# Chapter 6
# Must Investments Contribute to the Development of the Host State? The *Salini* Test Scrutinised

**Dai Tamada**

**Abstract** The *Salini* test, established in the *Salini* case, is composed of four conditions for identifying what constitutes an *investment* under Article 25(1) of the ICSID Convention. This test, however, is among the most controversial topics in investor-State arbitration, as it has been accepted by many tribunals, whilst, at the same time, has been widely criticised by many other tribunals. Among the four conditions, the most criticised is the fourth; namely, the contribution of a transaction to the *economic development* of the host State. Post-*Salini* tribunals have been divided into two camps: one, which accepts the *Salini* test per se, and another, which criticises, modifies, or outright rejects any such economic development condition. So far, these two trends in the arbitral jurisprudence have yet to be reconciled and, thus, it would be premature to identify a definitive conclusion as to whether the *Salini* test holds as it is, or has been modified or entirely rejected by post-*Salini* tribunals. That said, the *Salini* test, particularly the development condition, presents a precious opportunity to reconsider the relationship between *investment* and *development*, both of which, at varying degrees, represent key aspects of the international legal system pertaining to the resolution of investment disputes. At the same time, through the prism of this relationship, there is scope to introduce variations to the notion of *development*, namely, that of *sustainable development*. This contribution aims at outlining the principal contours of the argumentation that seeks to introduce this notion in international investment law and arbitration.

**Keywords** Investor-State arbitration · ICSID · Definition of investment · The *Salini* test · Economic development · Sustainable development

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## 6.1 Introduction

In investor-State arbitration, a seemingly simple question that has been posed and which remains widely debated is whether foreign *investment* must contribute to the *development* of the host State. Needless to say, the notion of *investment* is pivotal in international investment agreements (IIAs) and investor-State arbitration, since their main purpose is the protection of *investment*. However, what constitutes an *investment* is not always clearly defined in IIAs or the ICSID Convention. *First*, States may freely define the notion of investment in their IIAs. However, IIAs normally contain non-exhaustive lists as to what constitutes *investment*, including all manner of assets. Against this broad definition, or lack of definition per se, scholars have long attempted to limit the scope of investment, by excluding, for example, types of assets such as portfolio investments and indirect investment.[1] In actual investment cases, in any event, the definition issue may be resolved pursuant to the definition provision specific to each IIA and the specific context of each IIA. *Second*, to the contrary, the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) contains no definition of *investment* and, as a result, should an investor attempt recourse to an ICSID tribunal, it would have to inevitably address the definition issue, should this be posed. In that sense, the definition issue under the ICSID Convention is of broader significance than that of IIAs. In addition, this issue appears as that of jurisdiction *ratione materiae*, since Article 25(1) of the ICSID Convention allows tribunals to establish jurisdiction solely on *investment*, as follows:

> The *jurisdiction* of the Centre shall extend to any legal dispute *arising directly out of an investment*, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally (emphasis added).

The definitional issue has been raised in terms of objections to the jurisdiction of the ICSID tribunals. In response to this, the tribunal in the *Salini* case formulated the so-called *Salini* test, composed of four conditions for the purposes of determining whether a transaction amounts to an *investment* within the context of the ICSID Convention. This chapter focuses on the content of the *Salini* test, with particular attention to its fourth condition, which requires that for a positive finding of *investment* that it ought to contribute to the development of the host State. In other words, unless an asset or operation contributes to the host State's development, it cannot constitute investment under the ICSID Convention, and, consequently, cannot justify the jurisdiction *ratione materiae* of the ICSID tribunal. Inevitably, this leads one to consider and re-analyse the relationship between investment and development. As the drafting history of the ICSID Convention lends little support for clarifying the integrity of the *Salini* test, including its fourth condition,[2] the analysis takes arbitral

[1] Sornarajah [1].

[2] Fellenbaum [2].

practice as its starting point, hence the focus on the pre- and post-*Salini* cases, and the *Salini* case itself in subsequent sections.

## 6.2 The *Salini* Test: Background, Implications and Acceptance

### *6.2.1 Pre-***Salini** *Cases Relating to the Definition of Investment*

It would be incorrect to claim that the *Salini* tribunal clarified, for the first time in the history of the ICSID Convention, the conditions of investment.[3] The tribunal in *Fedax v. Venezuela* (1997)[4] had already shown certain criteria of investment, where the issue before the tribunal had been whether an acquisition of promissory notes, issued by the Venezuelan state in connection with the contract, constitutes investment.[5] The tribunal stated as follows:

> The basic features of an investment have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and *a significance for the host State's development*. […] And most importantly, there is clearly *a significant relationship between the transaction and the development of the host State*, as specifically required under the Law for issuing the pertinent financial instrument. It follows that, given the particular facts of the case, the transaction meets the basic features of an investment (emphasis added).[6]

This finding is worth being analysed from several perspectives. *First*, the *Fedax* formula is based on the scholarly opinion of Professor Schreuer,[7] and is composed of five elements, which are almost identical to the *Salini* test, apart from the element of 'regularity of profit and return'. Several tribunals in the pre-[8] and post-*Salini* cases followed the *Fedax* formula, rather than the *Salini* test in relation to the post-*Salini* cases. *Second*, according to the *Fedax* tribunal, the promissory notes satisfy the condition of 'significance of the host State's development', even though the financial

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[3] Kang [3, pp. 159–160].

[4] *Fedax N.V. v. Venezuela* is one of them. *Fedax N.V. v. Venezuela*, ICISD Case No. ARB/96/3, Award on Jurisdiction (11 July 1997).

