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The Definition of Investment under Article 25 of the ICSID Convention: A Critical Legal Study on the Post Salini Development

Mobarak Hossain*

Abstract: *The International Centre for Settlement of Investment Disputes (ICSID) is an Investor-State Dispute Settlement (ISDS) arbitration tribunal. The subject-matter jurisdiction of this arbitration tribunal called (the tribunal) requires that the dispute must be arisen out of the investment, though the Convention of ICSID (the ICSID convention) does not define 'investment'. According to the ICSID convention and its rules, the definition agreed by the parties found in the investment treaty or investment agreement covers jurisdictional requirement and ICSID tribunal has followed this approach traditionally. Despite such traditional approach, the tribunal in the ICSID case of Salini Costruttori SPA vs. the Kingdom of Morocco (Salini Case) prescribed four characteristics of an investment in defining investment to satisfy the jurisdiction under article 25 of the ICSID convention in 2001. This development of investment definition is known as Salini approach. Post-Salini, some of ICSID tribunals and Non-ICSID tribunals have shifted from the traditional legal position and developed the definition independently. Though the ICSID jurisprudence on the definition has been heterogeneous, the development plays a significant role on the jurisdiction in the subsequent ICSID tribunals. The autonomous development of jurisprudence in international investment law by the post-Salini international arbitral tribunal is remarkable.*

Keywords: Investment, ICSID Tribunals, Sanili Approach, Traditional Approach, Autonomous Approach

1. Introduction

The ICSID is one of the international ISDS centres in the world which facilitates arbitration for the legal dispute arising out of investment between a state and a foreign investor.[1] The ICSID convention was enforced on 14 October 1966. The ICSID arbitral tribunal is constituted under article 25 of the ICSID convention based on the two jurisdictional conditions. One is subject-

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1 ICSID arbitration tribunals has the jurisdiction over a dispute directly arising out of investment between a contracting state and a national of another contracting state, which the parties to the dispute consent in writing to submit to the centre (Article 25 of the ICSID Convention). Merely a participation in the ICSID convention does not amount to consent to jurisdiction (ICSID Convention, Preamble, Para 7). Even states can accept the jurisdiction of ICSID tribunal not being the party to the Convention.

matter jurisdiction (*ratione materiae*) of ICSID tribunal and another is the parties` consent.[2] The existence of investment is the subject-matter jurisdiction. As the definition of 'investment' is not provided in the ICSID convention,[3] the ICSID tribunal relies on the definition available in an investment treaty agreed on by the parties.

For determining the subject matter jurisdiction, historically tribunals were deferential with what states include asset and economic activities through their BITs (Bilateral Investment Treaties). But in last half decade, the major changes occurred to this approach of tribunals in defining investment[4]. The ICSID tribunal in the *Salini*[5] case shifted from the traditional approach to new approach in 2001. Before *Salini case*, the ICSID tribunal in *Fedax*[6] had slightly differed with the previous tribunal in the history of ICSID jurisprudence. But the *Salini* tribunal recognized four objective criteria explicitly and made them mandatory to become an investment under article 25 of ICSID convention[7]. Thus the *Salini* case was a shift from the traditional approach to new approach in defining investment. This approach is also known as the *Salini* test[8] or restrictive approach[9] or objective approach[10] for determining the subject-matter jurisdiction.

1.1 Justification of the Research

There are many definitions of investment in international investment law and it does not have vacuum in this regard. Many scholars define investment in various ways in their books and articles. Some scholars analyze the approach

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2 *Ibid*

3 Paolo Vargiu, 'Beyond Hallmarks and Formal Requirements: A Jurisprudence Constante on the Notion of Investment in the ICSID Convention' (2009) 10 J. World Investment & Trade 753

4 Julian Davis Mortenson, 'The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law' (2010) 51(1) Harvard International Law Journal p 259

5 ICSID Case No ARB/2000/4, Decision on Jurisdiction (July 23, 2001), 42 I.L.M. 609 (2003)

6 *Fedax NV vs Republic of Venezuela*, ICSID Case No ARB/1996/3, Decision of the tribunal on objections to Jurisdiction (July 11, 1997), 37 ILM 1378 (1998)

7 Alex Grabowski, 'The Definition of Investment under the ICSID Convention: A Defense of Salini' (2014) 15(1) Chicago Journal of International Law 287

8 Jeremy Marc Exelbert, 'Consistently Inconsistent: What Is a Qualifying Investment under Article 25 of the ICSID Convention and Why the Debate Must End' (2016) 85(3) Fordham L. Rev. 1243, 1257;

9 *Supra note* 7; *Supra note* 15

10 Krista Nadakavukaren Schefer, *International Investment Law* (Edward Elgar 2016)

of ICSID tribunal regarding investment definition. Julian Davis Morteneon[11] and Jeremy Mere Excelbert[12] argue that ICSID tribunals should accept the definition that states agree on because the autonomy of state is recognized in international law and the traditional jurisprudence of ICSID accepts what state defines and includes in the definition clause of investment treaty. On the other hand, Mahnaz Malik, Alex Grabowsi and Krista Nadakvukaren stand on the subjective and objective approach in defining investment. Even Salacuse define it as a broad asset-based approach dividing into two categories which are similar to the element of objective test. Dolzer is strict neither on objective criteria nor on party-based approach in defining an investment. Rather he supports a flexible combination between two approaches.[13] A similar way with the autonomous approach Demirkol analyzes article 25 of the ICSID convention for defining investment.[14] Vargui explains the typical characteristics of investment on the basis of the judgment of *Malaysian Historical Salvors case* in defining investment for jurisdictional approach.[15] Therefore it requires a critical discussion on the decision of the ICSID tribunal in *Salini* case whether and how the ICSID tribunal develops a definition of investment or not.

