différends Relatifs aux Investissements (CIRDI)*, 775 JDI 801 (1982).
78. Carreau, Flory & Juillard, *supra* n.28, at 560, ¶ 935 (author's translation from French original).
79. *Ibid.*
80. *Ibid.*, at 568, ¶ 953 (author's translation from French original).

> [D]esire to disturb neither the formal nor the material unity of litigation regarding certain investments: the flexibility of contractual stipulations allows for global submission to the Centre of transactions whose nature and structure are complex but whose legal form splits them into a multitude of contractual arrangements, some of which might escape the Centre's jurisdiction.[81]

The other source cited in *Salini v. Morocco* suggested a traditional definition of the concept of investment founded on the three elements of contribution, certain duration and risk,[82] while noting that other, less strict, definitions had also been put forward.[83]

The second – intuitive – approach was advanced by Georges Delaume, former Senior Legal Adviser to the World Bank, in reaction to the traditional definition. Because he deemed the definition based on contribution, duration and risk to be too restrictive, he suggested a more flexible test based on the Preamble of the Convention – the contribution to the host State's economic development:

> [The] traditional concept, which is inspired by a *narrow* economic and legal conception, is today substituted by another concept, which is essentially economic in nature and *legally flexible* in its formulation, that is not based on contribution of ownership but rather on the *expected – if not always actual* – contribution of the investment to the economic development of the country in question.[84]

After highlighting that direct investment is far from being the only means of associating a foreign party with the development of the host State, he further observed:

> Without going on at length about this contemporary phenomenon, it is still appropriate to deduce from it, for the purposes of the ICSID Convention, the sole consequence that follows, namely that as a result of this evolution, the scope of application of Article 25(1) is *considerably enlarged* and offers for those interested new opportunities for recourse to ICSID to settle their potential disputes.[85]

The Tribunal in the *Salini v. Morocco* case merged these two approaches. While retaining from the first the idea that real criteria of investment exist and must be satisfied cumulatively, it borrowed from the second a fourth element, which it understood as an integral part of a new definition of an investment. Seemingly harmless, this combination is the source of the ambiguities that surfaced in the subsequent case law on the concept of investment within the meaning of Article 25(1) of the ICSID Convention.

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81. *Ibid.*, at 570, ¶ 956 (author's translation from French original).
82. Emmanuel Gaillard, *Note under Fedax v. Venezuela*, 278 JDI (1999).
83. *See* Sébastien Manciaux, who suggested taking into account only the concept of the "growth of the host State's estate." Sébastien Manciaux, *Investissements Étrangers et Arbitrage Entre Etats et Ressortissants d'autres Etats: 25 Années d'activité du Centre International pour le Règlement des Différends Relatifs aux Investissements* 71 *et seq.* (Thèse Dijon 1998), published in 2004 under the title *Investissements Étrangers et Arbitrage entre Etats et Ressortissants d'autres Etats* (Litec 2004). *See especially ibid.*, at 43 *et seq.* For a more recent position from the same author, *see* "Actualité de la notion d'investissement international" in *La Procédure Arbitrale Relative aux Investissements Internationaux: Aspects Récents* (Charles Leben (ed.), Anthemis 2010).
84. Delaume, *supra* n.77, at 801 (author's translation from French original) (emphasis added).
85. *Ibid.*, at 802 (author's translation from French original) (emphasis added).

b. Evolving From Four to Three Criteria

The four-fold *Salini* test has been followed by a number of tribunals, which have required a contribution, duration, risk, and contribution to the economic development of the host State. The decisions in *Jan de Nul v. Egypt*,[86] *Saipem v. Bangladesh*,[87] *Kardassopoulos v. Georgia*,[88] *Bayindir v. Pakistan* (with certain nuances),[89] and *Millicom v. Senegal*[90] provide illustrations of this trend. Interestingly, in *Helnan v. Egypt* the tribunal adopted the respondent's view that "based on ICSID precedents, as summarized in the unchallenged statement by Professor Ch. Schreuer, ... to be characterized as an investment a project 'must show a certain duration, a regularity of profit and return, an element of risk, a substantial commitment, and a significant contribution to the host State's development.'"[91] This appears as somewhat of a paradox when one recalls that Professor Schreuer is himself an advocate of an approach that is not based on a strict definition but, rather, on "features [that] should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention."[92]

