



Is “Contribution to the Host States Development” An Essential Criterion to Define Investment Under International Investment Law?: A Search Through the Lens of Arbitral Awards

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Abstract

International Investment Arbitration proceedings often deliver its Award in two parts: (i) Jurisdiction and (ii) Merit. One of the most debated and controversial elements in the Jurisdictional Proceedings have been the definition of ‘Investment’. The controversy was particularly fuelled by the Salini Test, which demanded an additional economic interpretation of the term investment, including four criteria. This research paper focuses on testing the criteria “contribution to the host State’s development” within the definition of investment. The test was applied frequently in following arbitral awards, with only a few attempting to analyse the criterion. Number of Tribunals accepted the test on its face, even though the concept had not attained the stature of Jurisprudence Constante. Seldom had the Tribunals attempted to analyse it through the prism of economic literature and feasibility of incorporating such an element within the scope of the definition of investment. In this paper, the authors would examine the significance and rationale used by the several investment arbitral Tribunals while accepting or rejecting the concept of economic development within the ambit of the definition of investment. Finally, discuss the relevance of the criterion.

Keywords Economic development · Contribution to the host state’s development · ICSID · Salini test · BIT

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Introduction

People across the globe in the 21st Century often take the liberty to utter ‘investment’ and ‘economic development’ in a single breath. However, the population in its totality does not need to speak about it with a uniform understanding and approach. Economic Development has been a constant concept to humankind since time immemorial. Humanity has been striving for it even when such specific terms were thousands of years away from being coined. At the very least, it existed as a predominant psychological condition.

On the other hand, foreign investment as a concept came much later. The modern concept of foreign investment law can be substantially traced back to post World War II (Vandeveld, 2010).

Although dispute settlements concerning International Investment have a long history, it was post World War II that the Secretary-General of the United Nations, in a report on The Promotion of the International Flow of Private Capital, suggested the establishment of special arbitration machinery for foreign investments (The History of the ICSID Convention, 1970). In around the 1960s, the International Centre for Settlement of Investment Dispute Convention (hereinafter referred as ICSID) was conceived by the staff of the World Bank. ICSID is hailed as the most significant development in establishing a dispute settlement mechanism in the discipline of international investment. The sheer number of memberships of the Convention is evidence of that. The Convention was often tested by the Contracting Parties, raising several controversies, debates and questionable awards.

Definition of Investment: The Controversy Within ICSID

It cannot be doubted that the definition of investment plays one of the critical roles, as it is primal for determining rights and obligation under the investment agreement (Yannaca-Small and Liberti, 2008). However, the most significant International Investment dispute settlement mechanism, i.e., ICSID, preferred not to define the term “investment”. This absence of a definition of the term ‘Investment’ within the Convention gave rise to the opportunity, wherein the parties challenged the jurisdiction of a Tribunal on the ground of whether the investment was qualified to be brought before the ICSID Jurisdiction.

The controversy was initiated when the Arbitration Tribunals constituted under ICSID Framework ventured into the interpretation of the definition of investment. Some concluded that the concept of investment must not only fulfil the criteria laid in the treaties but also must accommodate itself within the economic understanding of the term Investment (Dolzer and Schreuer, 2012). This economic understanding has been considerably influenced by the *Salini Test*, a principle expounded by the Tribunal in *Salini Costruttori S.p.A. and Italstrade S.p.A. v. the Kingdom of*

*Morocco*¹ (hereafter referred as *Salini Award*). Prior to the *Salini Award*, another Tribunal in *Fedax v. Venezuela*² (hereafter referred as *Fedax Award*) attempted to lay down tests to satisfy economic understanding or objective understanding of the term investment. It listed five criteria, including the criterion that investment should be of significance to the host state’s development. *Salini Test (Salini Award)* prescribed four criteria—including the criterion “contribution to the host State’s development”—out of the five conditions laid by *Fedax Award* (Schreuer, 2002). This very test was applied on several arbitral awards, with only a few attempting to analyse the criterion and not accepting the test on the face of it. The Awards which chose to include the criterion “contribution to the host State’s development” were primarily dependent on the rationale that the object and purpose of the Convention (ICSID) were to promote “economic development” as provided under the Preamble and same to be read in the definition of “investment”. Prof. Schreuer states that the feature of the host State’s development is not a necessary element of an investment but only such a part that can be typical and not a jurisdictional one (Schreuer, 2002, p. 128).

The feature “contribution to host State’s development” or “contribution to the economic development of host State” became a regular feature of debate in several awards such as *Patrick Mitchell v. The Democratic Republic of Congo*³ (hereafter referred as *Patrick Mitchell Award*), *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*⁴ (hereafter referred as *Malaysian Salvors award*), *Saba Fakes v. the Republic of Turkey*⁵ (hereafter referred as *Saba Fakes Award*), *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. the Islamic Republic of Pakistan*⁶ (hereafter referred as *Bayindir—Pakistan Award*), *Joy Mining Machinery Limited v. The Arab Republic of Egypt*⁷ (hereafter referred as *Joy Mining Award*), *Consortium Groupement L.E.S.I.–DIPENTA v. The People’s Democratic Republic of Algeria*⁸ (hereafter referred as *LESI-Dipenta Award*), *Jan de Nul N.V. and Dredging International N.V. v. the Arab Republic of Egypt*⁹ (hereafter referred as *Jan de Nul Award*). Besides, some cases preferred rejection of the *Salini Test* in totality, which also amounted

¹ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001.