1.2 Methodology

Salini case is the turning point for this research work. This study divides the discussion into Pre-*Salini* and Post *Salini* development. The development is explained based on the primary data and secondary data. The primary data includes the famous ICSID cases, BITs and IIA. It takes journal article, book chapter and commentary as secondary data.

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11 *Supra* note 4 p 259

12 *Supra* note 8

13 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd ed, OUP 2012) 76

14 Berk Demirkol, 'The Notion of 'Investment' in International Law'(2015) 1(1) The Turkish Commercial Law Review 41

15 *Supra* note 3

2. The Concept Of Investment Developed By ICSID Tribunals

The concept of investment has been developed by the centre since 1975. The question regarding subject matter jurisdiction arose in *Alcoa Minerals* case [16] whether Aloca`s operation is investment or not. The tribunal accepted the meaning of investment under article 25 of the ICSID convention traditional way.[17] The consent of the contracting parties and the intention of the draft maker was the basis of the decision. The same approach of ICSID tribunals had continued until the decision of *Fedax v Venezuela* which was made in 1998.[18] The tribunal in *Salini* Case rendered a new approach regarding the determination of investment under article 25 of the ICSID convention. Even some ICSID tribunals constituted after the decision in *Salini* case have followed neither traditional approach nor *Salini* approach. Those tribunals have diluted from *Salini* approach to some extent. In other words, the determination of investment has been developed in article 25 of the ICSID convention in three ways. Firstly, the traditional approach till 2001 means *pre-Salini*; secondly, the restrictive or objective approach developed by *Salini* decision on jurisdiction after 2001 which is known as Salini approach and thirdly, a combined concept of investment where traditional and Salini approach both are followed post-2001 by the ICSID tribunals which is known as autonomous approach.

2.1 Pre-Salini

Traditional approach

In *Holidays Inns vs Morocco*[19], the first ICSID case, the respondent objected over the contract loan that it is not an investment under Article 25 of the ICSID convention.[20] Based on the basic agreement of the parties, the tribunal found its jurisdiction because that contract loan was the general unity of investment operation.[21] The decision of the tribunal in *Alcoa Minerals case*

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16 ARB/1974/2 (1975) of ICSID Case

17 *Ibid*

18 ARB/1996/3 (1997) of ICSID Case

19 ARB /72/1of ICSID case ; *Fedax N. V. vs The Republic of Venezuela* (1996) ICSID ARB/96/3, Decision on Jurisdiction (July 11, 1997) para 26

20 Pierra Lalive, 'The First 'World Bank' Arbitration (Holidays Inns vs Morocco)-Some Legal Problems' page 155 (https://accademic.oup/bybil/article-pdf/51/1/123/6704534/51-1-123.pdf)

21 *Supra note* 19, para 26

was more specific. The tribunal considered the substantial amount as the foreign investment because the mining company relied on the consent of the Republic of Jamaica under the agreement with the Republic of Jamaica.[22] In the case of *Kaiser Bauxite Company*[23] and *Reynolds Jamaica Mine Limited and Reynolds Metals Company,*[24] the tribunal relied also on the consent of the parties. In these cases, the tribunals neither defined nor characterized the investment. Rather tribunals accepted as the investment whatever the parties agreed on.

Following the same traditional approach, though the tribunal of *Liberian Eastern Timber Corporation vs Government of the Republic of Liberia case*[25] determined the meaning of 'investment' what the provision of Article III (1) of the concession agreement between the Government of Liberia and LETCO included, the two characters of investment, the economic and profitable development were identified independent of the agreement.[26] Though this traditional view of the tribunal considered the concession agreement[27] the objective characteristics of investment were expressed. In *SOABI v Senegal,*[28] the tribunal considered an operation encompassing a separate agreement for the existence of an investment.[29]

Development in Fedax case

The respondent in the *Fedax* case, Venezuela, raised the issue that the promissory notes issued by the government of Venezuela did not satisfy the

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22 *Alcoa Minerals of Jamaica Inc. vs. Government of Jamaica*, (1974) ARB/ 74/2 of ICSID, Decision on Jurisdiction and Competence (6 July 1975) in ed. P Sanders, Yearbook Commercial Arbitration, Vol. IV (The Hague Kluwer Law International, 1979) 206; *Supra note 19*

23 ARB/74/3 of ICSID case, Decision on Jurisdiction (6 July 1975) ICSID Reports 1 (1993); *Supra note 19*

24 ARB/74/4 of ICSID case (unpublished)

25 ARB/83/2 (1986) of ICSID case

26 'International Centre For Settlement of Investment Disputes: Arbitral Tribunal Award in Liberian Eastern Timber Corporation (*LETCO vs The Government of The Republic of Liberia* (Recovery of Damages for Breaches of a Concession Agreement)' (May 1987) 26(3) International Legal Materials 647-669 https://www.jstor.org/stable/20693112 Accessed: 16-03-2019 10:44 UTC; *Supra note 19*

