3-2023

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Citation

CHAN, Darius and LAI, Justin. Two decades after Salini v Morocco: The case for retaining the Salini test with modifications. (2023). *Arbitration International*. 39, (1), 63-84.

Available at: https://ink.library.smu.edu.sg/sol_research/4192

Arbitration International, 2023, **XX**, 1–22
https://doi.org/10.1093/arbint/aiad007
Advance access publication 20 March 2023
Article

OXFORD

Two decades after Salini v Morocco: the case for retaining the Salini test with modifications

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ABSTRACT

The definition of an investment under Article 25 of the ICSID Convention continues to attract a divergence of views. Ever since its use in 2001, the Salini Test, in its various forms, has become the predominant method that tribunals use to determine whether there is an investment. However, the Salini Test is hardly free from controversy, and suffers from two significant issues. First, its criteria are often subject to differing interpretations, leading to confusion over how the test should actually be applied. Second, the Salini Test has lost its legal force over time, as it has been relegated to factors that are 'typical characteristics of an investment' rather than jurisdictional requirements, of which the latter is arguably its proper role as part of a 'double-keyhole' test. This article addresses these issues by taking a detailed look at the individual criteria of the Salini Test and its original purpose. It proposes that (i) the Salini Test remains the best method for determining the meaning of 'investment' in Article 25 of the ICSID Convention, and (ii) regardless of whether the Salini Test is jurisdictional requirements or indicative factors, its individual criterion is in urgent need of refinement due to their inconsistent usage.

INTRODUCTION

When an investor-state dispute comes before an International Centre for Settlement of Investment Disputes (ICSID) tribunal, a preliminary matter that must first be determined is whether there is an investment, to begin with. This is because Article 25 of the ICSID Convention sets out the jurisdiction of ICSID tribunals, which 'shall extend to any legal dispute arising directly out of an investment …'. Thus, it must first be determined that a transaction is an investment before ICSID tribunals can obtain jurisdiction over the dispute.

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A transaction must satisfy up to two different tests[1] in order to be considered an investment in an ICSID proceeding.[2] First, if there is an applicable International Investment Agreement (IIA),[3] and the IIA contains a provision defining what an investment is, then the definition of investment in that IIA must be satisfied. This is a requirement that is independent of Article 25 of the ICSID Convention—satisfying the IIA definition of an investment does not automatically mean that the meaning of 'investment' in Article 25 of the ICSID Convention is fulfilled.[4]

Second, in order to satisfy the meaning of 'investment' in Article 25 of the ICSID Convention, the transaction must pass what is commonly referred to as the Salini Test. The Salini Test has, for the past decade, been treated as a list of factors,[5] rather than a set of jurisdictional requirements as it originally was.[6] This Test presently consists of at least three objective criteria: (i) a contribution, (ii) for a certain duration, (iii) and the assumption of risk on the part of the investor.[7] A fourth criterion of a contribution to the host state's economy is also often analysed, but has not been widely accepted as part of the Salini Test.[8]

Whilst the Salini Test has become the prevailing method[9] that tribunals use to determine if there is an investment since its inception in 2001, the criteria of risk and contribution to the host state's economy have not always been applied in a consistent manner. The criterion of 'risk' has often been glossed over and misunderstood, given that tribunals often swing between requiring a more stringent standard of an investment risk or requiring some minimal amount of risk. Next, the bar for a contribution to the host state's economic development has also sometimes been set very high, such that it would not be possible for the investor to tell if he has made an 'investment' until the outcome is determined. Conversely, other tribunals have declined to meet that high threshold or even use the requirement at all.

This article explores these criteria in greater detail, and also compares the Salini Test to other methods of determining the existence of an investment, in order to show that the Salini Test, when applied correctly and in a consistent fashion, is arguably still the best method to determine whether a transaction is an investment.

Specifically, this article argues that (i) the criterion of duration should be reworded to that of the 'intended duration' for clarity; (ii) the criterion of risk in the Salini Test should be understood as encompassing a broad variety of risks—including 'commercial' risk—as it was originally conceived. The preference for some form of 'investment' risk should arguably be rejected because there are no less than five distinct problems with its current definition; and (iii) the criterion of having contributed to the host state's economic development should be tweaked to focus on the potential for contribution. Even if Salini Test is used only as factors indicating the presence of an investment (as opposed to requirements that must be satisfied), the individual criteria should be refined as described above.

1 Tribunals commonly refer to this as a 'double-barreled' or 'double keyhole' approach. For this article, the term 'double-keyhole' will be used, as it better conveys the idea that there are two doors that must be unlocked via the application of two tests.

2 McLachlan, Shore and Weiniger, *International Investment Arbitration - Substantive Principles* (2nd edn Oxford University Publishing 2012) para 6.01.

3 The term IIA covers many types of agreements relating to investments, of which the most common is a Bilateral Investment Treaty (BIT). It may also refer to Multilateral Investment Treaties, Free Trade Agreements that have an investment-related chapter, and so on.

4 Michael Waibel, 'Opening Pandora's Box: Sovereign Bonds in International Arbitration' (2007) 101 The American Journal of International Law, 718.

5 See The traditional view: jurisdictional requirements section.

6 See The current view: a set of factors section.

7 *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001) para 52.

8 *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v Romania*, ICSID Case No. ARB/10/13, Award (2 March 2015) para 198; *Marco Gavazzi and Stefano Gavazzi v Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility, and Liability (21 April 2005) para 114; *Electrabel S.A. v The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law, and Liability (30 November 2012) para 5.43; *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award (31 October 2012) para 306.

9 See the Some considerations in an analysis of the Salini Test section, for examples of less commonly used methods of determining whether an investment exists.

SOME CONSIDERATIONS IN AN ANALYSIS OF THE SALINI TEST

Before delving into the individual criteria of the Salini Test, two considerations must be borne in mind to properly scope and understand the inquiry behind each criterion.

First, brief mention must be made of some other methods to determine the existence of an investment that has not garnered as widespread acceptance and use as the Salini Test. These include relying solely on the definition of investment within an IIA, as well as treating the term 'investment' as having an inherent meaning. This part will go through these alternative methods and analyse why they have fallen out of favour compared to the Salini Test. Second, one must identify the precise role of the Salini Test, to properly give effect to its intended role as delineating the outer limit of what may be defined as an investment, whilst at the same time not to overstep its limited function and expand it into a decisive test of the existence of an investment.

The Salini Test as the preferred method to determine the existence of an investment

The Salini Test was not the only method that tribunals used to determine if there was an investment in the dispute before them. Other approaches can be categorized into two main methods, although they have since fallen out of favour. Through the subsequent analysis, this article argues that there are good reasons for abandoning their use in favour of keeping faith with the Salini Test.

Complete reliance on the IIA definition

A small number of tribunals have not warmed to the idea of using the Salini Test *at all*. The main reason for this is that no definition of the term 'investment' was provided for in the ICSID Convention, and there is compelling evidence in the form of the ICSID Executive Directors Report ('the Report') to show that such a definition was to be left to the parties.[10] Specifically, an oft-quoted section of the Report states that 'No attempt was made to define the term "investment" given the essential requirement of consent by the parties ...'.[11]

Hence, certain tribunals feel duty bound to give effect to the definition of an investment within the relevant IIAs, to the point where the Salini Test is disapplied[12] or simply not analysed,[13] especially since there is often an existing definition of an investment in the relevant IIA.[14] For example, in *Awdi v Romania*, the tribunal stated that 'the definition of "investment" in a treaty will determine its content in an exclusive way, with no room for additions or subtractions'.[15]

However, this stance of complete reliance on the IIA definition is rarely adopted, as it is a somewhat extreme manner of analysis that gives parties the complete freedom to determine what is an investment.[16] It has been consistently argued throughout the years that parties cannot

[10] *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (18 March 1965) para 27.

[11] *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (18 March 1965) para 27.

[12] *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v Romania*, ICSID Case No. ARB/10/13, Award (2 March 2015).

[13] *Siemens A.G. v The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 August 2004) para 150; *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 February 2005) para 128.

[14] McLachlan, Shore and Weiniger, *International Investment Arbitration - Substantive Principles* (2nd edn Oxford University Publishing) para 6.42; See also Michael Hwang SC and Jennifer Fong, 'Definition of Investment – A Voice from the Eye of the Storm' (2011) 99 Asian Journal of International Law, 115–116.

[15] *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v Romania*, ICSID Case No. ARB/10/13, Award (2 March 2015), para 199.