[5] The tribunal explains the 'promissory note' as follows: '[a] promissory note is by definition an instrument of credit, a written recognition that a loan has been made. In this particular case the six promissory notes in question were issued by the Republic of Venezuela in order to acknowledge its debt for the provision of services under a contract signed in 1988 with Industrias Metalúrgicas Van Dam C. A.; Venezuela had simply received a loan for the amount of the notes for the time period specified therein and with the corresponding obligation to pay interest'. Ibid., para. 37.

[6] Ibid., para. 43.

[7] Ibid., endnote 63; Schreuer [4].

[8] *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision on Jurisdiction (16 July 2001), para. 65.

instrument—in that case, the promissory notes—was generally regarded as borderline. *Third*, crucially, the *Fedax* formula does not express the conditions under the ICSID Convention Article 25(1), since it regarded Article 25(1) as only requiring consent of the contracting States, which is expressed in a particular IIA.[9] Consequently, the jurisdictional requirements under the ICSID Convention and under a particular IIA are integrated into one whole, and this is why the *Fedax* formula should be understood as containing the criteria of investment under both instruments.[10]

A further pre-*Salini* case is *CSOB v. Slovakia* (1999)[11] in which a near-identical issue was raised to the tribunal, and identical reasoning was advanced by the tribunal. *First*, the tribunal had to address whether a loan constitutes investment under the ICSID Convention *and* the BIT. The tribunal answered affirmatively that '[t]his is so, if only because under certain circumstances a loan may contribute substantially to a State's economic development'.[12] *Second*, as to the definition of investment, the tribunal integrated the ICSID Convention and the BIT as a whole, in the same ways as the *Fedax* tribunal. As shall be addressed in subsequent sections of this chapter, the *Salini* tribunal isolated the ICSID investment from the BIT investment for the first time,[13] which is the reason that the *Salini* case is regarded as the leading case on the definition of investment *under the ICSID Convention*. *Third*, notably, the *CSOB* tribunal relied on the preamble of the ICSID Convention to deduce the development condition.[14]

### *6.2.2 The* Salini *Test*

In *Salini v. Morocco* (2001),[15] the tribunal had to consider whether a construction contract with regard to a highway qualified as investment under the ICSID Convention. On this, the tribunal stated as follows:

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[9] *Fedax v. Venezuela*, *supra* note 4, para. 21. The tribunal, quoting the opinion of Mr. A. Broches, stated that 'the requirement that the dispute must have arisen out of an 'investment' [under Article 25(1) of the ICSID Convention] may be *merged into the requirement of consent* to jurisdiction' (emphasis added).

[10] Although the relationship between the ICSID Convention and IIAs, concerning the definition of *investment*, has been widely discussed, the present analysis does not touch upon this aspect.

[11] *Ceskoslovenska Obchodni Banka, A.S. (CSOB) v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction (24 May 1999).

[12] Ibid., para. 76.

[13] Gaillard and Banifatemi [5, p. 107].

[14] *CSOB v. Slovakia*, *supra* note 11, para. 64. The tribunal stated that '[t]his language [economic development] permits an inference that an international transaction which contributes to cooperation designed to promote the economic development of a Contracting State may be deemed to be an investment as that term is understood in the Convention'.

[15] *Salini Construttori S.p.A. and Italstrade S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001).

> The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction (*cf. commentary by E. Gaillard, cited above, p. 292*). In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.[16]

This part of the decision contains the *Salini* test, composed of four conditions of investment, namely: the contribution of money or assets; a certain duration; the element of risk; and a contribution to the economic development of the host State. Several points should be mentioned to facilitate an understanding of the *Salini* test. *First*, the *Salini* test is applicable only within the context of the interpretation and application of the ICSID Convention. Consequently, non-ICSID tribunals are not necessarily required to apply the *Salini* test as a question of law.[17] *Second*, the *Salini* test is based on an *objective* approach,[18] independent from the *subjective* perception of investment by the contracting Parties as may be expressed in individual IIAs. Therefore, different to the situation in the pre-*Salini* cases, the *Salini* test concentrates on the definition of investment only under the ICSID Convention, setting aside the definition under any IIA. *Third*, it seems that the development condition was transplanted from the preamble of the ICSID Convention.[19] However, this was inspired more directly by an academic opinion of Georges Delaume, who had suggested a flexible test of investment by proposing a definition of investment based on 'the expected—if not always actual—contribution of the investment to the economic development of the country in question'.[20] *Fourth*, the tribunal indicates some flexibility on the development condition, by stating that 'one may add' it to other three conditions. This suggests that it is not a mandatory, but an optional condition, depending on the tribunal's evaluation in each case. In addition, the *Salini* tribunal did not make clear whether the four conditions must be examined individually or in combination. The tribunal seems to have chosen the latter, by stating that 'these various criteria should be assessed *globally* even if, for the sake of reasoning, the Tribunal considers them individually here' (emphasis added).[21] Consequently, the development condition should not be examined independently from the other three conditions. *Fifth*, what is important is how to apply the development condition in actual cases. In the *Salini* case, that condition was not seriously discussed by the tribunal, which simply concluded that:

> […] the contribution of the contract to the economic development of the Moroccan State cannot seriously be questioned. In most countries, the construction of infrastructure falls

[16]Ibid., para. 52.

[17]Although non-ICSID tribunals have also adopted the *Salini* test, their decisions are not being analysed as part of this contribution and will be so in a different opportunity.