27 The Concession Agreement between LETCO and Liberia, 1986

28 ARB/82/1 of ICSID case (August 1, 1984)

29 *Supra note* 19 para 25

elements of an investment under the convention.[30] Hence the tribunal had to differ from the traditional approaches of previous tribunals in analyzing the elements of an investment under article 25. Continuing with the traditional approach, the tribunal in *Fedax* case discussed the characteristics to become an investment. The tribunal opined that the promissory was not the ordinary commercial transaction.[31] As Venezuela relied on the public law that describes the certain elements for being a transaction, the tribunal mentioned[32] that the basic features of investment are a certain period of time, profit and return, assumption of risk, a contribution to the host State's development referring to the commentary of Christoph Schreuer. The promissory notes satisfy the basic features of an investment accordingly. For the first time, any ICSID tribunal analyzed that the investment under article 25 of the ICSID convention has an ordinary meaning. But the tribunal did not make them binding to become an investment as rather the tribunal relied on the consent of the contracting parties,[33] the scope of the bilateral agreement between Venezuela and Netherland[34] and state practices.

Development in CSOB vs Slovakia

The same approach as like *Fedax case* was applied in the case of *CSOB vs Slovakia*[35] in a more formal way taking into consideration the basic features of an investment. The two-fold test method was applied to determine the subject matter jurisdiction of the tribunal regarding a dispute over 'loan granted under consolidate agreement'.[36] First, this tribunal analyzed it under article 25 of the ICSID convention and secondly, analyzed the definition found in the (Bilateral Investment Treaty) BIT agreed by the parties to define and determine whether the loan is investment or not.[37]

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30 *Ibid*, para 25
31 *Ibid*, para 42
32 Christoph Schreuer: "Commentary on the ICSID Convention," ICSID Review-Foreign Investment Law Journal, Vol. 11, 1996, 316, 355-358, 372
33 *Ibid*, Para 31
34 Bilateral Investment Agreement between the Republic of Venezuela and the Kingdom of Netherland 1991
35 Case No ARB/97/4, Decision on Jurisdiction (May 24, 1999)
36 *Ibid*, Para 68
37 *Ibid*, Para 68

2.2 Post-Salini

A significant development of the ICSID jurisprudence occurred in *Salini* case regarding the definition of investment in 2001.[38] The foreign investor was an Italian company in this case and the Kingdom of Morocco was the host country. The Italian company, the claimant, constructed a road from Raba to Fej by an agreement abiding by the laws and regulations of Morocco. This project was expected to finish by 32 months but took four months more to complete.[39] The work was finally handed over to the government of Morocco on October 26, 1999. The Italian company sent a memorandum of that accounts to the head of ADM and to the ministry of infrastructure in September 1999 but they did not reply to the claimant.[40] The claimant requested for arbitration on May 1, 2000 and this case was registered on 13 June 2000. The tribunal was constituted based on the consent of both parties. The respondent, the government of Morocco, made three objections at the preliminary stage of the proceedings. One of those objections was that the Tribunal did not have jurisdiction of *ratione personae* and *ratione materiae*.[41] The Kingdom of Morocco submitted that the definition clause of bilateral investment treaty between Italy and Morocco does not include it as an investment. Hence the tribunal did not have *ratione materiae* under the convention.[42] The claimants said that the dispute over the non-performance of contract is an investment under article of 1(c) and 1(e) of the bilateral[43] treaty because the contract has economic value.[44] The respondent argued that this broader definition of investment is diluted from[45] the Washington convention. Hence the contract does not constitute an investment within the meaning of the convention.[46] The opinion of the arbitral tribunal was that its jurisdiction depends upon the existence of an investment within the meaning of the bilateral treaty as well as that of the Convention.[47]

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[38] *Supra note* 5
[39] *Ibid*, Para 4
[40] *Ibid*, Para 5
[41] *Ibid*, Para 10
[42] *Ibid*, Para 36
[43] The Treaty between the Government of the Kingdom of Morocco and the Government of the Republic of Italy for the reciprocal promotion and protection of investments, signed on July 18, 1990, which came into force on January 1, 1992
[44] *Ibid*, Para 37
[45] *Ibid*, Para 38
[46] *Ibid*, Para 39
[47] *Ibid*, Para 44

The tribunal emphasized on the development of ICSID cases regarding the meaning of investment and found a separate meaning in the ICSID jurisprudence. The tribunal opined that the meaning of investment developed by the ICSID case had to be satisfied also in addition to the definition clause of bilateral treaty.[48] Both parties in Salini case agreed that the definition of investment under the convention is not provided referring to the report of Executive Director.[49] The tribunal noted that the respondent raised a question regarding the meaning of investment under article 25 of the convention in almost every case and the concept of investment under article 25 cannot be diluted by the consent of the contracting parties. Rather it is observed that there is an independent meaning of investment in that article. This requirement must be fulfilled as the jurisdiction of the Centre.[50] The tribunal referred to *Fedax v Venezuela* and said that this is the first ICSID case where the elements of investment are explained based on the commentary of E Gaillard and scholarly writings of IFI Shihata and A .R Parra.[51] Hence four elements of investment are: 1.contributions of money, 2. certain duration 3.an involvement of risks in the transaction and 4.the contribution to the economic development of the host State.[52] The tribunal tested the contract in issue of the Italian company by these four-prong and found that contract in issue was an investment under the ICSID convention.[53] This decision of the tribunal, therefore, is marked as Salini approach which is known as objective or restrictive approach.