[16] Joseph M Boddicker, 'Whose Dictionary Controls?: Recent Challenges to the Term "Investment" in ICSID Arbitration' (2010) 25 AUILR 1031, 1068–1069; Cf *SGS Société Générale de Surveillance S.A. v Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction (12 February 2010) para 93; *Bureau Veritas, Inspection, Valuation, Assesment and Control, BIVAC B.V. v Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction (29 May 2009) para 78; *Joy Mining Machinery Limited v Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2004) para 49.

have complete power over the definition of an 'investment',[17] as doing so will allow parties to sidestep the jurisdiction requirement in Article 25 of the ICSID Convention, effectively rendering it otiose.[18] Additionally, it will also blur the lines between commercial arbitration and investment arbitration, which is something arbitral tribunals have been very wary of.[19]

Viewing the term 'investment' as having an inherent meaning

Some tribunals, including as recently in *Air Canada v Venezuela*, view the word 'investment' as having an objective, inherent meaning that must be taken into account whether or not the Salini Test is applied.[20] To be clear, this is technically a different method of identifying the existence of an investment, since unlike the Salini Test, there is no fixed criteria that has been explicitly defined.[21] Furthermore, as explained in *KT Asia*, the inherent meaning applies 'irrespective of the application of the ICSID Convention'.[22] Practically, any difference is more apparent than real, because the inherent meaning taken into consideration by tribunals often corresponds to or overlaps with the criteria stated in the Salini Test.[23]

However, despite the lack of a practical difference, this approach is problematic. By virtue of not having fixed criteria that can be used to assess a transaction, the definition of an investment would be left to the mercy of each arbitral panel, which may have their own views on what key criteria should be required or considered. While flexibility is also one of the Salini Test's strengths,[24] in that it can be applied to many different types of transactions, the subjectivity of having an ambiguous set of factors to be considered might be going too far. Such subjectivity will likely result in too much uncertainty for the potential parties involved. Furthermore, due to its similarity to the Salini Test, the standard criticisms of the Salini Test (reading in requirements that are not present in the ICSID Convention,[25] and for failing to interpret the ICSID Convention in accordance with the Vienna Convention on the Law of Treaties[26]) apply to this inherent approach as well, making it no better than the Salini Test at the very least.

[17] Stratos Pahis, 'Investment Misconceived: The Investment-Commerce Distinction in International Investment Law' (2020) 45 Yale J Int'l L 69, 81; Michael Waibel, 'Opening Pandora's Box: Sovereign Bonds in International Arbitration' (2007) 101 The American Journal of International Law, 718; Emmanuel Gaillard, 'Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice' in Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (1st edn Oxford University Press 2009), 411.

[18] *Víctor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No. ARB/98/2 (8 May 2008) para 232. See also *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (18 March 1965) para 25 ('While consent of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction').

[19] *Romak S.A. v The Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award (26 November 2009), para 189; *Air Canada v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/17/1, Award (13 September 2021) para 293; See also Stratos Pahis, 'Investment Misconceived: The Investment-Commerce Distinction in International Investment Law' (2020) 45 Yale J Int'l L 69, 93.

[20] *KT Asia Investment Group B.V. v Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award (17 October 2013) paras 165–166; *Air Canada v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/17/1, Award (13 September 2021) paras 293–294; *Saba Fakes v Republic of Turkey*, ICSID Case No. ARB/07/20, Award (14 July 2010) paras 108–109.

[21] Ibid.

[22] *KT Asia Investment Group B.V. v Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award (17 October 2013) paras 165–166.

[23] Ibid.

[24] See the Conclusion section.

[25] *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) paras 313–314.

[26] *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award (30 October 2017) para 6.55; For a comprehensive examination of the application of the Vienna Convention of the Law of Treaties to Art 25 of the ICSID Convention, see *Ambiente Ufficio S.p.A. and others (formerly Giordano Alpi and others) v Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) paras 441–474.

The purpose of the Salini Test

The proper purpose of the Salini Test must be identified, as this helps scope the inquiry into why the criteria of the Salini Test should be defined in a particular manner. The two contrasting viewpoints in this area are (i) the Salini Test is a set of jurisdictional requirements, all of which must be satisfied for an investment to exist, and (ii) the Salini Test is just a list of factors descriptive of typical characteristics of an investment, and the failure to satisfy any one (or more) criterion is not fatal to the finding that an investment exists.

The traditional view: jurisdictional requirements

In its early years, the Salini Test was used as a set of jurisdictional requirements, of which the failure to satisfy any of them would result in the tribunal asserting that it has no jurisdiction over the dispute.[27] This is why the process of determining the existence of an investment is commonly described as a double-keyhole test[28]—the Salini Test was the second 'keyhole' that had to be unlocked in order to satisfy the jurisdiction *ratione materiae* requirement.

However, this approach faced a barrage of criticism[29] focussed on the fact that because the term 'investment' in Article 25 of the ICSID Convention was left undefined, there was no basis[30] for tribunals to impose additional requirements on top of whatever has been stated in the applicable IIA. In particular, it has been observed that[31]:

> The development by some tribunals of the elements of the Salini test from a descriptive list of typical features towards a set of mandatory legal requirements is indeed unfortunate…To the extent that the 'Salini test' is applied to determine the existence of an investment, its criteria should not be seen as a rigid list of distinct jurisdictional requirements each of which must be met separately, but as characteristics that an investment in the sense of Art. 25(1) typically displays.

The current view: a set of factors

As a response to such criticism, modern practice has moved past the application of the Salini Test as jurisdictional requirements that are determinative of the existence of an investment. Instead, the prevailing view is that the Salini Test is no more than a set of factors to be taken into consideration in the overall determination of whether there is an investment.[32] The following statement in the 2019 case of *SCB v Tanzania* captures this view succinctly[33]:

[27] *Joy Mining Machinery Limited v Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2004) para 49; *Jan de Nul N.V. & Dredging International N.V. v Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction (16 June 2006) para 91.

[28] *Malicorp Limited v Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award (7 February 2011) para 107; *Ambiente Ufficio S.p.A. and others (formerly Giordano Alpi and others) v Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) para 438.

[29] *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v Romania*, ICSID Case No. ARB/10/13, Award (2 March 2015) para 197; *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) para 312; Julian Davis Mottenson, 'The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law' (2010) 51 Harvard International Law Journal 257.

[30] This notion that there is no basis for additional jurisdictional requirements to be imposed will be challenged later in this article under the header 'Problems with the current view'.

[31] Schill SW, *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Loretta Malintoppi and others (eds) (3rd edn Cambridge University Press 2022) 191.

[32] *Abaclat and others (formerly Giovanna A. Beccara and others) v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) para 364; *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) para 316; Philip Morris Brand SARL, *Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (2 July 2013) para 185; *RENERGY S.à r.l. v Kingdom of Spain*, ICSID Case No. ARB/14/1, Award (6 May 2022) para 562; *B3 Croatian Courier Coöperatief U.A. v Republic of Croatia*, ICSID Case No. ARB/15/5, Award (Excerpts) (5 April 2019) para 597.

[33] *Standard Chartered Bank (Hong Kong) Limited v United Republic of Tanzania*, ICSID Case No. ARB/15/41, Award (11 October 2019) para 200.

> These Salini factors are not to be taken as prescriptive or dispositive but merely as indicative of typical elements that the Tribunal could consider in determining whether the subject matter from which the dispute has arisen is an 'investment' contemplated by the ICSID Convention.

Since the Salini Test comprises mere 'factors', tribunals have stressed that the Salini criteria are not to be construed as determinative of whether there is an investment. For example, the tribunal in *Biwater v Tanzania* stated that even if 'any, or all, of the Salini criteria are not satisfied in this case, this would not necessarily be sufficient – in and of itself – to deny jurisdiction'.[34]

Problems with the current view

The problem with such an approach is that it renders the Salini Test relatively toothless, since whether a transaction fulfils the Salini Test or not does not necessarily impact the analysis of the existence of an investment. Simply put, there are no legal implications for failing to satisfy the Salini Test—as long as the relevant IIA definition of 'investment' is satisfied, jurisdiction *ratione materiae* can be established. This arguably should not be the case, since it would render the word 'investment' in Article 25 devoid of meaning.[35] Then, there would be no need for a double-keyhole test,[36] and what is an investment would be regulated solely by the definition in the applicable IIA.

Such a position is arguably not supported by law. Although the oft-quoted Director's Report states that 'no attempt was made to define the term "investment" given the essential requirement of consent by the parties',[37] that does not mean that the provision of consent fully abrogates the requirement that there be an investment. It is commonly overlooked that just a few paragraphs earlier in the very same Report, it is stated that[38]:

> While consent of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto.

Additionally, although much consideration has been given to the fact that no definition was provided for the term 'investment' in Article 25 of the ICSID Convention, it was not for the want of trying.[39] The negotiating parties did attempt to define the term investment,[40] and ultimately, the lack of a definition was a compromise between the negotiating parties to take into account

[34] *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) para 318.

[35] *Joy Mining Machinery Limited v Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2004) para 49; Schill SW, *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States,* Loretta Malintoppi and others (eds) (3rd edn Cambridge University Press 2022) 158.

[36] Ursula Kriebaum, Christoph Schreuer and Rudolf Dolzer, *Principles of International Investment Law* (3rd edn Oxford University Press 2022) 81.

[37] *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (18 March 1965) para 27.

[38] *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (18 March 1965) para 25; See also A. Broches, 'Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction' (1966) 5 Colum J Transnat'l L 263, 266.

[39] For a detailed summary of the drafting process, see Julian Davis Mottenson, 'The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law' (2010) 51 Harvard International Law Journal 257, 281–296.