[18]The *Salini* tribunal stated that 'ICSID case law and legal authors agree that the investment requirement must be respected as *an objective condition* of the jurisdiction of the Centre [ICSID]' (emphasis added). *Salini v. Morocco*, *supra* note 15, para. 52.

[19]Emmanuel Gaillard and Yas Banifatemi, *supra* note 13, p. 98.

[20]Delaume [6, p. 801]. English translation is based on the following article. Ibid., pp. 115–116.

[21]*Salini v. Morocco*, *supra* note 15, para. 52.

> under the tasks to be carried out by the State or by other public authorities. It cannot be seriously contested that the highway in question *shall serve the public interest*. Finally, the Italian companies were also able to provide the host State of the investment with *know-how in relation to the work to be accomplished* (emphasis added).[22]

The *Salini* tribunal makes it clear that the contract on the construction of infrastructure serves the *public interest* of the host State and, because of this, satisfies the development condition. This reasoning is reminiscent of *Consortium R.F.C.C. v. Morocco* (2001), in which the tribunal admitted the existence of a contribution in entirely identical words to those stated in the *Salini* case,[23] namely that:

> [s]'agissant enfin de *la contribution du marché au développement économique de l'Etat marocain*, celle-ci ne peut sérieusement être discutée. La construction des infrastructures relève, dans la plupart des pays, des tâches de l'Etat ou d'autres collectivités publiques. Il ne peut être sérieusement contesté que *l'autoroute en cause servira l'intérêt public*. Enfin, le Consortium était également à même d'apporter à l'Etat d'accueil de l'investissement *un savoir-faire en relation avec l'ouvrage à réaliser* (emphasis added).[24]

This reasoning, identical to that in the *Salini* case, suggests that, insofar as an operation serves the *public interest*, it can be deemed to contribute to the development of the host State.

### 6.2.3 *Post-*Salini *Cases that Espouse the Development Condition*

The *Salini* test has been widely accepted and applied as a four-prong test that includes the development condition in the following post-*Salini* cases: *Joy Mining v. Egypt* (2004),[25] *Bayindir v. Pakistan* (2005),[26] *Jan de Nul v. Egypt* (2006),[27] *Helnan v. Egypt* (2006),[28] *Saipem v. Bangladesh* (2007),[29] *Kardassopoulos v. Georgia* (2007),[30] and

[22]Ibid., para. 57.

[23]This is due to the same three arbitrators, namely, Robert Briner (president), Bernardo Cremades and Ibrahim Fadlallah, being present in both cases.

[24]*Consortium R.F.C.C. v. Morocco*, *supra* note 8, para. 65.

[25]*Joy Mining Machinery Limited v. Egypt*, ISCID Case No. ARB/03/11, Award (30 July 2004), para. 53.

[26]*Bayindir Insaat Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005), para. 130.

[27]*Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction (16 June 2006), para. 91.

[28]*Helnan International Hotels v. Egypt*, ICSID Case No. ARB/05/19, Decision on Objection to Jurisdiction (17 October 2006), para. 77.

[29]*Saipem S.p.A. v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction (21 March 2007), para. 99.

[30]*Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction (6 July 2007), para. 116.

*Millicom v. Senegal* (2010).[31] In *Joy Mining v. Egypt* (2004), for example, the tribunal adopted almost the same conditions as the *Salini* test, where it stated that:

> Summarizing the elements that an activity must have in order to qualify as an investment, both the ICSID decisions mentioned above and the commentators thereon have indicated that the project in question should have a certain duration, a regularity of profit and return, an element of risk, a substantial commitment and that *it should constitute a significant contribution to the host State's development*. To what extent these criteria are met is of course specific to each particular case as they will normally depend on the circumstances of each case (emphasis added).[32]

In the above decision, the tribunal adopted five conditions, relying on the opinion of Professor Christoph Schreuer.[33] One added condition was 'a regularity of profit and return', which had already appeared in the *Fedax* formula. As to the development condition, the qualification *significant* was added to the contribution that requires a quantitatively considerable amount of contribution, which was lacking in the *Salini* test.[34] Following *Joy Mining v. Egypt*, the *Salini* test was further accepted, with slight modifications, by other tribunals. In *Helnan v. Egypt* (2006), the tribunal followed the *Salini* test and, with regard to the development condition, stated that '[a]s for the contribution to the development of the EGYPT's [sic] development, the importance of the tourism industry in the Egyptian economy makes it obvious'.[35] In *Saipem v. Bangladesh* (2007), in the same sense, the tribunal relied on the *Salini* test, but referred to it as the four 'elements'.[36] Having applied the four conditions to the case, the tribunal concluded that 'Saipem has made an investment within the meaning of Article 25 of the ICSID Convention',[37] although it is not clear whether the tribunal applied the development condition to this case disjunctively yet along with the other condition.[38]

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[31] *Millicom International Operations B.V. and Sentel GSM S.A. v. Republic of Senegal*, ICSID Case No. ARB/08/20, Decision on Jurisdiction (16 July 2010), para. 80.

[32] *Joy Mining v. Egypt*, *supra* note 25, para. 53. The tribunal did not clarify whether five elements were based on the *Salini* test, even though it referred to the *Salini* case. *Ibid*., para. 51.

[33] Ibid., footnote 18; Schreuer [7].

[34] *Malaysian Historical Salvors Sdn Bhd (MHS) v. Government of Malaysia*, ICSID Case No. ARB/05/10, Award (17 May 2007), para. 114.