Salini approach

The four elements set forth in *Salini case* have been mandatory qualifications for an investment under article 25.[54] Such qualifications of an investment under article 25 are identical with the economic meaning of investment.[55] This legal meaning of investment has been developed only by the ICSID tribunals and finally determined by the tribunal of Salini case.

What does the contribution in money means? The tribunal analyzed that know-how of Italian companies, the necessary equipment and qualified

48 *Ibid*, Para 46
49 *Ibid*, Para 51
50 *Ibid*, Para 52; the commentary by E. Gaillard, in JDI 1999, p. 278 et seq., who cites the award rendered in 1975 in the Alcoa Minerals vs. Jamaica case as well as several other authors
51 *Ibid*, Para 52
52 *Ibid*, Para 52
53 *Ibid*, Para 58
54 *Supra Note* 30, Page 66
55 *Ibid*, Page 66

personnel for the accomplishment of the works, the production tool on the building site, obtained loans enabling them to finance, and bank guarantees are the contribution in money and in industry.[56]
Thus the Salini tribunal assessed that the minimal duration would be two to five years for certain duration of investment[57] and the risk in the transaction is consisting of the potential increase in the labour cost due to modification of Moroccan law, any accident or damage caused to property during the performance of the works, problems of coordination possibly arising from the simultaneous performance of other projects and any unforeseeable incident that could not be considered as force majeure.[58]
The Tribunal assessed the contribution to the economic development that the highway would make the contribution to the growth GDP of Morocco.[59] The above four elements are amount to investment under article 25 of the ICSID convention. Therefore the anything cannot be investment unless satisfaction the four elements.

The mention of four features of an investment in Salini case is not the first time. Before the decision of *Salini*, the ICSID tribunal of *Fedax* case and *CSOB* had mentioned similar features of investment. But the decision in Salini case is different from the traditional approach because the tribunal has considered the four criteria as the cumulative mandatory jurisdiction requirement.[60] When the subsequent ICSID tribunals have accepted the Salini approach, the four elements of investment become a test to determine an investment[61] in international investment law especially in ICSID jurisprudence.

The tribunal in *SGS vs Pakistan*[62] has analyzed the Pre Shipment Inspection (PSI) agreement and activities of SGS objectively considering the decision of *Fedax* and *CSOB* approach that PSI agreement is an investment.[63] Even the respondent of the case also depended on the decision of Salini.[64] This

56 *Supra note* 19
57 *Ibid*, Para 54
58 *Ibid*, Para 55
59 *Ibid*, Para 58
60 *Supra Note* 30, Page 66
61 *Ibid*, page 67
62 *SGS Société Générale de Surveillance S.A. v. the Islamic Republic of Pakistan* (2001) ARB/01/13 of ICSID case, the decision on jurisdiction (6 August 2003)
63 *Ibid*, Para 126
64 *Ibid*, Para 104

restrictive or objective approach regarding the definition of investment under article 25 is discussed in the footnote in detail in this case in responding the question whether the contested issue has arisen directly out of investment or not.[65]

The ICSID tribunal in *AES Corporation vs Argentina* analyzed the same elements for determination of investment. The tribunal observed that AES made a contribution in capital over a reasonable period of time for the economic development of Argentina taking the risk associated with the transaction.[66] The tribunal also accepted that AES suffered losses as a result of its investment in Argentina.[67]

The parties in *Bayindir vs Pakistan*[68] referred the decision of *Salini vs Morocco* for determination of subject matter jurisdiction under article 25 of the ICSID convention.[69] Pakistan objected to the jurisdiction of the tribunal that there lacked the subject matter jurisdiction because the issue did not arise out of investment within the meaning of BIT[70] and article 25 of the ICSID convention.[71] As both parties relied on the *Salini* test, the tribunal applied the *Salini* test and examined whether the construction of highway satisfied the four elements of investment.[72] Interestingly the fact of the case is similar to that of *Salini vs Morocco*. The government of Morocco raised the same question as Pakistan has raised the same in the present case. But the tribunal has referred to two more cases because it has differed from the explanation about duration and economic development contribution to the host country. In the explanation of duration, the Tribunal has referred to the decision of *Joy Mining*[73] where the tribunal said that the construction of highway requires heavy capital and service and long-term commitment.[74] The fourth condition

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65 *Ibid*, Para 133
66 *AES Corporation v Argentina* (2002)ARB/02/17 of ICSID case, Decision on Jurisdiction (26 April 2005) Para 88
67 *Ibid*, Para 86
68 *Bayindir Insaat TuRizm v the Islamic Republic of Pakistan* (2003) ARB/03/29 of ICSID case, Decision on Jurisdiction (16 November 2005)
69 *Ibid*, Para 130
70 Agreement Between the Republic of Turkey and the Islamic Republic of Pakistan Concerning the Reciprocal Promotion and Protection of Investments" of 16 March 1995
71 *Ibid*, Para 104
72 *Ibid*, 130
73 *Joy Mining Machinery Limited vs The Arab Republic of Egypt*, ICSID Case No ARB/03/11, Decision on Jurisdiction (6 August 2004)
74 *Ibid*, Para 132

has been explained and emphasized more elaborately than *Salini*. In this context, the tribunal has added "significant" word as an adjective with economic contribution.[75] However, there has been consistent development regarding the explanation to the elements of an investment with *Salini* approach referring to the decision of *L. E. S. I case.*[76] The tribunal uttered this condition that is already included in the three classical conditions set out in the '*Salini* test'.[77]