[40] A Broches, 'Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction' (1966) 5 Colum J Transnat'l L 263, 268; Schill SW, *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Loretta Malintoppi and others (eds) (3rd edn, Cambridge University Press 2022) 155–157.

the interests of those who wanted a definition, and those who did not want one. The tribunal in *Ambiente Ufficio and others v Argentina* highlighted this situation which is often missing or simply not referenced in an analysis of Article 25 of the ICSID Convention, which is worth quoting *in extenso*[41]:

> In fact, the question of whether and how to define the concept of 'investment' was one of the most contentious issues in that process. While a first camp, mostly consisting of developed (viz. capital-exporting) States, proposed to abstain from any definition of investment and to leave that matter entirely to the consent of the States involved, another group of States, dominated by developing (viz. capital-importing) States, was strongly in favour of a precise and narrow definition that would limit the Convention's scope of application *ratione materiae* to a well-defined (and if possible even exhaustive) list of protected investments. When the negotiations were on the brink of failure due to the stalemate between the two camps, a compromise proposal introduced by the United Kingdom brought the breakthrough, permitting that in the final vote the Convention was adopted by an overwhelming majority…
>
> … Accordingly, the consent of the parties as to the scope of the term 'investment' is to be deemed of great relevance when establishing the meaning of Art. 25 of the ICSID Convention, without the concept thus becoming subject to the parties' unfettered discretion.

Accordingly, this compromise was meant to give parties greater (but not total) say over what would constitute an investment.[42] As Mr Aron Broches, the former general counsel of the World Bank, who was heavily involved in the drafting of the ICSID Convention and the Director's Report, observed, the definition of 'investment' in a BIT 'will be given great weight in any determination of the Centre's jurisdiction, **although it would not be controlling**'.[43]

Critically, once it is accepted that the lack of definition of the term 'investment' in Article 25 does not give parties *carte blanche* to define investment howsoever they want, the notion of having an additional jurisdictional requirement, such as the Salini Test, becomes necessary and logical.[44] However, since the parties definition would be given 'great weight in any determination of the Centre's jurisdiction',[45] there is also the need to scope the Salini Test in a manner which still gives deference to the parties' intentions that States should have great leeway in defining what an investment is.

Such a position already exists—although it seems not to have been commonly discussed in case law—where the Salini Test is treated as an 'outer limit' as to what is permissible under the ICSID Convention.[46]

[41] *Ambiente Ufficio S.p.A. and others (formerly Giordano Alpi and others) v Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) paras 449–454; See also Schill SW, *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Loretta Malintoppi and others (eds) (3rd edn Cambridge University Press 2022) 154.

[42] *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (18 March 1965) para 27.

[43] A Broches, 'Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction' (1966) 5 Colum J Transnat'l L 263, 268; See also Michael Waibel, 'Opening Pandora's Box: Sovereign Bonds in International Arbitration' (2007) 101 The American Journal of International Law, 718.

[44] This disposes of the notion above that there is no legal basis for imposing additional jurisdictional requirements in determining the existence of an investment under Article 25 of the ICSID Convention—the true problem with the early application of the Salini Test was not that there was no basis to impose additional jurisdictional requirements, but that the Salini Test was applied in too strict a fashion such that it could override the BIT definition on too regular a basis.

[45] A Broches, 'Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction' (1966) 5 Colum J Transnat'l L 263, 268.

[46] *CMC Muratori Cementisti CMC Di Ravenna SOC. Coop., CMC Muratori Cementisti CMC Di Ravenna SOC. Coop. A.R.L. Maputo Branch and CMC Africa Austral, LDA v Republic of Mozambique*, ICSID Case No. ARB/17/23, Award (24 October 2019) para 193; Schill SW, *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Loretta Malintoppi and others (eds) (3rd edn Cambridge University Press 2022) 154; Michael Hwang SC and Jennifer Fong, 'Definition of Investment – A Voice from the Eye of the Storm' (2011) 99 Asian Journal of International Law, 102–103.

An outer limit

Under the 'outer limits' approach, the Salini Test applies as a jurisdictional requirement (ie the second part of the double-keyhole test) to determine 'whether the definition of "investment" in the BIT "exceeds what is permissible" under the ICSID Convention'.[47] In other words, the Salini Test will delineate the boundaries of what is deemed to be permissible under the ICSID Convention, whilst within those boundaries, parties are free to agree on their own definitions of investment in their IIAs.[48] Under this approach, there will be a clear legal basis to exclude transactions that fall outside the outer limits of ICSID jurisdiction.

A clear example of a situation where the outer limits approach would operate would be where two countries agree to define a simple sale of goods as an investment in their BIT.[49] Such a possibility is not merely academic, for there have been cases in which the transactions alleged to be investments are described as 'ordinary sales contracts'. Two examples can be found in *Joy Mining*, where neither a bank guarantee[50] nor the sale and purchase of mining equipment[51] were found to be investments. This was despite the fact that both the bank guarantee and the sale of the mining equipment arguably fell under one of the categories of the definition of investment provided for in the UK-Egypt BIT,[52] illustrating the use of the Salini Test as an outer limit.

The definition of an investment under the Salini Test will therefore tend to be broader than most BIT definitions, which is arguably preferable for three reasons. First, this approach does not offend the accepted method for interpretation of treaties.[53] One of the main criticisms of the Salini Test in its early stages of use was that there was no basis for implementing those criteria as jurisdictional requirements, either from Article 31 or Article 32 VCLT.[54] However, as the above analysis shows, there is an arguable basis for implementing the Salini Test as a delineation of the outer limits of ICSID jurisdiction. This is done by giving primacy to the IIA definition of an investment, whilst at the same time giving effect to the legal requirement of Article 25 of the ICSID Convention.[55]

Second, this approach is consistent with the broad nature of the Salini Test, which the next section of this article will analyse. Briefly, the Salini Test has been criticized as too broad and, because of that, ineffective. For example, the definition of 'risk' requires nothing more than 'a

[47] *CMC Muratori Cementisti CMC Di Ravenna SOC. Coop., CMC Muratori Cementisti CMC Di Ravenna SOC. Coop. A.R.L. Maputo Branch and CMC Africa Austral, LDA v Republic of Mozambique*, ICSID Case No. ARB/17/23, Award (24 October 2019) para 193.

[48] *SGS Société Générale de Surveillance S.A. v Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction (12 February 2010) para 93; *Garanti Koza LLP v Turkmenistan*, ICSID Case No. ARB/11/20, Award (19 December 2016) para 241; *Beijing Urban Construction Group Co. Ltd. v Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction (31 May 2017) para 136; Pierre-Marie Dupuy, 'About the Definition of an International Investment – The Requirement of a Contribution to the Economic Development of the Host State' in Emmanuel Galliard and Y Banifatemi (eds), *Jurisdiction in Investment Treaty Arbitration* (Juris Publishing 2018) 42.

[49] In practice, this is unlikely to occur as the countries would be opening themselves up to massive liability under international investment law, due to the large volume of cross-border sale of goods transactions. Nevertheless, the point is made to show that it is theoretically possible.

[50] *Joy Mining Machinery Limited v Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2004) para 44.

[51] *Joy Mining Machinery Limited v Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2004) para 55.

[52] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments.

[53] Following Article 31 of the VCLT, Article 25 of the ICSID Convention must be interpreted in accordance with its ordinary meaning, in its context and in the light of the object and purpose of the ICSID Convention. Article 32 allows supplementary material to be taken into account in certain situations.

[54] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155.

[55] For a comprehensive examination of the application of the Vienna Convention of the Law of Treaties to Art 25 of the ICSID Convention, see *Ambiente Ufficio S.p.A. and others (formerly Giordano Alpi and others) v Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) paras 441–474.

participation in the risks of transaction', which may be said to be fulfilled in almost (but not) every case. However, this makes sense within the context of the Salini Test being the outer limits of ICSID jurisdiction. As the boundary, the Salini Test should ideally not be narrower than the definition of investment in most IIAs.[56]

Third, this approach has the practical effect of dispelling any notion that the Salini Test presents too tough of a jurisdictional obstacle, which may incentivize investors to proceed under non-ICSID arbitration such as the Permanent Court of Arbitration (PCA). PCA tribunals are not required to perform this preliminary analysis because they do not have to adhere to the ICSID Convention.[57] Although it may be within the investor's rights to proceed under an alternative regime, it would be lamentable if potential claimants avoid choosing the ICSID regime, which was created to handle investment arbitrations,[58] if they think that the jurisdiction requirement will be more difficult to satisfy as compared to non-ICSID arbitration.

Given the abovementioned points, it is suggested here that the alternative methods of determining an investment's existence described above are not adequate substitutes for the Salini Test. Regardless of whether the Salini Test is applied as jurisdictional requirements or a list of factors indicating the presence of an investment, there is also a corresponding need to re-examine the criteria of the Salini Test, because the Salini Test is not without problems of its own. Put another way, even if the Salini Test is used as factors indicating the presence of an investment, these factors should be refined. This is the focus of the next section.

AN ANALYSIS OF THE INDIVIDUAL CRITERIA OF THE SALINI TEST

This section seeks to provide a detailed analysis and refinement of the four criteria referred to in the Salini Test. These criteria were first stated in *Salini v Morocco*, which recognized *FEDAX v Venezuela* as the '[notable] first decision' in which the award turned on the notion of investment.[59] Of the four generally analysed criteria, the first two criteria concerning 'contribution' and 'duration' are generally uncontroversial as they are quite straightforward in their definition and application. They are rarely disputed, and even if they are contested, these are largely questions of fact that can be disposed of relatively quickly.[60] On the other hand, the criteria of 'risk' and 'contribution to the host state's economic development' have been understood quite differently by various tribunals and have been applied quite inconsistently.