Others tribunals have rejected the inclusion of a fourth criterion in the definition of investment, based on the notion that while the economic development of a host State is one of the proclaimed objectives of the ICSID Convention, this objective is not in and of itself an independent criterion for the definition of an investment. These include *LESI-Dipenta v. Algeria*,[93] *Saba Fakes v. Turkey*,[94] *RSM v. Central African*

86. *Jan de Nul v. Egypt*, *supra* n.71, ¶ 91.
87. *Saipem v. Bangladesh*, *supra* n.72, ¶ 99.
88. *Kardassopoulos v. Georgia*, *supra* n.73, ¶ 116.
89. *Bayindir v. Pakistan*, *supra* n.70, ¶ 130.
90. *Millicom International Operations B.V. and Sentel GSM S.A. v. Republic of Senegal*, ICSID Case No. ARB/08/20, Decision on Jurisdiction of the Arbitral Tribunal (16 July 2010) (Tercier, Abraham, Hobér), ¶ 80 ("The ICSID Convention also contains no definition of an investment. In general, in practice a broad concept is applied, even in decisions where special criteria have been used, such as those set out in the decision of 23 July 2001, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (ICSID Case no. ARB/00/4, *Journal du droit international* 196 (2002), p. 124, exhibit CL-27). This is also not the place for the Arbitral Tribunal to discuss the relevance of each of these conditions, since it appears obvious that, regardless of the list relied on, they are all fulfilled in the present case.").
91. *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction (17 October 2006) (Derains, Dolzer, Lee), ¶ 77.
92. Schreuer, *supra* n.62, at 128, ¶ 153.
93. *LESI-Dipenta v. Algeria*, *supra* n.69, ¶ 13(iv) ("... it seems that, in conformity with the objective of the Convention, for a contract to be deemed an investment it must fulfill the following three conditions; a) the contracting party has made a contribution in the country in question, b) this contribution must extend over a certain period of time, and c) it must entail some risk for the contracting party. However, it does not seem necessary to establish that the contract addresses economic development of the country, a condition that is in any case difficult to establish and implicitly covered by the three conditions adopted herein.")
94. *Saba Fakes v. Turkey*, *supra* n.56, ¶ 111 ("The Tribunal is not convinced ... that a contribution to the host State's economic development constitutes a criterion of an investment within the framework of the ICSID Convention. Those tribunals that have considered this element as a separate requirement for the definition of an investment, such as the *Salini* Tribunal, have mainly relied on the preamble to the ICSID Convention to support their conclusions. The present Tribunal observes that while the preamble refers to the 'need for international cooperation for economic development,' it would be excessive to attribute to this reference a meaning and

Republic,[95] *Quiborax v. Bolivia*,[96] *Electrabel v. Hungary*,[97] and *KT Asia v. Kazakhstan*.[98] The *Pey Casado* tribunal, in particular, held that:

> It is this Tribunal's view, however, that the definition comprises only three elements. The requirement of a contribution to the economic development of the host State, as difficult to establish as it may be, relates to the merits of the dispute and not the jurisdiction of the Centre. An investment may prove useful or not for a host State without it losing its quality [as an investment]. It is true that the Preamble to the ICSID Convention mentions the contribution to the economic

function that is not obviously apparent from its wording. In the Tribunal's opinion, while the economic development of a host State is one of the proclaimed objectives of the ICSID Convention, this objective is not in and of itself an independent criterion for the definition of an investment. The promotion and protection of investments in host States is expected to contribute to their economic development. Such development is an expected consequence, not a separate requirement, of the investment projects carried out by a number of investors in the aggregate. Taken in isolation, certain individual investments might be useful to the State and to the investor itself; certain might not. Certain investments expected to be fruitful may turn out to be economic disasters. They do not fall, for that reason alone, outside the ambit of the concept of investment.").