But the fact in the case of *Jan de Nul vs Egypt*[78] is different from the previous one. The claimants, dredging company incorporated in Belgium, took a tender from SCA (Suez Canal Authority) and both parties made a contract to accomplish the dredging in Suez Canal. The claimants complained that SCA concealed significant information about the nature of the soil. Therefore they had to suffer loss. The claimants went to the civil court of Egypt seeking compensation. When the suit was at the stage of appeal in the High Court, they requested for arbitration to the centre under the 1977 BIT[79] and 2002 BIT.[80] The tribunal in this case found a common issue from both parties' submission was whether the dispute arose out of an investment or not. The tribunal accepted the *Salini* test[81] and agreed that the activities of claimants regarding with the dredging operation in the Suez Canal clearly satisfied the elements of investment.[82] The duration of dredging operation has been more disputed matter than other three conditions of an investment and finally, both parties agreed that at least two years can satisfy the condition and the time of the pre tender work was also considered for the duration.[83]

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75 *Ibid*, Para 137
76 ICSID Case No ARB/03/08, Award of 10 January 2005
77 *Ibid*, Para 137
78 *Jan de Nul N. V. v The Arab Republic of Egypt* (2004) ARB/04/13 of ICSID case
79 Agreement between the Belgo-Luxembourg Economic Union on the one hand, and the Arab Republic of Egypt on the other hand, on encouragement and reciprocal protection of investments of 28 February 1977
80 Agreement between the Belgo-Luxembourg Economic Union on the one hand, and the Arab Republic of Egypt on the other hand, on encouragement and reciprocal protection of investments of 28 February 1999
81 *Supra Note* 78, Para 91
82 *Supra Note* 73, Para 92
83 *Supra Note* 76, Para 94

The tribunal in *Saipem case* has accepted Salini approach.[84] Saipem, an Italian company, signed a contract with PetroBangla for constructing a gas pipeline and it was to finish before 30 April 1991. It was delayed due to local opposing the construction and the construction was finished in June 1992 and Petro Bangla took over the work on 14 June 1992. The dispute was that delaying the second payment and not returning the warranty bond to Saipem which was issued by it as a guarantee. Saipem went for arbitration under ICC and got an award in favour of them and told Petro Bangla to pay the rest amount and give back the warranty bond. Petro Bangla went to Dhaka civil court against that order and the court made an order of injunction and Saipem appealed to the High Court Division of the Supreme Court of Bangladesh and the same time requested to the centre for arbitration under BIT[85] between Italy and Bangladesh. The centre accepted the request and composed a tribunal based on the consent of both parties. Bangladesh objected regarding the subject matter jurisdiction because it was a contract claim relied on the decision of *SOABI vs Senegal*.[86] But the tribunal applied well-known Salini test to examine whether contract satisfies the four elements of an investment[87] and the tribunal concluded that the contract satisfied all four conditions of Salini test.[88]

Traditional approach

Post-2001, the approach of ICSID tribunal in defining investment under the Convention is not uninformed. The traditional approach has been accepted in *MCI vs Ecuador*.[89] The respondent argued that four elements of salini test/approach such as certain duration of investment, the expectation of profits, the assumption of risks, and significance contribution to the host State's development did not exist in the sea coast contract.[90] In reply, based on the *Fedax vs the Republic of Venezuela* and the *CSOB v Slovakia* cases, the

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84 *Saipem S. P. A v The People's Republic of Bangladesh*, (2007) ARB/05/07 of ICSID case, Decision on Jurisdiction (21 March 2007)

85 "Agreement Between the Government of the Republic of Italy and the Government of the People's Republic of Bangladesh on the Promotion and Protection of Investments" of 20 March 1990

86 *Ibid*, Para 103

87 *Ibid*, Para 99

88 *Ibid*, Para 110, 111

89 *M.C.I v Republic of Ecuador*, ICSID Case No ARB/03/6, Award (July 31, 2007); See also *Bear Creek Mining vs Republic of Peru*, ICSID Case No ARB/14/21, Award (30 November 2017) ; *Postova Banka vs The Hellenic Republic*, ICSID Case No ARB/13/8, Award (15 June 2018); *Churchil Mining v Republic of Indonesia*, ICSID Case No ARB/12/14 and 12/40, Decision on Jurisdiction (24 February 2014); *Planet Mining v The Republic of Indonesia*, ICSID Case No ARB/12/14 and 12/40, Decision on Jurisdiction (14 February 2014); *Rafat Ali Rizvi vs The Republic of Indonesia*, ICSID Case No ARB/11/13, Award on jurisdiction (16 July 2013)

90 *Ibid*, Para 138-139

claimant argued that the scope of the ICSID Convention cannot limit what BIT includes as investment.[91] The tribunal said that the required elements of investment followed in Salini case must be considered as mere examples and not necessary elements. Nevertheless, the tribunal considered the seacoast project and the consequences thereof within the characterizations of investment required by BIT.[92] The traditional approach of this tribunal has made an intermission in the continuous development of Salini approach.

An autonomous approach

Many ICSID tribunals have followed a divergent view from Salini approach and the traditional approach. The sole arbitrator in *Malaysian Historical Salvors case*[93] did not follow the traditional approach and Salini approach strictly. A degree of divergence appears when the tribunal did not consider all four elements of investment cumulatively. Regularity in the return of profit is one of the four elements was treated as immaterial in defining investment under article 25 of the ICSID convention.[94] In the same time, the tribunal, in this case, examined all elements of Salini criterions very closely and considered the significant contribution to the economic development to the host country was more important for determination of investment under that article.[95] The explanation in this case matches neither with traditional approach nor with Salini approach.