The criterion of 'contribution'

This requires the tribunal to inquire on the existence and the form of contribution that has been made by the investor.[61] A contribution of some kind, including non-monetary forms[62] is

[56] This is not to say that the contours of the Salini Test change according to what most IIAs define as an investment. The Salini Test is still objective in nature—disputes under IIAs which contain an overly expansive definition of investment may still be rejected as falling outside the boundaries of ICSID jurisdiction.

[57] *Flemingo DutyFree Shop Private Limited v Republic of Poland*, PCA Case No. 2014-11, Award (12 August 2016) para 298; *Fynerdale Holdings BV v The Czech Republic*, PCA Case No. 2018-18, Award (29 April 2021) para 541; *Guaracachi America, Inc. and Rurelec PLC v The Plurinational State of Bolivia*, PCA Case No. 2011-17, Award (31 January 2014) para 364.

[58] See Julian Davis Mottenson, 'The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law' (2010) 51 Harvard International Law Journal 257, 266–267.

[59] *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001) para 52.

[60] Yas Banifatemi and Elise Edson, 'Jurisdiction of the Centre' in Julien Fouret, Rémy Gerbay and Gloria M. Alvarez (eds), *The ICSID Convention, Regulations and Rules: A Practical Commentary* (Edward Elgar Publishing), paras 2.35 and 2.37.

[61] At this stage of the Salini Test, the inquiry is not about whether the contribution identified **in fact** contributed to the economic development of the host state. That inquiry is dealt with in the fourth criterion.

[62] *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001) para 53; *Romak S.A. v The Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award (26 November 2009), para 214; *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v Romania*, ICSID Case No. ARB/10/13, Award (2 March 2015) para 200.

sufficient to satisfy this criterion. This criterion is seldom challenged, given that a contribution is required for there to be a transaction in the first place. There is also no requirement that the contribution be 'significant'.[63]

The criterion of 'a certain duration'

The length of 'a certain duration'

The contribution in question must have been for a certain duration, which is not set in stone, but is generally regarded as being sufficient if it is at least two years or longer.[64] It is the intended duration of the investment that counts,[65] not the actual duration,[66] and pre-investment activities are also considered in this assessment.[67]

Problems with using duration as a criterion in the Salini Test

The main problem with a duration requirement is that, although a line should be drawn somewhere, it is very difficult to justify picking any one length of time in particular as the minimum duration.[68]

Whilst the *Salini* tribunal surely did not pick a duration of two years simply by chance, there has been little exposition in *Salini* and subsequent caselaw on why two years was specifically chosen, and not any other period of time. Of course, if one is to go down that path of analysis, then the question becomes one that is frustratingly subjective. Where on the spectrum of potential durations should the line be drawn? There is no clear answer to this, which is probably why tribunals have been quick to emphasize that this requirement is to be analysed flexibly.[69]

Although such an analysis might point strongly towards dropping the requirement of duration altogether, there is still at least one good reason to retain it. At its bare minimum, a duration requirement assists in differentiating investments from one-off commercial transactions. For example, in *Christian and Antoine Doutremepuich v Mauritius*, the tribunal found that 'it is clear, however, that there is no duration at all. The financial contributions by the First Claimant, in the form of payments of bills and invoices in Mauritius, were one-off payments for goods or services…'[70] Retaining such a criterion is in line with the purpose of the Salini Test as argued above—as an outer limit, only excluding what is manifestly not an investment.[71]

[63] *Christian Doutremepuich and Antoine Doutremepuich v Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction (23 August 2019) para 126.

[64] *Jan de Nul N.V. & Dredging International N.V. v Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction (16 June 2006) paras 93–95; *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001) para 54.

[65] *Jin Hae Seo v Republic of Korea*, HKIAC Case No. 18117, Final Award (27 September 2019) para 136; *Mason Capital L.P. and Mason Management LLC v Republic of Korea,* PCA Case No. 2018-55, Decision on Respondent's Preliminary Objections (22 December 2019) para 227; *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award (31 October 2012) para 304.

[66] If it was the actual duration of the investment that counted, it could result in an absurd situation where a state can expropriate investments before the two year mark approaches, then argue that there is no investment because the duration requirement was not satisfied.

[67] *Jan de Nul N.V. & Dredging International N.V. v Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction (16 June 2006) paras 94–95.

[68] A simple example is to ask the question: why should the duration be two years and not one year and eleven months?

[69] *Romak S.A. v The Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award (26 November 2009) para 225; *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award (31 October 2012) para 303.

[70] *Christian Doutremepuich and Antoine Doutremepuich v Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction (23 August 2019).

[71] See p 9 above.

Recommended refinement of the criterion of 'duration'

This criterion of duration should be retained, as it is still useful in excluding one-off transactions that were clearly not meant to be investments. It is also proposed that this criterion be renamed as 'intended duration' rather than simply 'duration', for conceptual clarity.

The criterion of 'risk'

The criterion of risk is in more urgent need of clarification and consistency, as it has been cursorily analysed in most decisions, and described as 'applied the most laxly'[72] out of all the Salini criteria. The biggest reason for this inconsistency is that two different conceptions of 'risk' have developed throughout arbitral jurisprudence. The traditional line of analysis follows the formulation in *Salini v Morocco*, which is that of 'a participation in the risks of the transaction'. A more 'modern' approach to this criterion focuses on what has been termed 'investment risk'.

The analysis below shows that while both approaches have their shortcomings, the traditional approach should arguably be retained as it recognizes that different transactions have different types of risks, and prevents arbitrary discrimination against certain types of transactions.

The traditional approach: 'A participation in the risks of the transaction'

The traditional formulation simply requires that there be 'a participation in the risks of the transaction' on the part of the investor.[73] This requirement is a very broad one, since it may be satisfied as long as the party who made the investment is susceptible to some form of risk.

The *Salini* tribunal gave the following examples of such risk: the premature termination of the contract, the variation of the prices in the contract, accident or damage caused to property during the works, and so on,[74] before concluding somewhat generally that '[a] construction that stretches out over many years, for which the total cost cannot be established with certainty in advance, creates an obvious risk for the Contractor'.[75] In *Quiborax v Bolivia*, the tribunal found that the investment was subject to 'risks, including market, financial and political risks'.[76] Taking this broad proposition to its extreme end, some tribunals have treated the 'very existence of a dispute' as evidence of the risk the investor had taken.[77]

Problems with the traditional approach

Given the particularly broad manner in which this criterion was phrased, it is no surprise that many transactions would easily satisfy this requirement.[78]

In particular, Christoph Schreuer and Rudolf Dolzer observed that[79]:

[72] Yas Banifatemi and Elise Edson, 'Jurisdiction of the Centre' in Julien Fouret, Rémy Gerbay and Gloria M. Alvarez (eds), *The ICSID Convention, Regulations and Rules: A Practical Commentary* (Edward Elgar Publishing), para 2.36.

[73] *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001) para 52.

[74] *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001) para 55.

[75] *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001) para 56.

[76] *Quiborax S.A., Non-Metallic Minerals S.A. v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction (27 September 2012) para 234.

[77] *FEDAX N.V. v The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction (11 July 1997) para 40; *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award (31 October 2012) para 301; *Manchester Securities Corporation v Republic of Poland*, PCA Case No. 2015-18, Award (7 December 2018) para 375.

[78] In 2018, the tribunal in *Manchester Securities v Poland* remarked at [375] that 'tribunals have considered a variety of risks, from the existence of the dispute itself to risks inherent in long-term contracts …'.

[79] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn Oxford University Press 2012), 75.

> The criterion of risk has also turned out to be of limited value in the characterization of an 'investment'. Practically every business deal which extends beyond the day of its conclusion will in some way involve circumstances that endanger the certainty that both sides are able and willing to comply with what was agreed.

Furthermore, if all tribunals adopted the *FEDAX* understanding of risk as being satisfied the moment there is a dispute, then this criterion of 'risk' would automatically be fulfilled in all cases and lose its meaning. This is probably why some tribunals have preferred to take a different approach, refining the traditional definition into what is known today as 'investment risk', although many tribunals continue to follow the traditional approach of simply requiring 'risk'.[80]

The modern approach: 'An Investment Risk'

The switch to requiring 'investment risk' instead of mere 'risk' was first expounded upon in some detail in *Romak v Uzbekistan*, although the initial strands of analysis can be traced to *Joy Mining v Egypt*.[81] In *Joy Mining*, the tribunal found that a contract to supply mining equipment did not amount to an investment, partly because the risk involved was 'not different from that involved in any commercial contract, including the possibility of the termination of the Contract'.[82] Although the terms 'commercial risk' and 'investment risk' were not used, it was clear that the tribunal would not accept the mere existence of risk that was common to all contracts as satisfying the criterion of risk in the Salini Test.