[35] *Helnan v. Egypt*, *supra* note 28, para. 77.

[36] *Saipem v. Bangladesh*, *supra* note 29, para. 99.

[37] Ibid., para. 111.

[38] The tribunal states that 'for the purpose of determining whether there is an investment under Article 25 of the ICSID Convention, it will consider the entire operation. In the present case, the entire or overall operation includes the Contract, the construction itself, the Retention Money, the warranty and the related ICC Arbitration'. Ibid., para. 110. There is no mention by the tribunal to the economic development of the host State.

### *6.2.4 Interim Evaluation*

The *Salini* test, composed of four conditions, was invented for the purpose of identifying whether a transaction amounts to an investment within the context of Article 25(1) of the ICSID Convention. It has been accepted and applied widely in several post-*Salini* cases. Consequently, it is possible to provisionally conclude that 'the case law is *progressively evolving* towards a greater recognition of the *Salini* criteria' (emphasis added),[39] and, more simply, that the *Salini* test constitutes '*un courant jurisprudential*'[40] within the context of ICSID dispute resolution. Moreover, it should be pointed out that, in many of the cases mentioned earlier, there was little need for tribunals to examine severely or individually whether the development condition had been met, since the operation or property in question was easily categorised as investment.

## 6.3 Criticism of the *Salini* Test

Most crucially, it should be noted that the *Salini* test, particularly in connection to the development condition, has been criticised and rejected by several tribunals. For example, although the *Saipem* tribunal adopted and applied the *Salini* test, as mentioned earlier, it observed that '[t]he need for the last element [contribution to the host State's development] is sometimes put in doubt'.[41] It is thus necessary to analyse the reasons behind the criticism that the development condition has attracted.

### *6.3.1 Text Takes Priority Over the Preamble*

Initial criticism is based on the interpretation methodology in the *Salini* test, which gives undue weight to the preamble of a treaty. The preamble of the ICSID Convention provides, in its first sentence, that the Contracting States consider 'the need for international cooperation for *economic development*, and the role of private international investment therein' (emphasis added) and, as mentioned earlier, the term *economic development* in the *Salini* test has been inducted from this preamble.[42]

According to this criticism, even though the preamble refers to *economic development*, this cannot be directly incorporated into the interpretation of a treaty term or provision, namely Article 25(1) of the Convention.[43] The customary rule of treaty

[39] Emmanuel Gaillard and Yas Banifatemi, *supra* note 13, p. 124.

[40] *L.E.S.I. S.p.A. et ASTALDI S.p.A. c/ République algérienne démocratique et populaire*, CIRDI No. ARB/05/3, Décision (12 Juillet 2006), para. 72.

[41] *Saipem v. Bangladesh*, *supra* note 29, footnote 22.

[42] More clearly, *CSOB v. Slovakia*, *supra* note 11, para. 64.

[43] Fellenbaum [8].

interpretation, as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT), dictate that the ordinary meaning of the terms of the text itself is the starting point of the interpretative exercise, and this takes priority over the general object and purpose of a treaty.[44] In *Saba Fakes v. Turkey* (2010),[45] for example, the tribunal stated that 'the criteria of (i) a contribution (ii) a certain duration, and (iii) an element of risk, are both necessary and sufficient to define an investment within the framework of the ICSID Convention. […] These three criteria derive from the ordinary meaning of the word "investment"'.[46] As to the economic development condition, then, the tribunal observed that it was:

> not convinced […] that a contribution to the host State's economic development constitutes a criterion of an investment within the framework of the ICSID Convention. Those tribunals that have considered this element as a separate requirement for the definition of an investment, such as the *Salini* Tribunal, have mainly relied on the preamble to the ICSID Convention to support their conclusions. The present Tribunal observes that while the preamble refers to the "*need for international cooperation for economic development*," *it would be excessive to attribute to this reference a meaning and function that is not obviously apparent from its wording*. In the Tribunal's opinion, while the economic development of a host State is one of the proclaimed objectives of the ICSID Convention, *this objective is not in and of itself an independent criterion for the definition of an investment* (emphasis added).[47]

This understanding was accepted by another tribunal in *Quiborax v. Bolivia* (2012).[48]

### *6.3.2 Redundant Due to the Other Three Conditions?*

The development condition is criticised because it can be fully covered by the previous three conditions. In *LESI-Dipenta v. Algeria* (2005),[49] for example, the tribunal omitted the development condition and applied the remaining three conditions to the case, by stating that:

> (iv) [i]t would seem consistent with the objective of the Convention that a contract, in order to be considered an investment within the meaning of the provision, should fulfill the following three conditions:
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> (a) the contracting party has made contributions in the host country;
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> (b) those contributions had a certain duration; and
>
> (c) they involved some risks for the contributor.

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[44] de Figueiredo [9].

[45] *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award (14 July 2010).

[46] Ibid., para. 110.

[47] Ibid., para. 111.

[48] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction (27 September 2012), para. 212.

[49] *Consorzio Groupement L.E.S.I. – DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/8, Award (10 January 2005).

> On the other hand, it is not necessary that the investment contribute more specifically to the host country's economic development, *something that is difficult to ascertain and that is implicitly covered by the other three criteria* (emphasis added).[50]

Similar reasoning was advanced by other tribunals, including *LESI-Astaldi v. Algeria* (2006)[51] and *RSM v. Central African Republic* (2010).[52] According to those tribunals, it is difficult to establish that the development condition was met and, furthermore, it is covered by the previous three conditions. The details of such reasoning will be discussed in subsequent sections.