95. *RSM Production Corporation v. Central African Republic*, ICSID Case No. ARB/07/02, Decision on Competence and Responsibility (7 December 2010) (Kettani, Merle, Stern), ¶¶ 54-56 ("*En partant ainsi du 'test Salini', le Tribunal ne suit pas certains tribunaux qui — comme l'a également plaidé la Demanderesse — ne voient dans le 'test Salini', aucun critère objectif permettant de définir ce qu'est un investissement. ... Ce Tribunal considère quant à lui qu'il s'agit bien de critères juridictionnels, même s'il reconnaît également qu'une approche globale est nécessaire. Cependant, comme indiqué précédemment, le Tribunal souhaite apporter certaines inflexions aux critères Salini, car il estime qu'en réalité le critère de la contribution au développement est trop subjectif et qu'il doit être remplacé par le critère de la contribution à l'économie, lui-même considéré comme présumé inclus dans les trois autres critères. ...*" (emphasis added)).

96. *Quiborax v. Bolivia*, *supra* n.75, ¶¶ 212 and 219 ("Rather, in the Tribunal's view, it means that the Contracting States to the ICSID Convention intended to give to the term 'investment' an 'ordinary meaning' as opposed to a 'special meaning.' This ordinary meaning is *an objective one* – an observation that finds support in the *Saba Fakes* award ... . The Tribunal agrees with the Parties that a contribution of money or assets (that is, a commitment of resources), risk and duration are all three part of the ordinary definition of investment. It understands risk to include the expectation of a commercial return. The Tribunal agrees with the Parties that a contribution of money or assets (that is, a commitment of resources), risk and duration are all three part of the ordinary definition of investment. It understands risk to include the expectation of a commercial return." (emphasis added)).

97. *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) (Kaufmann-Kohler, Veeder, Stern), ¶ 5.43 [hereinafter *Electrabel v. Hungary*] ("Article 25 of the ICSID Convention requires that the dispute arises directly from an investment, but provides no definition of investment. While there is incomplete unanimity between tribunals regarding the elements of an investment, there is a general consensus that the *three objective criteria* of (i) a contribution, (ii) a certain duration, and (iii) an element of risk are necessary elements of an investment." (emphasis added)).

98. *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award (17 October 2013) (Kaufmann-Kohler, Glick, Thomas), ¶¶ 168 and 171 ("Consequently, the Claimant must show that it has made an 'investment' under the *objective definition developed in the framework of the ICSID Convention* in order to establish that the Tribunal has *ratione materiae* jurisdiction over the present dispute ... . The Respondent also cites the contribution to the host State's development or prosperity as a requirement for an investment. In the Tribunal's opinion, such a contribution may well be the consequence of a successful investment. However, if the investment fails, and thus makes no contribution at all to the host State's economy, that cannot mean that there has been no investment. ..." (emphasis added)).

> development of the host State. However, this reference is presented as a *consequence* and *not as a condition of the investment*: by protecting investments, the Convention facilitates the development of the host State. This does not mean that the development of the host State is a constitutive element of the notion of investment. This is why, as was noted by certain arbitral tribunals, this fourth condition is in reality encompassed by the first three.[99]

Even tribunals adopting an intuitive approach and viewing an investment in more liberal terms have followed suit, finding, like *Pey Casado v. Chile*, that economic development is a consequence of an investment, not an essential component of the notion. Thus, the tribunal in *Alpha v. Ukraine* held that:

> The Tribunal is particularly reluctant to apply a test that seeks to assess an investment's contribution to a country's economic development. Should a tribunal find it necessary to check whether a transaction falls outside any reasonable understanding of 'investment,' the criteria of resources, duration, and risk would seem fully to serve that objective. The contribution-to-development criterion, on the other hand, would appear instead to reflect the *consequences* of the other criteria and brings little independent content to the inquiry. At the same time, the criterion invites a tribunal to engage in a *post hoc* evaluation of the business, economic, financial and/or policy assessments that prompted the claimant's activities. It would not be appropriate for such a form of second-guessing to drive a tribunal's jurisdictional analysis.[100]