This distinction between 'commercial risk' and 'investment risk' was elucidated upon in further detail in *Romak v Uzbekistan*.[83] There, the tribunal's description of investment risk contained three criteria:

1. An investment risk is present in a situation 'in which the investor cannot be sure of a return on his investment'.[84]
2. The investor also 'may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations'.[85] Here, 'the investor simply cannot predict the outcome of the transaction'.[86]
3. Investment risks are not the same as commercial risks such as the risk of non-performance. All contracts carry such risk of 'doing business generally'. Thus, such commercial risk is 'not useful for the purpose of distinguishing between an investment and a commercial transaction'.[87]
4. A fourth criterion was added six years later in 2015, in *Postova Bank v Greece*, where the tribunal further distinguished the concept of investment risk from 'sovereign risk'. A 'sovereign risk' was described as 'the risk of interference of the Government in a contract or any other relationship'.[88]

[80] See, for example, *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya*, ICSID Case No. ARB/15/29, Final Award (22 October 2018) para 300; CMC Muratori Cementisti CMC Di Ravenna SOC. Coop., *CMC Muratori Cementisti CMC Di Ravenna SOC. Coop. A.R.L. Maputo Branch and CMC Africa Austral, LDA v Republic of Mozambique*, ICSID Case No. ARB/17/23, Award (24 October 2019) para 195; *Krederi Ltd. v Ukraine,* ICSID Case No. ARB/14/17, Award (2 July 2018) paras 237–238; *Toto Costruzioni Generali S.p.A. v Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 September 2009) para 78.

[81] *Joy Mining Machinery Limited v Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2004).

[82] *Joy Mining Machinery Limited v Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2004) para 57.

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

[84] *Romak S.A. v The Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award (26 November 2009) para 230.

[85] *Romak S.A. v The Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award (26 November 2009) para 230.

[86] *Romak S.A. v The Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award (26 November 2009) para 230.

[87] *Romak S.A. v The Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award (26 November 2009) para 229.

[88] *Poštová banka, a.s. and Istrokapital SE v Hellenic Republic*, ICSID Case No. ARB/13/8, Award (9 April 2015) para 369.

These four criteria show that the modern approach towards 'risk' is much narrower than the *Salini* version of 'risk', since what may be characterized as 'commercial risk', or the 'risk of doing business generally' will no longer satisfy the criterion of risk for the purposes of the Salini Test.[89]

Consequently, under the modern approach, the risks in any transaction can be classified into three main categories: (i) investment risk, (ii) commercial risk, and (iii) sovereign risk. Only a transaction that contains investment risk would satisfy the criterion of risk under the Salini Test. This modern approach was subsequently endorsed and adopted by a number of tribunals.[90]

Although the modern approach towards 'risk' provides more specificity than the broadness of the traditional approach, the modern approach contains its own set of conceptual problems that do not appear to have been brought up before the tribunals that applied it.

Problems with the modern approach

The concept of investment risk is enticing because, as its name suggests, it purports to provide an avenue for tribunals to easily distinguish between investments and non-investments. However, beneath the veneer of this attractive concept lies a more daunting task—ascertaining what exactly investment risk entails. Unfortunately, this task is not as easy as it seems, and once the definition (as stated in *Romak v Uzbekistan* and *Postova Bank v Greece*) is unpacked and analysed, certain problems begin to grow more apparent.

There are no less than five distinct problems, all of which are not easily curable with the current definition of investment risk.

The requirement that there must be uncertainty over a return on the investment is too restrictive

The first problem with the modern approach is that it requires the investor to be unsure of a return on the investment.[91] This is unlikely to mean uncertainty over the exact amount that is expected to be returned to the investor, as that would render this requirement meaningless since there is the potential for the expected return to change in virtually all situations. Therefore, although unstated, this should be taken to mean uncertainty over whether there will be any return at all.

However, on either of the above interpretations, this description will immediately operate as a bar to any investment that has a certain return.[92] A prime example would be construction contracts that are often acquired after a tender process, where the winning bid is known from the start. That winning bid is known, and represents the return on the investment, since that is the sum the host state is paying the investor in exchange for the construction of the relevant infrastructure(s). This is perhaps why the *Salini* tribunal, in which the transaction in question was a construction project, did not adopt such an approach, instead remarking that 'it also does not matter that the remuneration of the Contractor was not linked to the exploitation of the completed work'.[93]

[89] It was subsequently recognised in *Nova Scotia Power Incorporated v Bolivarian Republic of Venezuela (II)*, ICSID Case No. ARB(AF)/11/1, Award (30 April 2014) para 110, that many of the risks described in *Salini v Morocco* were 'what may broadly be termed "commercial risk"'.

[90] *Raymond Charles Eyre and Montrose Developments (Private) Limited v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25, Award (5 March 2020) para 293; *Standard Chartered Bank (Hong Kong) Limited v United Republic of Tanzania*, ICSID Case No. ARB/15/41, Award (11 October 2019) para 218; *Christian Doutremepuich and Antoine Doutremepuich v Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction (23 August 2019) para 145.

[91] *Romak S.A. v The Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award (26 November 2009) para 230; *Poštová banka, a.s. and Istrokapital SE v Hellenic Republic*, ICSID Case No. ARB/13/8, Award (9 April 2015) para 368.

[92] In fact, the language is wide enough to exclude all kinds of transactions that mandate upfront payment.

[93] *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001) para 56.

Other typical forms of investments that would be affected by such a description include bonds that pay out a certain sum and are redeemable at a specific par value, and any kind of loan agreement that states the exact interest rate and sums payable. This has been recognized in *Yukos Capital v Russia*,[94] where the tribunal stated:

> the factor of risk, however useful it may be as an indicator to distinguish a sale from an investment, can have only limited value where the investor makes its investment by way of a loan… Where the mechanism of a loan is used, the investor retains the right to repayment of capital; has the ability to fix its returns through a specified interest rate; and may also have other legal mechanisms open to it to limit its risk. This makes it different from an equity investment.[95]

Such transactions will *by definition* fail to satisfy the criteria of investment risk, simply because the uncertainty required for such investment risk is not applicable to begin with.[96]

Fortunately, this definition has not been frequently pushed to such an extreme limit, perhaps because it would be difficult to justify excluding certain transactions from being investments just because the return on the investment is certain. Nevertheless, it is difficult to see how this condition could be improved in a manner that still allows it to retain its distinguishing characteristic, as tribunals would then be debating over how much of an uncertainty in the return is required. Calibrating a general rule will not be a simple task, if it is even possible at all, given the wide variety of transactions that have been found to be investments.

The requirement of not knowing the amount to be spent is too easily satisfied

The second problem with the modern approach is that one of its requirements is too easily satisfied. Having an investment risk means that 'the investor…may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations'.[97]

Although this statement was likely made to distinguish investments from ordinary commercial transactions,[98] where the amount to be paid in consideration for goods and services are generally certain, there is no elaboration on how much uncertainty is required. Absent further refinement, it would appear that this requirement can be satisfied as long as there is uncertainty over the total cost to be incurred by the investor. Such a reading covers an inordinate number of scenarios, including virtually every long-term transaction.

To illustrate this, take, for example, a simple transaction that obliges A to pay B $1000 per month over a few years. It is technically possible for A to argue that he does not know the amount he will end up spending, due to a variety of factors such as (i) inflation, which will decrease the true/time value of the $1000 and vice versa, (ii) fluctuations in exchange rates, bearing in mind that this is necessarily a cross border transaction, and (iii) central bank involvement in the changing of interest rates. These factors (of which the effects will be more pronounced the longer the duration of the transaction is) affect the amount of money A has to pay B, even if both A and B dutifully discharge their relevant contractual obligations.

[94] *Yukos Capital SARL v The Russian Federation*, PCA Case No. 2013-31, Interim Award on Jurisdiction (18 January 2017).

[95] *Yukos Capital SARL v The Russian Federation*, PCA Case No. 2013-31, Interim Award on Jurisdiction (18 January 2017) paras 492–493.

[96] See Stratos Pahis, 'Investment Misconceived: The Investment-Commerce Distinction in International Investment Law' (2020) 45 Yale J Int'l L 69, 112.

[97] *Romak S.A. v The Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award (26 November 2009) para 230; *Poštová banka, a.s. and Istrokapital SE v Hellenic Republic*, ICSID Case No. ARB/13/8, Award (9 April 2015) para 368.

[98] *Joy Mining Machinery Limited v Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2004) para 58.

Although this particular example might be considered a stretch, it serves to highlight just how broadly phrased this criterion is. When this rule was formulated in *Romak v Uzbekistan*, the tribunal was dealing with a simple supply contract.[99] Due to the short nature of the transaction, it would have been much less susceptible to concepts such as inflation, and therefore this formulation was sufficient to dispose of the issue. However, it cannot be used as a general rule for all types of transactions, especially those that are more complicated or longer term.

This requirement might make a little more sense in the context of what has later been termed an 'operational risk'.[100] This refers to 'a risk inherent in the investment operation in its surrounding - meaning that the profits are not ascertained but depend on the success or failure of the economic venture concerned'.[101] For instance, if a particular investment is the construction and maintenance of infrastructure such as a power plant,[102] then the investor will likely be responsible for all the attendant costs of running the power plant. If accidents happen or repairs are necessary, then the investor will be liable for such costs, and thus the investor cannot be certain of the exact sum he must spend. Although this might fit the mould of what the *Romak* tribunal was proposing, such a concept of 'operational risk' is only applicable where the transaction is about the operation or maintenance of the investment,[103] and cannot be used in situations where it would not even apply at all.[104] Thus, even under this approach, the concept of 'operational risk' cannot be used as a general rule for all types of transactions.

