

# **NEED TO DEVELOP THE DEFINITION OF INVESTMENT UNDER INTERNATIONAL INVESTMENT LAW BEYOND SALINI AND QUIBORAX TESTS TO ACHIEVE EQUITABILITY**

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## **ABSTRACT**

The globe is not physically fragmented as this phrase is very relevant in the context of global economic relations. Investment is the key contributor to the economic development of any country. In the global context, cross border investments are inevitable and inexorable, particularly for the developing and underdeveloped countries which need such investments greatly for their economic development. However, when a person or institution from one country invests money/capital in another country, the question of protecting such investment certainly reaches the surface. The modern investment law encompasses two important protective principles (1) protecting the rights of investors, and (2) protecting the right to the economic development of host countries. In any dispute between the money/capital contributor and the host country, a fundamental question is whether the claimant's contribution of money/capital in the host country constitutes an investment. It is an important question, as the rights and duties of the parties depend on the answer to this. The International Centre for Settlement of Investment Disputes (ICSID) which is the main forum for the settlement of the international investment disputes, did not define investment. This made the tribunals under ICSID to determine this question. Two different tests (1) the Salini test and (2) Quiborax test articulated by the tribunals create uncertainty in the investment law. This paper will focus on the merits and demerits of these tests and will discuss how to achieve an equilibrium whereby both parties' interests are reasonably protected.

**Keywords:** Investment, Definition, ICSID, Salini Test, Diluted Test, Quiborax Test, Interests Equilibrium Tests.

## INTRODUCTION

The acceptance by the International Centre for Settlement of Investment Disputes (ICSID) for arbitration or conciliation of any investment-related dispute depends on the cardinal question of whether the claimant able to prove that the contribution of money/capital for a venture in a host country constitutes an investment or whether the host country could successfully rebut the claimant's argument. Article 25(1) of the ICSID states “[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment...”<sup>i</sup>

However, the problematic issue is the absence of a definition of what constitutes an investment in the ICSID. This created a somewhat impassibility for the arbitration tribunals to resolve this question. The promoters for the forum of international arbitration for international investment disputes and the signatories of the ICSID were intending and anticipating the international arbitration as provided by the ICSID for the investment dispute will clear the uncertainties as to the protection of investors' investment while aiding and sustaining the host state to develop their economy. These two objectives are bound together with the view of promoting international investment and protecting the interests of both investors and host countries. The question of why the ICSID did not define investment for this purpose, could reasonably arise for many people.<sup>ii</sup>

It is highly probable the promoters and signatories of the ICSID deliberately want to prevent jeopardizing the process of international investment by providing definition which may lead to controversy as either party-investors or host countries or both would have felt or charged that the definition is unfavourable for them. It seems that the promoters and signatories of this convention adopted a soft approach to this question by permitting the parties-both investors and host countries to determine this question through their respective Bilateral Investment Agreement (BIT) in a consensual manner. However, leaving this question undefined and indefinite could certainly open space for dispute as each party (the investor and host country) could make conflicting claims. The cases before the ICSID tribunals were established evidence which proving these positions as in many cases investors were attempting to claim their money/capital involvement is an investment, while the host countries were not ready to accept

any blanket claim asserting that that such acceptance will affect their right to economic development.

*In Kaiser Bauxite Company v. Jamaica*, the tribunal seriously considered two important claims raised by the respective parties (1) the money/capital contribution by the claimant was an investment, and (2) rebuttal by the host country that it was not an investment.<sup>iii</sup> Jamaica (the host country) submitted that Article 25(1) does not apply to any dispute regarding minerals or other natural resources as it argued that any contracting agreement for money/capital contribution on these areas does not constitute an investment. However, the tribunal was in the view that the whole dispute is investment-based dispute because it arose because of investment. The tribunal stated since both Jamaica and the US are members of the ICSID convention, no party could withdraw from its jurisdiction unilaterally, especially at the time of the dispute.<sup>iv</sup> This case indicates that the tribunal has taken an objective approach to determine the question of what constitutes investment though it did not go into any detailed discussion on the definition of investment, at the end it concluded that the dispute is purely investment-related. A similar approach was taken by the tribunal in *Alcoa Minerals of Jam. v. Jam.*, though the question of what constitutes an investment was not raised by either party but the tribunal raised it *sua sponte* to resolve the jurisdiction issue.<sup>v</sup>