The case law is thus slowly moving away from the fourth *Salini* criterion:[101] unlike the three other criteria, which are perceived to be of the essence of an investment, the claim that an essential element of the definition of an investment can be borrowed from the Preamble of the Convention is perceived as being artificial. The Preamble's reference to "the need for international cooperation for economic development, and the role of private international investments therein" appears to be a mere acknowledgment that investment fosters economic development.

c. Three – Not Four, Five or Six Criteria

The significant impact of *Salini v. Morocco* can also be seen in the attempts by certain tribunals to not only apply its criteria, but also to supplement them by a further condition such as the regularity of profit and return,[102] or the further requirements that

99. *Pey Casado v. Chile*, *supra* n.53, ¶ 232 (author's translation from French original) (emphasis added).

100. *Alpha Projektholding GMBH v. Ukraine*, ICSID Case No. ARB/07/16, Award (8 November 2010) (Robinson, Alexandrov, Turbowicz), ¶ 312 (emphasis added). For a similar finding, *see Quiborax v. Bolivia*, *supra* n.75, ¶ 219.

101. For an acknowledgement of this trend, *see also* Antonio Parra, "The Convention and Centre for Settlement of Investment Disputes" in *Collected Courses of the Hague Academy of International Law* vol. 374, 341-342 (Brill Nijhoff 2014).

102. Following *Fedax v. Venezuela*, certain tribunals have added to the *Salini* test the criterion of regularity of profit and return. In reality, the existence of a risk, which is one of the recognized criteria – and indeed of the essence – of an investment means that there may be no profit at all. *See, e.g., Electrabel v. Hungary*, *supra* n.97, ¶ 5.43 ("The expectation of profit and return which is sometimes viewed as a separate component of an investment must rather be

investments be made in good faith and in accordance with the law of the host State. The common point between these tribunals is their adoption of a deductive approach and adherence to an objective definition of investment. Unlike tribunals having adopted an intuitive method and searching for mere characteristics which may or may not exist in every case, their approach can be understood by the underlying aspiration to narrow the definition of investment and, thereby, restrict jurisdiction under Article 25(1). The difficulty they each have encountered is that, while adhering to an objective approach, they have added qualitative or quantitative requirements to characterize the *Salini* criteria.

A first example is the annulment decision in *Patrick Mitchell v. Congo*.[103] The *ad hoc* committee in that case found that, in light of the Preamble of the ICSID Convention, it was "quite natural that the parameter of contributing to the economic development of the host State has always been taken into account, explicitly or implicitly, by ICSID arbitral tribunals in the context of their reasoning in applying the Convention, and quite independently from any provisions of agreements between parties or the relevant bilateral treaty."[104] On this basis, the committee held that a law firm's activity could not be characterized as an investment under the Convention. It noted in passing that the firm in question did not provide any services to the Republic,[105] overlooking that, even if an investment is required to contribute to the economic development of the host State, such a contribution occurs through the role it plays in the country's economy in general.[106] The *ad hoc* committee nevertheless nuanced its reasoning by specifying:

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considered as included in the element of risk, since every investment runs the risk of reaping no profit at all."). *See also Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award (31 October 2012) (Hanotiau, Williams, Ali Khan), ¶ 305 ("With respect to the other *Salini* criteria, the Tribunal notes that most of the recent decisions have generally refused – rightly so – to take into consideration 'regularity of profit and return'. Indeed, some investments can qualify as such although they were loss leaders. Others may indeed be contingent on extraneous events, such as the discovery of natural resources or, as here, the evolution of the oil price on the world market. The criterion should rather be qualified as an expectation that the investment will be profitable. This was undoubtedly the expectation of Deutsche Bank.").

103. *Patrick Mitchell v. Congo*, *supra* n.26.

104. *Ibid.*, ¶ 29.

105. *Ibid.*, ¶ 39 ("As a legal consulting firm is a somewhat uncommon transaction from the standpoint of the concept of investment, in the opinion of the *ad hoc* Committee it is necessary for the contribution to the economic development or at least the interests of the State, in this case the DRC, to be somehow present in the transaction. If this were the case, qualifying the Claimant as an investor and his services as an investment would be possible; furthermore, it would be necessary for the Award to indicate that, through his know-how, the Claimant had concretely assisted the DRC, for example by providing it with legal services in a regular manner or by specifically bringing investors.").