The investor cannot predict the outcome of the transaction

A third problem is that another requirement of having an investment risk is that 'the investor simply cannot predict the outcome of the transaction'.[105] This phrase has the unfortunate effect of painting the investor as a gambler, entering the casino with no knowledge of whether he will be richer or poorer when he leaves. This simply cannot be the case, as investors, especially seasoned businessmen or large companies, will generally do their due diligence and make some assessments of the risks before deciding to enter into a transaction.[106] In such cases, it can hardly be said that these investors cannot predict the outcome of the transactions.

There is also the problem of subjectivity, as what a host state might have viewed as a certainty may be seen in a different light from the investor's point of view, especially if the investor is not a large multinational corporation with many analysts to predict the multitude of different outcomes. Although the requirement is phrased as 'the investor… may not know…',[107] there is no reason why the host state cannot argue that a transaction is in reality not as complicated as the investor is making it out to be. This must of course be balanced against the leeway that should be granted to each individual's assessment, for even seasoned businessmen may reasonably disagree on the riskiness of a particular transaction. The problem is drawing the line somewhere, but this is not something that can be easily or consistently done.

99 *Romak S.A. v The Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award (26 November 2009) paras 24–40.

100 Although the case of *Postova Bank* used the term 'Investment Risk' interchangeably with the term 'Operational Risk', the latter is a subset of the former rather than two alternative phrases that mean the same thing.

101 *Poštová banka, a.s. and Istrokapital SE v Hellenic Republic*, ICSID Case No. ARB/13/8, Award (9 April 2015) para 378.

102 *Standard Chartered Bank (Hong Kong) Limited v United Republic of Tanzania*, ICSID Case No. ARB/15/41, Award (11 October 2019) para 6.

103 Another example would be the provision of aeroplane flights, which was the subject of the dispute in *Air Canada v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/17/1, Award (13 September 2021).

104 For example, it clearly cannot be applied to a loan agreement where there is nothing to manage or operate.

105 *Romak S.A. v The Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award (26 November 2009) para 230; *Poštová banka, a.s. and Istrokapital SE v Hellenic Republic*, ICSID Case No. ARB/13/8, Award (9 April 2015) para 368.

106 Alex Grabowski, 'The Definition of Investment under the ICSID Convention: A Defense of Salini' (2014) 15 CJIL 287, 307.

107 *Romak S.A. v The Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award (26 November 2009) para 229; *Poštová banka, a.s. and Istrokapital SE v Hellenic Republic*, ICSID Case No. ARB/13/8, Award (9 April 2015) para 369.

Instead of reading this as an independent requirement, it is arguably more suitable to treat this phrase as an amalgamation or a summary of the first two requirements, where the effect of not knowing how much to spend and whether you will get a return on the investment means that the investor 'cannot predict the outcome of the transaction'. Unfortunately, this will then simply be a recharacterization of what has already been analysed and adds nothing new.

The requirement of investment risk punishes those who attempt to mitigate such risks

The fourth problem is that this definition of investment risk effectively punishes parties who try to mitigate risks. In most transactions, parties usually take steps to address some of the uncertainties through contractual terms. For example, it is common for loan agreements to be lengthy and provide for what happens when a specified situation occurs.[108] Surely it cannot be the case that parties are punished by not having their transactions be considered an investment when they are simply trying to reduce the risks involved through typical risk allocation mechanisms.[109]

There is also the converse situation to consider, where the terms of a contract instead operate to increase the risk of a transaction that may not normally contain such risks. This appeared to be the case in *Salini v Morocco*, as one of the risks the tribunal identified was the risk associated with the prerogatives of the owner permitting him to prematurely put an end to the contract.[110] If this was a contractual right, does this constitute a valid means of increasing the uncertainty over a return on the contract, and thus making it more likely for the transaction to be considered an investment?

The cases do not address this converse situation directly, in part perhaps due to the unlikeliness of an investment being made under a contract that inflates the risk. However, a scenario where one party for whatever reason insists on having such a term and the other party reluctantly acquiesces is not out of comprehension, especially if there is unequal bargaining power. In principle, it is quite likely that there would be problems associated with a practice of artificially increasing the risk of a transaction in order to qualify for investment protection.

Ignoring the fact that commercial or sovereign risks can be the maximum risk the investor is exposed to

A fifth problem is that commercial or sovereign risk may not qualify as 'risk', even if that is the maximum amount of risk the investor is faced with. Since it has been stated that investment risk does not include commercial risk or sovereign risk, this leads to an absurd result where it becomes theoretically impossible for the investor to satisfy the criterion of 'risk'.

A commercial risk includes the risk of one party defaulting on its obligations,[111] which means that a party cannot or will not perform its side of the bargain. It has also been described as 'the risk of doing business generally'.[112]

Unfortunately, it is not entirely clear where the boundary between a commercial risk and an investment risk lies. Although the description of an investment risk suggests that such risks are comparatively higher or riskier than commercial risk, what is considered a commercial risk by arbitral tribunals *may already cover the maximum extent of an investor's potential loss*. Take, for

[108] One example can be found on the World Bank Website, which provides the loan between the Republic of Cameroon and the International Bank for Reconstruction and development as a sample: http://web.worldbank.org/archive/website01210/WEB/IMAGES/CM_LA_EN.PDF accessed 11 May 2022.

[109] Shalanda Helen Baker, 'Unmasking Project Finance: Risk Mitigation, Risk Inducement, and an Invitation to Development Disaster?' (2011) 6 Texas Journal of Oil, Gas, and Energy Law 273, 333.

[110] *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001) para 55.

[111] *Romak S.A. v The Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award (26 November 2009) para 229; *Poštová banka, a.s. and Istrokapital SE v Hellenic Republic*, ICSID Case No. ARB/13/8, Award (9 April 2015) para 369.

[112] *Romak S.A. v The Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award (26 November 2009) para 229.

example, a common form of investment—a loan.[113] Even if the entity the loan was extended to became bankrupt or for whatever reason unable to repay the loan at all, the amount that the investor loses is the amount that he has extended for the loan.

This applies even if the repayment of the loan is determined by the success of the underlying venture,[114] for the investor will never lose more than what the investor has put in—the investor cannot be unsure over the total amount the investor has to spend. The suggestion that something above and beyond such risk is required for a transaction to constitute an investment may not be appropriate, yet this is precisely the type of loss that has been defined as a commercial risk and is to be excluded from the investment risk analysis. After all, such investments are unlike shorting stocks on the stock market, where investors face a real risk of losing more than the original amount they invested.

That is not to say that further costs will never be incurred. Investors may incur legal fees and expenses when a lawsuit is filed on their behalf or against them for a breach of contract, or there may be costs for transporting goods out of the host state. However, to adopt the language in *Romak*,[115] such costs are not useful for distinguishing between an investment and an ordinary commercial transaction as they are present even in failed commercial transactions. The question then arises—what more is required for such risk to 'evolve' into an investment risk?

It is perhaps for this reason that some tribunals do not follow this approach of distinguishing commercial risk from investment risk. In *Nova Scotia Power v Venezuela*, the tribunal described the risks involved in *Salini v Morocco* as commercial risks.[116] However, notwithstanding that they were commercial risks, the *Nova Scotia Power* tribunal opined that they were sufficient to satisfy the criteria of risk as they were borne over an extended period of time.[117] In *Helnan v Egypt*, the tribunal found that the risk of non-profitability over a period of 26 years was sufficient to constitute risk,[118] even though such risk would clearly be considered commercial risk. In *Gavrilovic v Croatia*, the tribunal disagreed with the respondent's argument that the claimants incurred no risk by stating that 'the Claimants made a contribution. In so doing, they assumed the risk that they would lose all or part of that contribution. This is the risk inherent in the purchase of any business, regardless of whether the business is in bankruptcy or whether it is solvent'.[119]

There is therefore no persuasive reason to exclude transactions that only involve commercial risks.[120]

Regarding sovereign risk, *Postova Bank v Greece* made it clear that 'sovereign risk', which is 'the risk of interference of the Government in a contract or any other relationship', is distinct from investment risk.[121] Yet, it is unclear why this is the case, given that sovereign interference in a contract is a very real risk that investors often face.

[113] *Ceskoslovenska Obchodni Banka, a.s. v The Slovak Republic*, ICSID Case No. ARB/97/4, Award (29 December 2004); Abaclat and others (*formerly Giovanna A. Beccara and others) v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011); *Tulip Real Estate Investment and Development Netherlands B.V. v Republic of Turkey*, ICSID Case No. ARB/11/28, Award (10 March 2014) para 203.

[114] One example would be *Standard Chartered Bank (Hong Kong) Limited v United Republic of Tanzania*, ICSID Case No. ARB/15/41, Award (11 October 2019).

[115] *Romak S.A. v The Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award (26 November 2009) para 229.

[116] *Nova Scotia Power Incorporated v Bolivarian Republic of Venezuela (II)*, ICSID Case No. ARB(AF)/11/1, Award (30 April 2014) para 110.

[117] Ibid.

[118] *Helnan International Hotels A/S v Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction (17 October 2006) para 77.

[119] *Georg Gavrilovic and Gavrilovic d.o.o. v Republic of Croatia*, ICSID Case No. ARB/12/39, Award (26 July 2018) para 215.