### *6.3.3 Development as an Expected Consequence of Successful Investment*

The most substantive criticism against the *Salini* test, and, in particular against the development condition, is based on the view that the contribution to the economic development of the host State is a *consequence* of investment, not an *a priori requirement* for qualifying as investment. This understanding was rapidly espoused by several tribunals around 2010, while its origin may be located earlier in *Pey Casado v. Chile* (2008),[53] in which the tribunal had stated that:

> L'exigence d'une contribution au développement de l'Etat d'accueil, difficile à établir, lui paraît en effet relever davantage du fond du litige que de la compétence du Centre. Un investissement peut s'avérer utile ou non pour l'Etat d'accueil sans perdre cette qualité. Il est exact que le préambule de la Convention CIRDI évoque la contribution au développement économique de l'Etat d'accueil. *Cette référence est cependant présentée comme une conséquence, non comme une condition de l'investissement*: en protégeant les investissements, la Convention favorise le développement de l'Etat d'accueil. Cela ne signifie pas que le développement de l'Etat d'accueil soit un élément constitutif de la notion d'investissement. C'est la raison pour laquelle, comme l'ont relevé certains tribunaux arbitraux, cette quatrième condition est en réalité englobée dans les trois premières (emphasis added).[54]

It is stated here that the contribution to the host State's economic development is a *consequence* of investment, not a *condition* for investment. This means that, even if, at the early stage of investment, an operation cannot bring any benefit to the host State, it nonetheless constitutes investment within the context of ICSID Convention proceedings. This basic understanding has been accepted, albeit with some variation as to the underlying reasoning.

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[50] Ibid., [Section: Questions of law], para. 13(iv).

[51] *L.E.S.I. – ASTALDI v. Algeria*, *supra* note 40, para. 72(iv).

[52] *RSM Production Corporation c. La République centrafricaine*, CIRDI Affaire No. ARB/07/02, Décision sur la compétence et la responsabilité (7 decembre 2010), para. 56.

[53] *Victor Pey Casado et Fondation «Présidente allende» c. République du Chili*, CIRDI affaire No. ARB/98/2, sentence arbitrale (8 mai 2008).

[54] Ibid., para. 232.

#### 6.3.3.1 Successful Investment

*First*, at the outset of an investment, there is only an expectation of future success and, thus, any possible contribution to the economic development of the host State is not yet certain. The tribunal in *Quiborax v. Bolivia* (2012)—adopting the first three conditions approach and eschewing the development condition—explained this as follows:

> The Tribunal appreciates that the element of contribution to the development of the host State is generally regarded as part of the well-known four-prong Salini test. Yet, such contribution may well be *the consequence of a successful investment*; it does not appear as *a requirement*. If the investment fails, it may end up having made *no contribution* to the host State's development. This does not mean that it is not an investment. For this reason and others, tribunals have excluded this element from the definition of investment (emphasis added).[55]

Furthermore, the tribunal in *KT Asia v. Kazakhstan* (2012) adopted this reasoning in denying the development condition.[56] This is predicated on the simple assumption that only when an investment is successful, can there be some contribution to the development of the host State. However, even when an investment was not successful, thus not productive, there must be an investment, independent of whether its operation had been successful.

#### 6.3.3.2 Expected Contribution or Desirable Consequence?

According to the foregoing, the key factor in establishing whether a transaction constitutes an investment should be found in its *expectation* of a successful result. It should be recalled, in this context, that the development condition, included in the *Salini* test, had originally been inspired by a scholarly opinion of Georges Delaume, according to which an investment should be identified on 'the *expected—if not always actual*—contribution of the investment to the economic development of the country in question' (emphasis added).[57] This means that, if there is an *expectation* of contribution this is enough for qualifying as an investment, even if it does not result in any actual benefit or merit to the host State. For example, if an investment contract for the drilling of several potential oil fields was concluded and the project had commenced, there must already be an investment at this moment, even if it will not successfully result in a finding of a productive oil field in the host State. In line with this argument, the tribunal in *Saba Fakes v. Turkey* (2010) held that:

> [t]he promotion and protection of investments in host States is *expected* to contribute to their economic development. Such development is *an expected consequence*, not a separate requirement, of the investment projects carried out by a number of investors in the aggregate. Taken in isolation, certain individual investments might be useful to the State and to the

[55] *Quiborax v. Bolivia*, *supra* note 48, para. 220.

[56] *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award (17 October 2012), para. 171.

[57] Georges Delaume, *supra* note 20, p. 801.

> investor itself; certain might not. Certain investments *expected to be fruitful* may turn out to be economic disasters. They do not fall, for that reason alone, outside the ambit of the concept of investment (emphasis added).[58]

Such reasoning was also adopted by the tribunal in *Electrabel v. Hungary* (2012),[59] which, with regard to the development condition, observed that: 'the economic development of the host State is one of the objectives of the ICSID Convention and *a desirable consequence* of the investment, but it is not necessarily an element of an investment' (emphasis added).[60]