106. For an approach favoring the contribution to the host State's economy, *see Phoenix Action Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/05, Award (15 April 2009) (Stern, Bucher, Fernández-Armesto), ¶¶ 82 and 85 [hereinafter *Phoenix v. Czech Republic*] ("... It is the Tribunal's view that the contribution of an international investment to the *development* of the host State is impossible to ascertain – the more so as there are highly diverging views on what constitutes 'development'. A less ambitious approach should therefore be adopted, centered on the contribution of an international investment to the *economy* of the host State, which is indeed normally *inherent in the mere concept of investment as shaped by the elements of contribution/duration/risk*, and should therefore in principle be presumed." (emphasis in original)).

> [The fact] that, in its view, the existence of a contribution to the economic development of the host State as an essential – although not sufficient – characteristic or unquestionable criterion of the investment, does not mean that this contribution *must always be sizable or successful*; and, of course, ICSID tribunals do not have to evaluate the real contribution of the operation in question. It suffices for the operation to contribute in one way or another to the economic development of the host State, and this concept of economic development is, in any event, extremely broad but also variable depending on the case.[107]

This idea is reminiscent, albeit in a very different context, of what Georges Delaume identified as the "expected – if not always actual" contribution to the development of the host State. Nevertheless, the difference in methodology between the two remains striking as Georges Delaume's suggestion of the application of this notion was in lieu of the traditional definition of an investment, not in addition to it.

A second example can be found in the award on jurisdiction in *MHS v. Malaysia*.[108] Although the award was annulled in full, and its authority is today questionable, it is worthy of note in that it introduced mere subjective factors, as additional jurisdictional requirements, into the objective definition of investment. In that case, the sole arbitrator refused to recognize as an investment the cash and services provided by an English company for the performance of a marine salvage contract over a period of forty-three months. The operation resulted in the recovery of the cargo of a ship sunken off the coast of Malacca, today Malaysia, making it possible for the Government to recover Chinese porcelain that had been lost with the vessel. As is customary in this kind of contract, the salvor's payment depended solely on the result of the venture. Considering that it had not received the payment owed to it, the English company availed itself of the bilateral protection treaty between the United Kingdom and Malaysia to bring its action before ICSID. The sole arbitrator held that the transaction did not qualify as an investment, notably because it did not contribute significantly to the economic development of Malaysia:

> Any contract would have made some economic contribution to the place where it is performed. However, that does not automatically make a contract an 'investment' within the meaning of Article 25(1). As stated by *Schreuer*, there must be a positive impact on a host State's development. *Schreuer* cites *CSOB* in concluding that an 'investment' must have a positive impact on a host State and, in *CSOB*, the tribunal stated that there must be significant contributions to the host State's economic development.[109]

> The Tribunal finds that ... the Contract did not make any *significant contributions* to the economic development of Malaysia. ... the Tribunal concludes that there was no *substantial contribution* because the nature of the benefits that the Contract offered to Malaysia did not provide substantial benefits in the sense envisaged in previous ICSID jurisprudence such as *CSOB*, *Jan de Nul* and *Bayindir*.[110]

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107. *Patrick Mitchell v. Congo*, *supra* n.26, ¶ 33 (emphasis added).
108. *MHS v. Malaysia*, Award, *supra* n.43.
109. *Ibid.*, ¶ 125.
110. *Ibid.*, ¶ 143 (emphasis added).

Irrespective of whether the enrichment of a country's cultural heritage contributes to its development, the requirement by the *MHS v. Malaysia* award of a contribution that is both quantitatively and qualitatively significant negates the intention of drafters of the ICSID Convention.[111] Many actors of relatively modest importance can play a role in a country's economy and their transactions deserve the protection of the Convention as much as the larger ones – at least that was the drafters' intention. Further, the success or failure of a transaction is only relevant to issues pertaining to the merits and not of jurisdiction. If an oil company dedicates human and financial resources to the exploration of an oil field pursuant to a production sharing contract with the host State, and if that activity does not lead to any discoveries, the company's contribution to the venture would still constitute an investment. The fact that, in the case of expropriation for example, the tribunal may take into account the failure of the exploration in the assessment of any potential damages does not mean that the operation is not an investment.[112]