[120] See generally Stratos Pahis, 'Investment Misconceived: The Investment-Commerce Distinction in International Investment Law' (2020) 45 Yale J Int'l L 69, 108–110.

[121] *Poštová banka, a.s. and Istrokapital SE v Hellenic Republic*, ICSID Case No. ARB/13/8, Award (9 April 2015) para 369. For examples of such sovereign intervention, albeit not specifically in the context of investment risk, see *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability (10 April 2013) para 517.

It is thus a welcome fact that this approach has not been universally adopted and some tribunals have recognized sovereign interference in the investment as an investment risk. In *Ambiente Ufficio v Argentina*, the Respondent state submitted that the investor had not undertaken any risk above and beyond that of ordinary commercial risk.[122] However, the tribunal disagreed, stating that 'given the risk of the host State's sovereign intervention, a risk that became manifest in Argentina's very default and restructuring, what is at stake is not an ordinary commercial risk'.[123] In *SCB v Tanzania*, the tribunal stated that 'the political risk of interference by the [Respondent state] with the Project, [is] not ordinary commercial risk'.[124]

On a related note, certain transactions were found to contain investment risk because they were made in a country where there was political strife.[125] In *Gavrilovic v Croatia*, the investor made investments during the Croatian War of Independence,[126] by purchasing certain companies in Croatia.[127] The tribunal observed that the investor undertook 'a number of risks, including that some of the assets belonging to the Five Companies might be destroyed during the war and that he would be unable to gain access to or claim title to the assets, depending on the war's outcome'.[128] In *Kardassopoulos v Georgia*, the investor was part of a joint venture to exploit oil and gas resources in Georgia.[129] The tribunal observed, albeit in one sentence, that 'the risk component is satisfied in light of the political and economic climate prevailing throughout the period of the investment'.[130] Given that these investments were made in 1991–92,[131] the political climate referred to here would be the immediate uncertainty following Georgia's declaration of independence in 1991.

Of course, that is not to say that any transaction made within a country experiencing political strife or a very interventionist government will automatically satisfy the requirement of investment risk. The inquiry takes into account whether the risk actually rose to a certain threshold such that it was sufficient to constitute investment risk. In *Nova Scotia Power v Venezuela*, the tribunal found that 'the political risk, in view of the type and duration of the commitment ... is minimal'.[132] In this regard, *Gavrilovic v Croatia* and *Kardassopoulos v Georgia* adhere to this principle as the investments concerned large companies and there was evidence to show that their business was affected by the political upheaval. And yet the general rule that can be extracted from such cases is that an investor who makes a transaction in a country with political tensions may find that the transaction is considered an investment in that country, but not if it were made in a more politically stable country. This approach is unsatisfactory because it should be the nature of the transaction rather than the country it takes place in that renders it an investment.

[122] *Ambiente Ufficio S.p.A. and others (formerly Giordano Alpi and others) v Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) para 485.

[123] Ibid.

[124] *Standard Chartered Bank (Hong Kong) Limited v United Republic of Tanzania*, ICSID Case No. ARB/15/41, Award (11 October 2019) para 223.

[125] In theory, political strife could amount to sovereign risk, since the risk of a government passing new laws that affect the transaction fall under the definition of a sovereign risk. In situations where the risk is more towards the physical destruction of the investor's assets, then this may not be a sovereign risk. Yet, it is hard to see why this should be investment risk as well given that such a risk will affect every transaction that occurs in the conflict zone.

[126] *Georg Gavrilovic and Gavrilovic d.o.o. v Republic of Croatia*, ICSID Case No. ARB/12/39, Award (26 July 2018) para 217.

[127] *Georg Gavrilovic and Gavrilovic d.o.o. v Republic of Croatia*, ICSID Case No. ARB/12/39, Award (26 July 2018) paras 97–98.

[128] *Georg Gavrilovic and Gavrilovic d.o.o. v Republic of Croatia*, ICSID Case No. ARB/12/39, Award (26 July 2018) para 217.

[129] *Ioannis Kardassopoulos v Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction (6 July 2007) paras 20–23.

[130] *Ioannis Kardassopoulos v Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction (6 July 2007) para 117.

[131] *Ioannis Kardassopoulos v Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction (6 July 2007) paras 13–23.

[132] *Nova Scotia Power Incorporated v Bolivarian Republic of Venezuela (II)*, ICSID Case No. ARB(AF)/11/1, Award (30 April 2014) para 111. Although only certain excerpts of the award were published, we can infer that the duration of the transaction was too short for political risks to be of any significance.

RECOMMENDED REFINEMENT FOR THE CRITERION OF RISK

Although this article has raised a number of issues plaguing the concept of investment risk, there are hints as to why tribunals have persisted with this concept of investment risk in certain scenarios. The common thread between the cases that have applied the concept of investment risk[133] is that the transactions might not contribute as much to the host state's economy as tangibly or as visibly as other cases. In *Romak*, the transaction in question was a sale of wheat pursuant to a supply agreement[134]; in *Postova Bank*, the purchase of government issued bonds[135]; in *Joy Mining*, the purchase of mining equipment.

These transactions may be contrasted with other forms of investments which may appear to have a much more visible or tangible contribution to an economy such as, the provision of commercial air travel services in *Air Canada*,[136] or the building of a highway in *Salini*.[137] Hence, although left unsaid in the various awards, a potential rationale for the use of the term 'investment risk' is that it is used as shorthand for tribunals to justify drawing a distinction between what appears to the tribunal to be an ordinary commercial transaction versus an investment.

Be that as it may, this article recommends following the traditional formulation of 'risk', as the problems inherent in the definition of investment risk cannot easily be solved. For instance, as explained above, there is no way to extend the concept of 'operational risk' to situations where there is nothing to operate or manage.[138] There is also no easy way to prescribe a threshold for how risky a situation must be before it can constitute an investment risk.

Furthermore, adopting the present definition of investment risk dramatically reduces the scope of what is considered an investment,[139] which is unlikely to be justifiable given the broadening and ever-changing nature of investments in the modern day and age.[140] As noted in *Biwater v Tanzania*, 'if very substantial numbers of BITs across the world express the definition of "investment" more broadly than the Salini Test, and if this constitutes any type of international consensus, it is difficult to see why the ICSID Convention ought to be read more narrowly'.[141] Since that judgement was handed down in 2008, the number of BITs with similarly broad definitions of investments have continued to increase, and although that alone does not result in any binding change in the ICSID Convention, it sharply reflects the increasing notion that the definition of an investment is a broad and flexible one.[142]

[133] This includes cases that predate the introduction of the term 'investment risk' in *Romak v Uzbekistan*, but nevertheless use the same reasoning.

[134] *Romak S.A. v The Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award (26 November 2009), para 215.

[135] *Poštová banka, a.s. and Istrokapital SE v Hellenic Republic*, ICSID Case No. ARB/13/8, Award (9 April 2015) para 51; See also Pietro Ortolani, 'Are Bondholders Investors? Sovereign Debt and Investment Arbitration after Postova' (2017) 30 Leiden Journal of International Law 383, 402.

[136] *Air Canada v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/17/1, Award (13 September 2021).

[137] *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001); see also *CMC Muratori Cementisti CMC Di Ravenna SOC. Coop., CMC Muratori Cementisti CMC Di Ravenna SOC. Coop. A.R.L. Maputo Branch and CMC Africa Austral, LDA v Republic of Mozambique*, ICSID Case No. ARB/17/23, Award (24 October 2019).

[138] Stratos Pahis, 'Investment Misconceived: The Investment-Commerce Distinction in International Investment Law' (2020) 45 Yale J Int'l L 69, 110–112; Pietro Ortolani, 'Are Bondholders Investors? Sovereign Debt and Investment Arbitration after Postova' (2017) 30 Leiden Journal of International Law 383, 402.

[139] McLachlan, Shore and Weiniger, *International Investment Arbitration - Substantive Principles* (2nd edn Oxford University Publishing) para 6.06.

[140] *Ambiente Ufficio S.p.A. and others (formerly Giordano Alpi and others) v Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) at 481; For an example of a push to recognise modern developments, see Helena Jung Engfeldt, 'Should ICSID Go Gangnam Style in Light of Non-Traditional Foreign Investments Including Those Spurred on by Social Media - Applying an Industry-Specific Lens to the Salini Test to Determine Article 25 Jurisdiction' (2014) 32 Berkeley J Int'l L 44.

[141] *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) paras 314 and 316.

[142] According to the Investment Policy Hub website, more than 2500 BITs contain a broad 'asset-based definition' of an investment https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping accessed 4 September 2022.

But perhaps the greatest reason why the traditional 'risk' formulation should be used is that ultimately, the type of risk present depends on the nature of each transaction,[143] and the terms 'investment risk', 'operational risk', and 'commercial risk' are all labels used to describe the different types of risk that may exist in different transactions.[144] Despite its broadness, the traditional formulation of 'a participation in the risks of the transaction' better encapsulates and captures the variety of risks that may arise in different transactions, and should arguably be adhered to.[145] Whilst it may seem like a broad formulation, as pointed out above, however, this broadness befits the purpose of the Salini Test to act as the outer limits of what is permissible under the ICSID Convention.[146]

The criterion of 'a contribution to the economic development of the host state'

Aside from the above three requirements of existence of contribution, duration, and risk, a fourth criterion that has not been received as well as the rest of the Salini Test is that of 'a contribution to the economic development of the host state'.[147] Currently, tribunals prefer not to consider this criterion as part of the Salini Test,[148] but as a factor in the overall assessment of whether there is an investment,[149] and some have not included it in the analysis at all.[150]

Reasons for rejecting this criterion

Two main reasons are usually given for the hostile treatment of this criterion: (i) the criterion requires an assessment that is inherently too subjective; and (ii) such an assessment analyses the outcome of the investment, rather than its status as an investment.