#### 6.3.3.3 The Expectation Approach

According to the above *expectation-related* approach, the existence of investment must be admitted only where there is *expected contribution* to or a *desirable consequence* of the development of the host State. In other words, a presumption of contribution suffices for identifying an investment. This understanding gives rise to further issues. *First*, that there is an accurate manner by which to identify, characterise or consider the expectation seems doubtful. In *Electrabel v. Hungary* (2012), the tribunal explains the nature of *expectation* by stating that '[t]he expectation of profit and return which is sometimes viewed as a separate component of an investment must rather be considered as included in *the element of risk*, since every investment runs the risk of reaping no profit at all'.[61] Thus, the expectation approach results in a conclusion that the development condition may be subsumed by the risk condition. *Second*, the tribunal's examination of expectation must be based on a presumption. If we require an actual/existing consequence of investment, in the forms of benefit, merit, or advantage, this leads to a 'post hoc evaluation' of investment activities.[62] The *expected contribution* suggests, on the contrary, that the tribunal is not completely required to identify the existence of a contribution, but it will be sufficient to determine that an investment aims at contributing, or is expected to contribute, to the economic development of the host State. *Third*, based on the above understanding, it appears reasonable to think that the development condition, if applicable, should be examined, not at the jurisdictional phase, but at the merits phase. It should be recalled that the *Salini* test was elaborated as a jurisdictional test, by which ICSID tribunals are required to examine the existence of jurisdiction *ratione materiae*. Against this presupposition, the expectation approach appears to require the application of the

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[58] *Saba Fakes v. Turkey*, *supra* note 45, para. 111.

[59] *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012).

[60] Ibid., para. 5.43.

[61] Ibid.

[62] In *Alpha v. Ukraine* (2010), the tribunal stated that 'the contribution-to-development criterion [...] invites a tribunal to engage in a post hoc evaluation of the business, economic, financial and/or policy assessments that prompted the claimant's activities. It would not be appropriate for such a form of second-guessing to drive a tribunal's jurisdictional analysis'. *Alpha Projektholding GMBH v. Ukraine*, ICSID Case No. ARB/07/16, Award (8 November 2010), para. 312.

development condition at the merits phase. In *Pey Casado v. Chile* (2008), in fact, the tribunal pointed out that:

> L'exigence d'une contribution au développement de l'Etat d'accueil, difficile à établir, *lui paraît en effet relever davantage du fond du litige que de la compétence du Centre* (emphasis added).[63]

### 6.3.4 Vagueness and Broadness of the Notion of Development

It is undeniable that, even if one were to reject the expectation approach, the terms *contribution* and *development/economic development* are too vague and extremely broad, possibly allowing the term *investment* to extend to any kind of asset or operation. In other words, if the development condition is not applied strictly, it may not serve the function of setting an outer-limit of the scope of the term *investment*.

#### 6.3.4.1 Flexible Condition

Even if one were to maintain the development condition, it may not have any significance in the actual case of application, since its threshold is too low to exclude certain categories of investments. In *Patrick Mitchell v. Congo* (2006), for example, the annulment tribunal took the position that the development condition, if accepted, requires only a quite small amount of contribution, by stating as follows:

> The ad hoc Committee wishes nevertheless to specify that, in its view, the existence of a contribution to the economic development of the host State as an essential – although not sufficient – characteristic or unquestionable criterion of the investment, *does not mean* that this contribution must always be *sizable or successful*; and, of course, ICSID tribunals do not have to evaluate the real contribution of the operation in question. It suffices for the operation to contribute *in one way or another* to the economic development of the host State, and this concept of economic development is, in any event, *extremely broad but also variable* depending on the case (emphasis added).[64]

This understanding corresponds to the arbitral practice in which ICSID tribunals quite flexibly applied the development condition. For example, the nature of investment was admitted not only with regard to construction contracts (*Salini v. Morocco*), but also to promissory notes (*Fedax v. Venezuela*) and loans (*CSOB v. Slovakia*). As is clear here, the pre-*Salini* tribunals adopted a loose criterion of 'contribution' and, consequently, the development condition was applied as a low threshold.

Conversely, however, some tribunals have *strictly* applied the development condition. In *MHS v. Malaysia* (2007), for example, the tribunal examined whether a

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[63] *Pey Casado c. Chili*, *supra* note 53, para. 232.

[64] *Mr. Patrick Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for the Annulment of the Award (1 November 2006), para. 33.

contract on the cargo salvage operation contributes to the development of Malaysia, by using the *significant* contribution criterion.[65] Based on this, the tribunal concluded that the contract does not satisfy the development condition, since 'the Contract did not benefit the Malaysian *public interest* in a material way or serve to *benefit* the Malaysian economy in the sense developed by ICSID jurisprudence, namely that the contributions were significant' (emphasis added).[66] This finding should be considered exceptional,[67] since the tribunal itself emphasised the 'unusual' character of the case.[68] In that case, an interesting issue was raised—namely, whether there could be a contribution to the *historical and cultural* development of Malaysia, had the salvage operation been successful. On this issue, however, the tribunal denied the *significant* contribution to the *economic* development of the host State, stating that:

> [t]o the extent that the Claimant had provided *gainful employment* to these Malaysians, the Tribunal accepts that the Contract did benefit the Malaysian public interest and economy *to some extent*. However, this benefit is not of the same *quality or quantity* envisaged in previous ICSID jurisprudence. The benefits which the Contract brought to the Respondent are largely *cultural and historical*. These benefits, and any other direct financial benefits to the Respondent, have not been shown to have led to *significant* contributions to the Respondent's *economy* in the sense envisaged in ICSID jurisprudence (emphasis added).[69]

Here, the tribunal understood the development condition as requiring *significant* contribution to the *economic* development of the host State,[70] excluding contributions of 'cultural and historical' significance alone. Pursuant to this qualification, it may be said that the investment arbitral jurisprudence is progressively evolving towards requiring an economic, as opposed to a purely legal, concept of investment.[71]

#### 6.3.4.2 Subjective Condition

*Second*, as a consequence of its vagueness, the development condition is deemed as being substantially 'subjective', depending on the tribunal's case-by-case evaluation.[72] To respond to this issue, some tribunals considered alternatives. In *RSM v. Central African Republic* (2010), for example, the tribunal observed that 'the criterion of the contribution to the development is *too subjective* and it must be replaced by the criterion of *the contribution to the economy*, which itself is considered as

[65] *MHS v. Malaysia*, *supra* note 34, paras. 124 and 130.