The argument of respondent in *Biwater Gauff Tanzania (BGT) (Ltd) vs Tanzania*[96] was relied on the Salini test. He argued that the project did not satisfy the element the regularity in the return of profit because the project was a loss leader. As such an inevitable unprofitable venture cannot itself be regarded as an "investment" within the meaning of the ICSID Convention and in particular.[97] The opinion of the tribunal is that the Salini test is not fixed or mandatory as a matter of law in international investment law and the application of it does not have a basis of rote, or overly strict in every case.[98] Moreover, the tribunal considered a the identified features of investment of Salini test, the circumstances of the case and the nature of legal instrument

91 *Ibid,* Para 148
92 *Ibid,* Para 165
93 ICSID Case No ARB/05/10, Award on Jurisdiction, May 17, 2007
94 *Supra Note* 105, Para 108
95 ICSID Case No ARB/05/10, Award on Jurisdiction, May 17, 2007, Para 125-145
96 ICSID Case No ARB/05/22, Award (July 24, 2008)
97 *Ibid,* Para 307
98 *Ibid,* Para 312

agreed by the parties which is more flexible and pragmatic approach to the meaning of investment.[99] Hence it is observed that the development of jurisprudence regarding the definition of investment under article 25 is not consistent.[100] Therefore the admission of existence of an investment became criteria of the tribunal.[101]

The analysis of ad hoc annulment committee in *Malaysia Historical Salvors case* is closer to the traditional approach.[102] The critique of the committee regarding the Salini approach is direct and elaborate.[103] The annulment committee referred to the *travaux préparatoires* and denied the imposition of an outer limit on the jurisdiction defining the investment.[104] This committee found that elements of investment in *Salini* test is largely consistent with the commentary of professor Christoph Schreuer and these are not jurisdictional requirement for the ICSID tribunal. Rather these are typical characteristics of investments under the Convention.[105] Referring to the decision of *Biwater vs Tanzania,* the committee opposed to apply the elements of investment developed by the *Salini case* in every ICSID case.[106]

In *Pantechniki vs Albania*[107] the tribunal discussed Douglas`s formulation of rule 23 rejecting the Salini test.[108] In the criticism, the tribunal observed that two subjective elements of Salini test, a certain duration of investment and significant contribution to the economic development of the host country, cannot be justified properly and uniformly.[109] Hence this award justifies a combined approach between the two. This development is held autonomously

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99 *Ibid*, Para 316
100 *Mihaly v Sri Lanka*, Award, 15 March 2002, Para 33
101 *Ibid* Para 62 (b)
102 *Malaysia Historical Salvors v Malaysia*, Decision on Annulment, 16 April 2009
103 Rudolf Dolzer and ChristophSchreuer, *Principles of International Investment Law* (2nd ed, OUP 2012) 68
104 *Supra Note* 115, Para 69
105 *Supra Note* 115, Para 76
106 *Ibid*, Para 79
107 *Pantechniki vs Albania*, Award, 30 July 2009
108 Zachary Douglas, the author of a book named '*The International Law of Investment Claims*' published by Cambridge University Press in 2009, designed the content of this book mentioning Rule 1 to Rule 56 following the procedure of investment dispute arbitration. Rule 23 of this book talks about the economic materialisation of an investment which requires only the commitment of resources to the economy of the host state by the claimant entailing the assumption of risk in expectation of a commercial return and it does not retain the Salini criteria
109 *Ibid*, Para 36, 43

by the ICSID tribunals after Sanili approach. The tribunal acknowledged the development of Salini test in international investment law. The ICSID convention and BIT both play a role for determination of subject matter jurisdiction[110] and the consent of the parties.[111] This tribunal further observed that the article 25 of the convention has an inherent meaning according to Douglas`s 23 rule and that meaning is known as investment.[112]

The tribunal in *RSM vs Grenada*[113] accepted the *Salini* test as a flexible benchmark and looked into the overall project that was considered as investment.[114] In *Alpha vs Ukraine,*[115] the tribunal opted the definition clause in BIT and the context of article 25 as well. Generally the tribunal should rely on the BIT agreed by the parties and in exceptional circumstances; the definition available in BIT could be rejected.[116]

The submission of respondent could not convince the tribunal in *Inmaris vs Ukraine.*[117] Where the respondent argued based on the significant contribution of economic development to the host country. As this element of investment was not satisfied, the respondent claimed the non-existence of investment in this case.[118] The tribunal rejected the argument based on the *Salini* test and opined that the case cannot impose such a mandatory definition to the ICSID Convention inappropriately.[119] Rather the tribunal deferred to the decision of contracting state of the ICSID convention. The contracting parties intentionally made the provision of the ICSID convention without mentioning definition or elements of investment and accepted what the definition of investment in BITs means and includes.[120] But this tribunal accepted the Salini test as a useful method in some circumstances to examine where a BIT or contract provide so broad definition that might cover a transaction as