In *Fedax N. 1. v. The Republic of Venezuela*, The main issue raised before the tribunal is the question of whether this dispute falls within the meaning of investment as provided in Art, 25(1) of ICSID as Venezuela argued that the company's transaction did not constitute an investment under the section 25(1) because the company's money involved only through the means of promissory notes issued by the Republic of Venezuela in relation with the contract made by the company with the Venezuelan corporation.<sup>vi</sup> The Republic of Venezuela thrust its argument based on the premise that the transaction involves promissory note does not constitute a direct foreign investment (FDI) or a long-term transfer of financial resources from one country to another. Venezuela also argued that the term 'investment' under this context, should be interpreted in the light of Art. 31(1) of the Vienna Convention on Law of Treaties (VCLT-1969), and accordingly, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.<sup>vii</sup> The tribunal briefly examined the Venezuelan law on Public Credit which provides the state to raise funds and resources through the operation of Public Credit, and also

the general requirements that are necessary for a financial/capital involvement to constitute an investment. It referred to the following features (1) a certain duration (2) a regulatory of profit and return (3) the assumption of risk, and (4) the significance for the host country. The tribunal viewed that the Company's financial involvement met all these features while it helped the host country to raised it funds and significantly helped the host country's (Venezuela) economic development. The tribunal concluded that the company's money/capital involvement meets all the required features of investment within the meaning of Art. 25(1).<sup>viii</sup>

## THE SALINI CRITERIA/TEST

However, the landmark case on the definition of investment is *Salini v. et al v. Morocco*, where the tribunal established a definition for 'investment' under the section Art.25 (1) which is well known as *Salini test or criteria*.<sup>ix</sup> According to this test/criteria money/capital involvement to constitute an investment under the sec. 25(1), four elements must be proved (1) a contribution of money or capital (2) a certain duration (3) an constituent of risk, and (4) a contribution to the economic development of the host state.<sup>x</sup> These criteria seemed to be striking a fair balance between the interest of the investor and the interest of the host state as the last element connects the money/capital contribution with the economic development of the host country.<sup>xi</sup> The Salini test was followed in *Mining Mach. Ltd. v. Egypt*<sup>xii</sup> and *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*.<sup>xiii</sup>

## PURE MONEY/ CAPITAL BASED INVESTMENT TEST

However, other decisions of the tribunal did not accommodate the Salini test in its full form, especially the tribunals were not prepared to accept the fourth element of the Salini test, which requires proof of contribution to the economic development of the host state, as they (the tribunals) were in the opinion that such requirement makes the definition of investment test for the purpose of applying section 25(1), superfluous. In *Quiborax v. Bolivia*, it was argued by the claimant that since the ICSD convention accommodates promoting both international investment and the development of economy of the host country, the requirement of economic development of the host country as an element of investment test is unnecessary.<sup>xiv</sup> Bolivia, on the other hand, argued that in the Salini case the tribunal had not only set out four elements for

the investment test, but it also accepted the requirement of good faith provided under Art. 31(1) of the VCLT (1969). However, The Tribunal held that investment though is not entirely an “independent” test, it necessitates an objective approach to ascertain its definition. Although the tribunal conceded that three elements of the Salini test are important to determine objectively the question of whether the money/capital involvement is an investment, it stated that there is no necessity to make a specific inquiry or questioning whether the claimant money/capital which was contributed for the mining operation actually made Bolivia’s economic economy successfully. The tribunal was in the view that such a question or requirement not helpful both to the investor and the host country as it will hinder the international investments as envisaged by the international conventions or bilateral agreements.<sup>xv</sup> However, it must be noted that all documents which were supporting the forming ICISID had made reference to the economic development of the host country and its significance for the promotion of international investment law.<sup>xvi</sup>

In *Saba Fakes v. The Republic of Turkey*, Turkey argued that the claimant’s money/capital contribution does not constitute an investment under Art. 25(1) as it fails to meet Saline criteria, particularly it did not help for the economic development of Turkey.<sup>xvii</sup> On the other hand, the claimant argued that Art. 1 of the BIT which was signed between the Netherlands and Turkey has defined investment and the claimant’s capital/money involvement meets the requirements that fall under that definition. The tribunal asserted that two positions (1) it is not bounded by the provisions decisions of the tribunal, and (2) that Art. 25(1) definition on investment is not an autonomous definition and Art. 1 of the BIT could override the definition given to it (investment) by the previous cases, especially the Saline case.<sup>xviii</sup> However, the tribunal sought to a strike balance between the Salini definitions with Article 25(1) of the ICSID Convention by explicating that the Art. 25(1) proposing an objective definition. The tribunal tacitly proposing pure money/capital-based investment test, thereby, making the question of whether the money/capital contribution has contributed to the economic development of the host country, irrelevant.

The drawing line between the Salini criteria and Quiborax stand is very clear as in the former case the tribunal sought a strike a balance between the interest of both the investor and the host country, and thereby, adopting an inclusive approach to define investment within the meaning of Art. 25(1) of the ICSID, in the latter case the tribunal was more cautious in protecting the money/capital involvement of the claimant without permitting the economic development

argument to defeat the claim of the claimant. In other words, the Quiborax ruling unambiguously signifying that when the parties agreed to the definition of investment provided in their BIT, it is sufficient to override other arguments against it.