[66] Ibid., para. 131.

[67] E.g. Chierici [10, p. 161].

[68] *MHS v. Malaysia*, *supra* note 34, para. 124. The tribunal describes the circumstances of the case as 'unusual situations'.

[69] *MHS v. Malaysia*, *supra* note 34, para. 132.

[70] The tribunal observed quite clearly that '[t]he *economic impact* of the benefits of the Contract must be assessed to determine whether there was an "investment"' (emphasis added). Ibid., para. 138.

[71] Emmanuel Gaillard and Yas Banifatemi, *supra* note 13, p. 124.

[72] As to the need of an industry-specific evaluation, particularly with regard to the entertainment sector, *see* Engfeldt [11].

presumed included in the three other criteria' (emphasis added).[73] Here, the tribunal proposes to replace the term *development* with the term *economy*. Similarly, the tribunal in *Phoenix v. Czech Republic* (2009)[74] highlighted the difficulties stemming from the subjectivity of the development condition:

> [t]he contribution of an international investment to the development of the host State is impossible to ascertain […]. A less ambitious approach should therefore be adopted, centered on the contribution of an international investment to *the economy* of the host State, which is indeed normally inherent in the mere concept of investment as shaped by elements of contribution/duration/risk, and should therefore in principle be presumed (emphasis added).[75]

Even if we replace the term *development* with that of *economy*, the problem is not necessarily resolved, since the latter is arguably wider in scope, and does not seem to shed more light on what kind of asset or operation would produce at least some benefits or merits to the host State's economy. For example, any kind of transaction or operation may bring know-how, development of human capital, and other benefits to the host State and its population. In this sense, any investment is possibly presumed to contribute to the host State's economy in one way or another.

### 6.3.5 Other Conditions Have Been Added

Several tribunals have added further conditions to the *Salini* test, thus increasing it to five or six conditions. These additional conditions pertain to the investor's good faith establishment of investment, and the legality of investment under the host State's domestic law. In *Electrabel v. Hungary* (2012), for example, the tribunal had stated that:

> subject to the wording of the provision in the treaty for dispute resolution, the *legality of the investment* and the investor's *good faith* may be relevant as elements of the definition of an investment or as a bar to the exercise of jurisdiction or to investment protection on the merits (emphasis added).[76]

### 6.3.6 Interim Evaluation

Provisionally, it can be concluded that the *Salini* test has attracted much criticism, particularly with regard to the development condition. Overall, this could be seen

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[73] *RSM c. La République centrafricaine*, *supra* note 52, para. 56. In original: 'le critère de la contribution au développement est trop subjectif et qu'il doit être remplacé par le critère de la contribution à l'économie, lui-même considéré comme présumé inclus dans les trois autres critères'.

[74] *PHOENIX Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009).

[75] Ibid., para. 85.

[76] *Electrabel v. Hungary*, *supra* note 59, para. 5.43.

as an attempt of arbitral tribunals to depart from the *Salini* test in its original formula. This tendency and its implications can be summarised as follows: *First*, some tribunals totally neglected the development condition, and did not apply it in cases before them. Others, however, attempted to modify it by requiring—more onerously insofar as the investor is concerned—that there be *significant* contribution to the *economic* development of the host State for a transaction to be considered an investment for the purposes of redress under the ICSID Convention. *Second*, the essential question is *not* whether the development condition in the *Salini* test should be maintained. As discussed in the foregoing, even if one were to maintain it as a low threshold for the determination of an investment under the ICSID Convention, it would appear useless and meaningless in any such exercise. *Third*, criticism against the development condition appear rather technical, than substantive, in the sense that they do not touch upon the essential problem of how one is to conceive *development*, or, alternatively, *economy*, under the ICSID Convention and, more broadly, under international norms relating to investment. This shall be analysed in the following section.

## 6.4 Development-Friendly Definition of Investment

### *6.4.1 IDI Resolution (2013)*

Although the development condition in the *Salini* test has been criticised, this condition is still supported by those who seek to emphasise the importance of the notion of *development* in the field of international law relating to investment. A 2013 Resolution of the *Institut de droit international* (IDI),[77] for instance, provides in Article 10 that:

> The definition of investment is determined according to the applicable international instruments, in compliance with the rules of interpretation mentioned in Articles 1-2 and 4 above.
>
> Given the fact that investment arbitration can be initiated by investors solely on the basis of a treaty, *special weight must be given to the requirement that the investment contribute to the development of the host State*, as may appear in the relevant instrument (emphasis added).

It is evident that IDI espouses a development-friendly definition of investment,[78] thus accepting the development condition of the *Salini* test. It is necessary, however, to evaluate IDI's intention carefully. *First*, IDI in referring to the validity of recourse to a *development* element, states that this is so to the extent 'as may appear in the relevant instrument'. This suggests that IDI regards the development element not as a universal mandatory condition applicable from the outset, but as potentially being applicable where such an element has previously been incorporated in the IIA

[77]Resolution of Institut de droit international: 'Legal Aspects of Recourse to Arbitration by an Investor Against the Authorities of the Host State under Inter-State Treaties' (Rapporteur: M. Andrea Giardina), Session de Tokyo—2013 (13 September 2013).