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[110] The Albania-Greece Bilateral Investment Treaty of 1991
[111] *Ibid*, Para 41
[112] *Ibid,* Para 47
[113] *RSM vs Grenada*, Award, 13 March 2009
[114] Rudolf Dolzer and ChristophSchreuer, *Principles of International Investment Law* (2nded, OUP 2012) 69; Ibid Para 255
[115] *Alpha vs Ukraine*, Award, 8 November 2010
[116] *Supra* Note 126, page 70
[117] *Inmaris vs Ukraine*, Decision on Jurisdiction, 8 March 2010
[118] *Ibid*, Para 128
[119] *Ibid*, Para 129
[120] *Ibid*, Para 130

investment that would not normally be characterized as an investment under any reasonable definition.[121]

The ICSID tribunal found that elements of Salini test seem to correspond to the purpose of the ICSID Convention. The preamble of convention provides three characteristics of investment. In order to constitute an investment within the meaning of its provision, the following three elements must be met: (i) that a contracting party to the agreement makes a contribution in the host country, (b) that such contribution is made with a certain duration in mind, and (c) that it contains an element of risk for the person making such contribution. In addition to these three elements, a contribution to the economic development of the host country, a fourth element of the Salini test, is not necessary to establish. This is, in any event, is difficult to establish.[122]

The observation of the tribunal in *Fakes vs Republic of Turkey*[123] was that the framework of the ICSID convention contemplated the required objective elements of investment. These objective elements of investment are distinguishing from the definition that partied agreed on.[124]

In *Phoenix Action, Ltd vs The Czech Republic,*[125] the application of a protected mechanism under the ICSID Convention and a mechanism under the BIT[126] was analyzed. It shows that a balance approach was followed to determine the case.
In *GEA Group vs Ukraine case,*[127] the conversion contract was questioned whether it was investment or not. Though the definition provided in the BIT covered the conversion contract,[128] the tribunal examined whether the conversion contract satisfies the objective elements of investment. In the

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[121] *Ibid*, Para 131

[122] *LESI-Dipenta v. Algeria* (ICSID Case No. ARB/03/08), Award, January 10, 2005, paraII.13(iv). See also *Bayindir v. Pakistan (*ICSID Case No. ARB/03/29), Decision on Jurisdiction, November 14, 2005, Para 131-137; *Mr Saba Fakes v Republic of Turkey*, ICSID Case No ARB/07/20, Award, July 14, 2010, Para 102

[123] *Mr Saba Fakes v the Republic of Turkey*, ICSID Case No ARB/07/20, Award, July 14, 2010

[124] *Ibid,* Para 108

[125] ICSID Case No ARB/06/5, Award, April 15, 2009

[126] The Agreement between the Government of the Czech Republic and the Government of the State of Israel for the Reciprocal Promotion and Protection of Investments, which was signed on September 23, 1997

[127] *GEA Group vs Ukraine*, ICSID Case No ARB/08/16, Award, 13 March 2011

[128] The Agreement between the Federal Republic of Germany and Ukraine on the Promotion and Mutual Protection of Investments, dated 15 February 1993

observation of the tribunal, article 25 placed a limitation on the ability of state parties to define investment in BIT for the purpose of the convention.[129] The objective elements were some contribution to Ukraine, a certain period of time and the risks of the economic operation.[130] But the tribunal criticized the Salini test and referred the approach applied in *Phoenix vs the Czech Republic*[131] and *Biwater vs Tanzania.*[132]
In *Abaclat and others vs the Argentine Republic,*[133] the double-barrelled test was applied. In other words, the issue was examined according to the definition provided BIT and the definition developed under article 25 of the ICSID convention by the different ICSID tribunals.[134] This tribunal made it mandatory. In the double barreled test, the consideration of the preamble of BIT[135] and the convention is analyzed and examined to identify elements of investment. The same analysis was also drawn in *Malicorp v Egypt*[136].

The ICSID tribunals constituted from 1975 to 1986, from the first case of Alcoa *Minerals of Jamaica Inc.* to *LETCO* case, followed the traditional approach strictly. This traditional approach was liberalized in the decision of *Fedax* case and *CSOB vs Slovakia* in 1997 and 1999 respectively. The elements of investment under article 25 of the ICSID Convention were

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[129] *Ibid,* Para 151
[130] *Ibid,* Para 151
[131] *Ibid,* Para 140
[132] *Ibid,* Para 142
[133] *Abaclat and other vs The Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and admissibility (4 August 2011)
[134] *Ibid,* Para 351
[135] The Agreement between the Argentine Republic and the Republic of Italy on the Promotion and Protection of Investments, signed in Buenos Aires on 22 May 1990
[136] Rudolf Dolzer and ChristophSchreuer, *Principles of International Investment Law* (2[nd]ed, OUP 2012) 72 See also *Malicorp Limited v The Arab Republic of Egypt*, ICSID Case No ARB/08/18, Award, 7 February 2011; *Cortec Mining Kenya Ltd and Stirling Capital Ltd v Republic of Kenya*, ICSID Case No ARB/15/29 (22 October); *Beijing Urban Construction Group Co. Ltd v Republic of Yemen*, ICSID Case No ARB/14/30 (13 May 2017); *Blusun S. A. v Italian Republic*, ICSID Case No ARB/14/13, Award (27 December 2016); *Union Fenova Gas S A v The Arab Republic of Egypt*, ICSID Case No ARB/14/4, Award (31 August 2018); *Masdar Solar & Wind Cooperatief UA v Kingdom of Spain,* ICSID Case No ARB/14/1, Award (16 May 2018); *Eiser Infrastructure Ltd v Kingdom of Spain,* ICSID Case No ARB/13/36, Award (4 May 2017); *Philip Morris v Uruguay*, ICSID Case No ARB/10/7, Decision on Jurisdiction (2 July 2013); *H&H Enterprises Investments, Inc v Egypt*, ICSID Case No ARB/09/15, Decision on Jurisdiction (5 June 2012); *Burlington Resources Inc v The Republic of Ecuador,* ICSID Case No ARB/08/5, Decision on Jurisdiction (2 June 2010);*AmbienteUfficio S P A vs The Argentine Republic*, ICSID Case No ARB/08/9, Decision on Jurisdiction (8 February 2013)