A subjective exercise

Regarding the subjective nature of this assessment, whether there has been a contribution to the economic development of a country is an inherently subjective assessment and one where reasonable people may come to different conclusions on the same issue.[151] This is especially so given that in *Salini v Morocco*, this requirement was not elaborated on much since the tribunal felt that the building of a highway was a clear-cut case of a contribution to the host state's economy that 'cannot seriously be questioned'.[152]

[143] *Manchester Securities Corporation v Republic of Poland*, PCA Case No. 2015-18, Award (7 December 2018) para 375.

[144] Ursula Kriebaum, Christoph Schreuer and Rudolf Dolzer, *Principles of International Investment Law* (3rd edn Oxford University Press 2022).

[145] With the exception that the existence of a dispute per se is not sufficient to satisfy this criterion.

[146] See p 9 above.

[147] *KT Asia Investment Group B.V. v Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award (17 October 2013) para 172; *Mabco Constructions SA v Republic of Kosovo*, ICSID Case No. ARB/17/25, Decision on Jurisdiction (30 October 2020) para 301; *Saba Fakes v Republic of Turkey*, ICSID Case No. ARB/07/20, Award (14 July 2010) para 111.

[148] As early as 2015, it was observed that 'there seems to be a move away from Salini to a simpler test involving contribution, duration and risk' in *Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co. (Private) Limited v Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Award (28 July 2015) para 285.

[149] *Ioannis Kardassopoulos v Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction (6 July 2007) paras 116–117; *Karkey Karadeniz Elektrik Uretim A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award (22 August 2017) para 636; *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award (30 October 2017) para 6.67; Cf *Bay View Group LLC and The Spalena Company LLC v Republic of Rwanda*, ICSID Case No. ARB/18/21, Award (30 March 2022) paras 216–221 (This case went against the weight of jurisprudence and considered the contribution to the economic development of the host state as a condition for an investment).

[150] *Saba Fakes v Republic of Turkey*, ICSID Case No. ARB/07/20, Award (14 July 2010) paras 110–111; *Víctor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No. ARB/98/2 (8 May 2008) para 232.

[151] Manchester Securities Corporation v Republic of Poland, PCA Case No. 2015-18, Award (7 December 2018) para 371; *MNSS B.V. and Recupero Credito Acciaio N.V v Montenegro*, ICSID Case No. ARB(AF)/12/8, Award (4 May 2016) para 189; *Philip Morris Brand SARL, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (2 July 2013) para 188.

[152] *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001) para 57.

There is also no consensus on by what metric such contribution should be measured, or the threshold of the contribution required.[153] A high threshold was propounded in *MHS v Malaysia*, in which the tribunal declared that a 'significant contribution' to the host state's economy was required.[154] This sparked controversy as the word 'significant' was an addition to what the tribunal in *Salini v Morocco* had stated. This was one of the reasons why the award was annulled two years later.[155] Although one subsequent tribunal that analysed this criterion also spoke of a 'substantial' contribution,[156] it has been suggested that this approach should not be adopted as holding the investor to very high standards results in a scenario whereby every investment must contribute significantly to the economic development of the country. This was best put in *Seo v Korea*:[157] '... it could hardly be expected that each individual investment would singlehandedly raise living standards and improve the general welfare (etc.) of an entire nation'.[158]

An ex-post facto analysis

Regarding the fact that such an analysis needs to be made only after some time has passed (ie *an ex-post facto* analysis), this makes it equally unsuitable to be used as a metric to determine whether an investment exists. Hence, tribunals have recognized that it is merely one of the expected consequences of making an investment.[159] As stated in *Phillip Morris v Uruguay*[160]:

> In order to determine whether an investment, at the time it is made, is capable of contributing to the economic development of the host State a tribunal would be required to conduct an ex post facto analysis of a number of criteria that, considering also the time elapsed, can generate a wide spectrum of reasonable opinions ... it would not be appropriate for such a form of second-guessing to drive a tribunal's jurisdictional analysis'.

If this criterion were to be adopted, then investors would have to know for sure that their undertaking or project would certainly contribute to the host state's economy. Not only is this a statistical improbability in that not every project will succeed, but it also conflicts with the criterion of 'risk' in the same test, be it commercial or investment risk, since there is always a risk that a project will not generate revenue or all the invested moneys would be lost.

Possible refinements to this criterion

Might it be possible to refine this criterion to a point where it becomes suitable for re-inclusion into the Salini Test? The tribunal in *Phoenix Action v Czech Republic* seemed to think so if it is included as a presumption[161]:

[153] *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), para 33.

[154] *Malaysian Historical Salvors, SDN, BHD v Malaysia*, ICSID Case No. ARB/05/10 (17 May 2007) para 123.

[155] *Malaysian Historical Salvors Sdn, Bhd v Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment (16 April 2009) para 80(b).

[156] *Toto Costruzioni Generali S.p.A. v Republic of Lebanon*, ICSID Case No. ARB/07/12 (11 September 2009) para 86.

[157] Although the tribunal was speaking in the context of a provision that was concerned with raising the living standards of the country and not a contribution to the host state's economy specifically, the same reasoning can apply here.

[158] *Jin Hae Seo v Republic of Korea*, HKIAC Case No. 18117 (27 September 2019) para 105.

[159] *Mabco Constructions SA v Republic of Kosovo*, ICSID Case No. ARB/17/25, Decision on Jurisdiction (30 October 2020) para 296; *Spółdzielnia Pracy Muszynianka v Slovak Republic*, PCA Case No. 2017-08, Award (7 October 2020) para 289; *Saba Fakes v Republic of Turkey*, ICSID Case No. ARB/07/20, Award (14 July 2010) para 111.

[160] *Philip Morris Brand SARL, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (2 July 2013) para 207.

[161] *Phoenix Action Ltd v Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009) para 85.

> A less ambitious approach should therefore be adopted, centred 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.

Unfortunately, presuming that the transaction in dispute will contribute in some way to the economy of the host state does not really provide anything concrete for tribunals to work with. Presuming that this criterion is fulfilled for all investments arguably renders it pointless to implement this criterion as a requirement.

Recommendation

Nevertheless, it is suggested here that, balancing the interests of investors and states alike, there is value in adopting a middle-ground approach between the strict *ex-post facto* analysis, and the broad presumption suggested by the *Phoenix* tribunal. Instead of *presuming* that there will be a contribution to the economic development of the host state, a tribunal could instead inquire as to whether there was *potential* for contribution. In this way, rather than do away with this criterion completely to the detriment of host states, the focus is not on the ultimate outcome, but on the potential of the investor's contribution at the time it was made. This suggestion is not novel. Georges Delaume, former Senior Legal Adviser to the World Bank had suggested focussing on the 'expected – if not always actual' contribution of the investment to the economic development of the host state.[162]

CONCLUSION

Despite there being serious challenges mounted against the Salini Test, ICSID tribunals have continued to apply it in their assessments, and even those that do not do so nevertheless use it as a starting point of analysis,[163] reflecting the overall effectiveness of the Salini Test in determining whether there is an investment or not.

Even if the Salini Test continues to be used only as factors that indicate the presence of an investment, the suggested refinements in this article should still be applied because they are consistent with modern treaty practice. For instance, the EU–Singapore Investment Protection Agreement states that an investment 'means every kind of asset which has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk or a certain duration'.[164] Model BITs such as the US Model BIT[165] and the Indian Model BIT[166] all make reference to these characteristics, where the traditional formulation of 'an assumption of risk' is used, and there is no mention of the phrase investment risk.[167] For the sake of consistency and relevance, the Salini Test should revert to adopting a similar formulation moving forward.[168]

[162] See Emmanuel Gaillard, 'Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice' in Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (1st edn Oxford University Press 2009), 412. For completeness, and according to Gaillard, Delaume had not intended for this criterion to be part of a formalistic test.

[163] Alex Grabowski, 'The Definition of Investment under the ICSID Convention: A Defense of Salini' (2014) 15 CJIL 287, 308.

[164] EU–Singapore Investment Protection Agreement (signed 19 October 2018, entered into force 21 November 2019) art 1.2.

[165] 2012 U.S. Model Bilateral Investment Treaty art 1 https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf accessed 12 May 2022.

[166] Model Text for the Indian Bilateral Investment Treaty art 1.4 https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf accessed 12 May 2022.

[167] Chester Brown, *Commentaries on Selected Model Investment Treaties* (Oxford University Press 2013).

[168] As stated in *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania, ICSID Case No. ARB/05/22* para 314: 'If very substantial numbers of BITs across the world express the definition of "investment" more broadly than the Salini Test, and if this constitutes any type of international consensus, it is difficult to see why the ICSID Convention ought to be read more narrowly'.