A different example is provided by the award in *Phoenix v. Czech Republic*, which added not one, but two additional criteria to the notion of investment under Article 25, namely good faith and an investment's conformity with the law of the host State. In reality, the issue in that case was the claimant's abuse of process and the illegality of the investment, which the tribunal sanctioned through the addition of these criteria to the objective definition of investment.[113] A more appropriate approach may have been

111. For examples of other tribunals having adopted the same qualitative and quantitative approach, *see, e.g., Toto Construzioni Generali S.P.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 September 2009) (van Houtte, Feliciani, Moghaizel), ¶ 86 ("In the present case, Toto's construction project meets the requirements deemed necessary by this Tribunal, i.e., a contribution by the investor, a profitability risk, a *significant* duration and a *substantial* contribution to the State's economic development ... ." (emphasis added)); *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9 (formerly *Giordano Alpi and others v. Argentine Republic*), Decision on Jurisdiction and Admissibility (8 February 2013) (Simma, Böckstiegel, Torres Bernárdez), ¶ 487 ("Fifthly, regarding the prerequisite of a *significant* contribution to the development of the host country, there can be no doubt, given the unity of the economic operation at stake, that the funds generated through the bonds issuance process were ultimately made available to Argentina and must be deemed to have contributed to Argentina's economic development. In view of the volume of the bonds involvement, the contribution was certainly significant to Argentina's development." (emphasis added)).

112. For a criticism of the *MHS v. Malaysia* award, *see also* Devashish Krishan, *A Notion of ICSID Investment*, 6 TDM 1 (2009), n.89 ("For ICSID purposes, all investment is by its nature pro-development. But some investments may in fact be anti-development for any number of extra-legal reasons (labour practices, corruption, environment, discrimination, exploitation, speculative). ICSID tribunals are neither competent nor equipped to make value judgments about investments – otherwise the ICSID system will collapse upon itself."); Walid Ben Hamida, *La Notion d'Investissement: La Notion Maudite du Système CIRDI?*, Gazette du Palais 14–15, 33 (2007); Crina Baltag, *Precedent on Notion of Investment: ICSID Award in MHS v. Malaysia* 4 TDM 5 (2007); Yulia Andreeva, *The Tribunal in Malaysian Historical Salvors v. Malaysia Adopts a Restrictive Interpretation of the Term "Investment"*, J. Int'l. Arb. 503 (2008).

113. For the tribunal's recognition of the objective nature of the requirement of investment, *see Phoenix v. Czech Republic, supra* n.106, ¶ 79 ("For that purpose, ICSID case law has developed various criteria to identify the pertinent elements of the notion of investment. Sometimes, however, in a minority of cases, this factual analysis of the existence of an investment, relying on the ordinary meaning of the term 'investment', is insufficient to detect an economic operation *which is objectively an investment*, but which is not a protected investment because,

to draw a distinction between the existence of an investment – for which the economic definition of investment would have sufficed – and the legality of that investment – which would have warranted the application of the principle of good faith and the requirement of legality under international law.[114]

Thus, although it presented the addition of the requirements of legality and good faith as a question of interpretation of Article 25(1) and the applicable investment treaty in light of the general principles of international law, the *Phoenix* tribunal supplemented the *Salini* test:

> The Tribunal cannot agree with the general statement of the Claimant proffered during the Hearing to the effect that 'it was the intent of the convention's drafters to leave to the parties the discretion to define for themselves what disputes they were willing to submit to ICSID.' There is nothing like a total discretion, even if the definition developed by ICSID case law is quite broad and encompassing. There are indeed some basic criteria and parties are not free to decide in BITs that anything – like a sale of goods or a dowry for example – is an investment. The Tribunal cannot fully agree with the Respondent either, as it considers that *the Salini test is not entirely relevant and has to be supplemented.* This will be further explained in the following paragraphs.[115]

Leaving aside this latter example, which in reality concerns the legality of an investment as opposed to its existence, the cases cited above and their introduction of qualitative and quantitative characterizations shows how difficult it is for arbitral tribunals to depart from the *Salini* criteria. The difficulty is understandable, given that *Salini v. Morocco* has done no more than define an investment from an economic standpoint. The further evolution of the ICSID case law on the notion of investment may therefore be just that: keeping to the essence of an investment – namely, contribution, duration and risk. As explained by the *Quiborax* tribunal:

> 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 investment. ...