asserted in these two decisions but these elements were not mandatory for the existence of an investment. The definition of investment in BITs agreed by the parties through which the parties gave their consent to the jurisdiction of the centre was the basis for the subject matter jurisdiction. The tribunal in *Salini vs Morocco* brought a new approach which is known as Salini approach/objective approach in 2001. The Salini approach, basically, has identified four elements of investment under article 25 of the ICSID convention. These four elements of investment have contemplated a definition of investment while determining the jurisdiction of the centre. The Salini approach is a test method to examine a disputed issue whether it is investment or not under article 25 of the Convention. This test had been an independent and mandatory in the ICSID jurisprudence since 2001 because almost all ICSID tribunals followed this new approach continuously for years after 2001. But this Salini approach was diluted in the application of test in uniformed way in the case of *Biwater Gauff Tanzania vs Tanzania* in 2007. Then a balanced approach was developed which is known as autonomous approach. This approach does not reject the four elements of investment. It makes flexible to identify and satisfy those four elements. The acknowledgement of the Salini approach, whether it is flexible or mandatory, shows that the ICSID tribunals post 2001 a definition of investment has been developed consistently in international investment law. Hence there is no a rule of precedent in international investment law and international law as well. But international investment law has brought such change in developing the Salini test which is remarkable and significant.

3. Conclusion

Salini vs Morocco case has been a most celebrated or a most criticised not only by the tribunals under the ICSID Convention but also by other ISDS tribunals[137]. When the question arises regarding the existence of an investment in any dispute, the tribunal either relies on or departs from the *Salini* test.[138] The economic meaning of investment has been transformed into legal meaning for the first time by the decision of *Salini vs Morocco.*[139] *Salini* approach followed the deductive methodology to identify the definition of investment. This approach introduced a true definition of an investment. Therefore, the

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137 Emmanuel Gaillard and Yas Banifatemi, 'The Long March Towards a Jurisprudence Constante on the Notion of Investment' in Meg Kinnear, Fischer, Almeida, Arias and Bidegain (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International 2015)

138 *Ibid*, Page 98

139 *Supra Note* 230, Page 66

Salini approach made two important contributions to international investment law. Firstly, it gave fully effect to the requirement under article 25 of the Convention and secondly, it proposed a notion of investment within the meaning of article 25 of the ICSID Convention.[140]

The methodology of *Salini vs Morocco*, the tribunals adhering to this approach have based their assessment on the presumption that there exists a true definition of an investment, and that such definition is based on constitutive elements or criteria. This same methodology is also followed in subsequent by many ICSID tribunals and Non-ICSID tribunals. For examples *SGS vs Pakistan, AES Corporation vs Argentina, Bayindir vs Pakistan, Jan de Nul vs Pakistan, Saipem vs Bangladesh, Joy Mining vs Egypt, LESI-Depinta vs Algeria, Pay Casado vs Chile and Patrick Mitchel vs Democratic Congo*. The ICSID tribunals in those cases said that a definition of investment does exist within the meaning of the ICSID Convention and that it does not suffice to note the existence of certain 'characteristics' which are typical of an investment to satisfy this objective requirement of the Centre's jurisdiction[141]. Each tribunal differs on the number of constitutive elements of investment under Article 25 of the Convention.

On the other hand, others tribunals have rejected the inclusion of a fourth criterion in the definition of investment, based on the notion that while the economic development of a host State is one of the proclaimed objectives of the ICSID Convention, this objective is not an independent criterion for the definition of an investment. These include *LESI Dipenta vs Algeria, Saba Fakes vs Turkey, RSM vs the Central African Republic, Quiborax v. Bolivia, Electrabel vs Hungary, and KT Asia vs Kazakhstan*. For example, the tribunal in *PeyCasado* said that the definition comprises only three elements. The requirement of a contribution to the economic development of the host States relates to the merits of the dispute and not the jurisdiction of the Centre. An investment may prove useful or not for a host State without it losing its quality. It is true that the Preamble to the ICSID Convention mentions the contribution to the economic development of the host State. However, this reference is presented as a consequence and not as a condition of the investment.[142]

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[140] *Supra Note* 232, Page 104
[141] *Ibid*, Page 114
[142] *Ibid*, Page 117

The significant impact of *Salini vs Morocco* can also be seen in the attempts by certain tribunals to not only apply its criteria, but also to supplement them by a further condition such as the regularity of profit and return, or the further requirements that investments be made in good faith and in accordance with the law of the host State[143]. For example, the tribunal in *Phoenix vs Czech Republic* added the legality of the investment and good faith constitutive elements. And the tribunal in Joy mining added the regularity of profit and return. Thus the Salini approach contributes to the development of a jurisprudence constante especially in giving of the economic meaning of investment under Article 25 of the convention where it did not have to that much development by the ICSID tribunals before 2001. The Salini approach has reflected on the most important source of international investment law that is international investment agreement, bilateral investment treaties.

143 *Ibid*, Page 120