The mutual consent of the parties or the principle of reciprocity is the decisive factor under the Quiborax ruling as the ruling suggests that the question of economic development also falls under the BIT agreement where the host state agreeing to the investment conditions that were laid down in the agreement and this is also lead to a presumption that the host country had already considered the question of its economic development before the signing of the agreement. In the Salini case, the tribunal referred to the preamble of the ICSID which emphasizes the significance of nurturing of economic development of the host country, and it (tribunal) inserted the economic development as a necessary requirement of investment test. The Salini test aimed at satisfying both the investors and the host countries by protecting the money/capital interest of investors while simultaneously protecting the economic interest of host countries.

This test may be also described as an '*interests equilibrium test*' which involves a search for an equilibrium level where both parties are satisfied because their interests are reasonably protected. However, the problem with this test lies in the question of the likelihood of achieving such an equilibrium if the tribunal found that the money/capital contribution of the claimant does not help the economic development of the host country. In this background, it is highly possible under the Salini test to recognize the claimant's money/capital contribution is not an investment. It could be contended that the Salini test does not promote investment but it hinders investment as it could create some uncertainties to potential investors as to the rights and claims.

On the other hand, the acceptance of Salini test/criteria without the fourth element (the economic development of host countries) as articulated in Quiborax case will definitely present an apprehensive picture to the host countries as these countries, especially the developing or underdeveloped countries the economic development is the prime concern in their national discourses. If the foreign investment fails to achieve results or caused a loss in terms of repayment with or without interest in the host country, the repercussion in terms of political, economic, and social costs will be very high.

The non-unanimity by all concerned parties including the ICSID on the definition of investment brings the right to development debate to the surface. It has been felt since the creation of the UN that the countries should have the right to development on their own terms and the investment law should accommodate this principle. However, this question has to be dealt with within the context of the real requirements of both investors and host countries. The investors need protection for money/capital and host countries, especially developing and underdeveloped countries seriously need investment for their economic developments. These interests should not be regarded as a conflict of interests though in several cases they led to disputes. The question is how to reach an equilibrium point where the interests of both parties are satisfied. The equilibrium could not be reached by presenting a purely commercial or contractual formula as the international investment is no more a purely commercial issue.

The international community has to continue its discourse on this question with the view of finding a unanimous definition on investment, so that investment will have a conventional definition (the definition which is recognized by the international convention). The conventional definition should accommodate the concerns and interests of both investors and host countries. The conventional definition should be the guidelines to other agreements including MIA (Multi-national investment agreement) and BIA, and the question of whether the proposed conventional definition should be regarded as the primary source to determine the investment question or whether it could override other definitions on investment is a subject for every stakeholder to reflect to find the answer. If the question of investment definition remains unabated and unresolved, then debate on the subject of ‘investors’ rights and right to development’ will remain unabatedly and this will create further uncertainty not only for both parties but also more importantly in the process of the global economic system.

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## ENDNOTES

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<sup>i</sup> Art. 25(1) International Centre for Settlement of Investment Disputes (ICSID).

<sup>ii</sup> See Jeremy Marc Exelbert, Consistently Inconsistent: What Is a Qualifying Investment under Article 25 of the ICSID Convention and Why the Debate Must End Article 25 of the ICSID Convention and Why the Debate Must End, *Fordham Law Review* *Fordham Law Review*, Volume 85 Issue 3 Article 12, available at <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5267&context=flr> .

<sup>iii</sup> ICSID Case No. ARB/74/3, 6 July 1975.

<sup>iv</sup> *ibid.*

<sup>v</sup> ICSID Case No. ARB/74/2, also see discussion by Alex Grabowski in his article “The Definition of Investment under the ICSID Convention: A Defense of Salini Defense of Salini, *Chicago Journal of International Law* *Chicago Journal of International Law*, Volume 15 Number 1 Article 13, available at <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1058&context=cjil>.

<sup>vi</sup> ICSID Case No. ARB/96/3.

<sup>vii</sup> Art. 31(1) of the Vienna Convention on Law of Treaties (VCLT-1969).

<sup>viii</sup> *Supra* note 5.

<sup>ix</sup> ICSID Case No. ARB/00/4, decision on Jurisdiction, para 52.

<sup>x</sup> *Ibid.*

<sup>xi</sup> See discussion on these elements by Aman Prasad, *Salini Criteria: A Strict- Deductive Approach Against the Principles of Article 25(1) ICISID*, available at <file:///C:/Users/R.Y/AppData/Local/Temp/SSRN-id3639087.pdf>

<sup>xii</sup> ICSID Case No. ARB/03/11.

<sup>xiii</sup> ICSID Case No. ARB/03/29. Also see *Jan de Nul N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13.

<sup>xiv</sup> ICSID Case No. ARB/06/2.

<sup>xv</sup> *Ibid.*

<sup>xvi</sup> See dissenting opinion in *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10.

<sup>xvii</sup> ICSID Case No. ARB/07/20.

<sup>xviii</sup> *ibid.* Also see how this ruling differs from *Phoenix Action Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5.