[78]Acconci [12, pp. 69–90].

applicable to the parties. *Second*, the Resolution requires States only to give 'special weight' to the development element, leaving unclear whether States shall accept it when they conclude IIAs.

### 6.4.2 Vestige of Droit International du Développement

Some have argued that the International Centre for Settlement of Investment Disputes (ICSID), given its institutional frame and general purpose, should function in a way that addresses the issue of *poverty*, by promoting the economic development of the poorest countries.[79] Were one to see the World Bank and ICSID as mechanisms to promote the development of the poorest countries, it would appear entirely appropriate to understand that investments, in order to benefit from the protection of ICSID, ought to positively contribute to the economic development of host States.[80]

However, there are some issues to be addressed before espousing a development-friendly approach. *First*, international investment law and arbitration do not maintain a distinction between developed countries (home State) and the developing countries (host State) in the protection of investment. In the current situation, however, ICSID tribunals are faced with different situations, namely North-North and South-South relations of investment, in which the traditional differentiation between the developing countries and the developed countries has decreased in significance.[81] *Second*, the above development-friendly approach to investment protection is reminiscent of the New International Economic Order (NIEO), which, through resolutions of the UN General Assembly, purported to modify international investment law at that time, particularly with regard to expectations of compensation in cases of expropriation. The ultimate purpose was to bring some economic in the relationship between developing countries (the 'Global South') and developed countries (the 'Global North'). In the event, however, this one-sided movement, supported only by the developing countries, could not succeed. This suggests that the healthy development of international investment law must be based on a win-win basis between both sides; the capital-exporting countries and the capital-importing countries. If one insists only on the development-friendly side of the ICSID Convention, through the development condition of the *Salini* test, it must fail, because of the imbalance of interests.

[79]It is said that '[t]he function of the ICSID Convention perfectly fits within the mission of the World Bank to alleviate *poverty* and reduce the gap between developed and developing countries by *favouring the growth* of the latter. […] the analysis on the extent of ICSID jurisdiction cannot be detached from the role played by economic development of the host state, […] in the light of the institutional frame in which the Centre has been devised'. Stefano Chierici, *supra* note 67, p. 160.

[80]Ibid., pp. 175–176.

[81]Pia Acconci, *supra* note 78, p. 89.

### *6.4.3 Intersection with the Sustainable Development Concept*

As arbitral trends remain fluid, it is too early to identify an emerging trend in arbitral jurisprudence, and generally in international investment law, that emphasises the importance of the *sustainable development*. It seems useful, however, to briefly look at what is argued, and to evaluate whether there is room for incorporating it into the definition of investment. *First*, most importantly in relation to our analysis, some authors promote the sustainable development concept by changing interpretations of existing IIAs,[82] irrespective of any modification of the treaty text itself.[83] In this respect, this line of argument can be intersected and addressed with the discussion surrounding the *Salini* test, since it relates only to the interpretation of the term *investment*. *Second*, as mentioned earlier, when the *Salini* tribunal applied the development condition in that case, it relied on the notion of *public interest*, by observing simply that 'the highway in question *shall serve the public interest*' (emphasis added). This reasoning allows us to consider the possibility of opening the door, through the notion of 'public interest', to the adoption of the sustainable development-friendly definition of investment. According to some, the sustainable development concept, in the context of investor-State arbitration, takes the form of the principle of good governance,[84] which is composed of the notions of transparency, anti-corruption,[85] due process and the rule of law. Needless to say, these all are reconcilable with the notion of *public interest*[86] and thus will be easily incorporated into the notion of *development* in the *Salini* test.

## 6.5 Conclusions

From around 2010, the arbitral jurisprudence tends to slowly depart from the *Salini* test, by criticising, modifying, or rejecting the development condition.[87] On the one hand, it might be possible to say that, setting aside this condition, there remains consensus among arbitrators and scholars to accept the *Salini* test. In that sense, the *Salini* test is possibly still alive and will be applied in future cases as a prototype of the notion of investment.[88] On the other hand, however, there is inconsistency in tribunal practice with regard to the notion of investment, which indicates a 'drifting' notion of

[82] See, for instance, Berner [13].

[83] Sacerdoti [14].

[84] Bonnitcha [15].

[85] The issue of corruption, in particular the corrupt investment, has been provoked in the investment cases. Tamada [16].

[86] Pia Acconci, *supra* note 78, p. 88. In this context, the principle of integration has been discussed and proposed to be introduced into the investor-State arbitration. Crockett [17].

[87] Emmanuel Gaillard and Yas Banifatemi, *supra* note 13, p. 119.

[88] Sungjin Kang, *supra* note 3, p. 187.

investment.[89] One should understand, from the above, the presence of difficulties in defining the notion of investment, particularly when one is to take into consideration the element of *development*.

A crucial point to be resolved is whether the development condition in the *Salini* test should be maintained, and, if so, in which form and to what effect. Unfortunately, arbitral tribunals have not yet been harmonised into a solid consistent jurisprudence in this regard. It is noteworthy, however, that the development condition in the *Salini* test relies on the notion of *public interest* which leaves for us—jurists, practitioners, and so on—the possibility to discuss the scope of *developmen*t under the ICSID Convention and, more widely, the scope and significance of *sustainable development* in international investment law.

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[89] Yala [18].

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