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for one reason or another, it is not the purpose of the multilateral or bilateral treaty of protection of investments to extend protection through international arbitration to such an investment." (emphasis added)).

114. The *Phoenix* tribunal rightly observed that investment arbitration is not designed to protect illegal investments. *See Phoenix v. Czech Republic, supra* n.106, ¶ 100 ("The purpose of the international mechanism of protection of investment through ICSID arbitration cannot be to protect investments made in violation of the laws of the host State. The protection of foreign investments made in accordance with the laws of the host State or investments not made in good faith, obtained for example through misrepresentations, concealments or corruption, or amounting to an abuse of the international ICSID arbitration system. In other words, the purpose of international protection is to protect legal and *bona fide* investments.").

115. *Phoenix v. Czech Republic, supra* n.106, ¶ 82 (emphasis added).

> In line with this trend, the Tribunal considers that a contribution to the economic development of the host State or an operation made in order to develop an economic activity in the host State is not an element of the objective definition of investment.
>
> Likewise, the Tribunal is of the view that neither conformity to the laws of the host State nor respect of good faith are elements of the definition of investment. The Contracting Parties to the BIT have limited the protections of the treaty to investments made in accordance with the law of the host State. This limitation may be a bar to jurisdiction, i.e. to the procedural protections under the Treaty, or to the application of the substantive treaty guarantees as a matter of merits. In addition, recourse to treaty arbitration and substantive treaty protections may in certain circumstances breach the prohibition of abuse of rights which is an emanation of the principle of good faith. That does not mean that these elements are part of the definition of investment. An illegal or bad faith investment remains an investment. It may not be a protected investment, i.e. deserve protection in the sense that access to treaty arbitration and/or substantive treaty guarantees may not be granted, but that is a different matter.
>
> In sum, for the previous reasons, the Tribunal concludes that the objective definition of investment under Article 25(1) of the ICSID Convention comprises the elements of contribution of money or assets, risk and duration.[116]

IV. CONCLUSION

Assessing whether the transaction in dispute is an investment is the very first mandate of any arbitral tribunal having to determine its jurisdiction under the ICSID Convention. Irrespective of whether the instrument on the basis of which an arbitral tribunal is seized is a contract, a law or a treaty, the requirement of a "dispute arising directly out of an investment" must be satisfied every time the ICSID Convention is put in motion. It is therefore no surprise that a decision such as *Salini v. Morocco*, and the objective definition it has introduced, have had such a significant impact on the ICSID case law.

Despite the almost universal reference to the *Salini* test, the evolution of the case law may at first seem chaotic and dispersed. Further, and pragmatically, because the notion is at the heart of a tribunal's jurisdiction, it readily brings into play diverging positions, with a claimant who seeks to establish jurisdiction and will favor a liberal view and a respondent who seeks to restrict the tribunal's jurisdiction and will favor a narrow view; the existing case law is also a result of these strategically conflicting positions.

More fundamentally, however, a progressive harmonization appears to take place towards the recognition of an objective requirement under Article 25 of the ICSID Convention and the necessity of autonomously ensuring a tribunal's jurisdiction under that provision. Likewise, the case law is progressively evolving towards a greater recognition of the *Salini* criteria and an economic, as opposed to a purely legal, conception of investment – in fact, the ordinary meaning of the word. If one views

116. *Quiborax v. Bolivia*, *supra* n.75, ¶¶ 220, 225-227.

jurisprudence constante as "the harmonious development of investment law [so as] to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law,"[117] *Salini v. Morocco* has unquestionably prompted an irreversible movement towards harmonization.

117. *Saipem v. Bangladesh*, *supra* n.72, ¶ 67.