² *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Objections to Jurisdiction, 11 July 1997.

³ *Patrick Mitchell v. The Democratic Republic of Congo*, Case No. ARB/99/7, Decision on the Application for Annulment, 9 February, 2004.

⁴ *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009.

⁵ *Saba Fakes v. the Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010.

⁶ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. the Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005.

⁷ *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004.

⁸ *Consortium Groupement L.E.S.I.–DIPENTA v. The People’s Democratic Republic of Algeria*, ICSID Case No. ARB/03/08, Award, 10 January 2005.

⁹ *Jan de Nul N.V. and Dredging International N.V. v. the Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008.

to an implicit rejection of the concept of “contribution to the host State’s development.” The sheer number of cases addressing the controversy crystallised the fact that there exists a controversy or unsettled position on the criterion. Although the debate was initiated through ICSID Tribunals, it has been extended to Non-ICSID cases as well, as evidenced by *White Industries Australia Limited v. The Republic of India*¹⁰ (hereafter referred as *White Industries Award*) and *Flemingo Duty-Free Shop Private Limited v. the Republic of Poland*¹¹ (hereafter referred as *Flemingo Award*).

Economic Development: An Inherent but Diverse Aspiration of Mankind

Economic Development is a constant and continuous focus of humankind at large. This very focus of humankind is often translated into State goals; however, there remains a massive void on an accepted uniform method to measure it (Schaub, 2004). Economic Development is not a monolithic concept in itself; it is further comprised of goals like Gross National Product growth, quality of life, measures relating to sustainable development, millennium development goals and other subjective goals of States (Dang and Pheng, 2015). Attaining those goals would have been simple if the theory of economic development had not been a subject of debate within the economic literature (Dang and Pheng, 2015). Classical theories, such as the Linear Stages of Growth Models, focus on massive capital injection to achieve a meteoric GDP growth rate. The Structural Change Models suggests that relocation of labour from the agricultural sector to the industrial sector is critical for economic growth (Dang and Pheng, 2015). The International Dependence Models argues that the continuing dominance of developed nations over developing nations has to led to the developing countries being exploited. It thus recommends that the developing country must break the relationship with developed countries (Dang and Pheng, 2015. p. 18; Schaub, 2004).

On the other hand, Neo-Classical Counter-Revolution models came as an opposing force to the International Dependence Model, stating that underdevelopment is not due to dependency on developed countries. Instead, it is due to domestic State intervention, corruption, poor resource allocation, and mismanagement (Dang and Pheng, 2015. p. 18). Contemporary theories like New Growth Theory emphasise the comparatively significant role of knowledge instead of labour and capital in economic growth. Whereas the Theory of Co-ordination Failure is based on an idea that a market may fail to achieve coordination among complementary activities and that such failure leads to an outcome inferior to a potential situation in which resources will be optimally allocated (Dang and Pheng, 2015, p. 19–20). However, none of these models is absolute; each comes with certain advantages and certain shortcomings (Dang and Pheng, 2015. p. 22–23). It is apparent that economic development in itself is a multidimensional process involving the intersection of diverse and

¹⁰ *White Industries Australia Limited v. The Republic of India*, UNCITRAL Rules, Final Award, 30 November 2011.

¹¹ *Flemingo Duty-Free Shop Private Limited v. the Republic of Poland*, UNCITRAL Rules, 12 August 2016.

unconnected goals of development (Dang and Pheng, 2015). It does not come with a straight-jacket formula that can be uniformly applied over all the nations without cognising their economic, social, political and cultural framework (Dang and Pheng, 2015, p. 22). While most economic development research attached primacy to economic growth as a prominent factor, it leads to a relatively narrow perspective producing nothing but distorted results, which ignored labour force composition and other indicators (Dang and Pheng, 2015, p. 22–23; Schaub, 2004, p. 3). Development is to be sought outside the group of facts which is described by economic theory. Developments are the changes in economic life that are not imposed but arise from within. If it appears that change is due to data change, it cannot be hailed as economic development (Schumpeter, 2012, p. 63–64). The economic theories themselves were often influenced by the economic policy of the State (Vanderveelde, 2010).

Individuals, institutions, universities, scholars, governments, international organisations have been researching the relationship between Foreign Direct Investment (the most prominent form of Foreign Investment) and Economic Development. Incidentally, the research findings have not been uniform; while some research result concluded that Foreign Direct Investment is beneficial, the others listed it as a hindrance (Schaub, 2004, p. 3). Such diverse results were owed to different theoretical approaches, different data sampling, and odd interpretative techniques of the empirical results (Schaub, 2004, p. 3). Apart from these, various social, political and economic features and stages of developing country also contributed to the variable findings of the researches undertaken. Economic Development is not just a singular, isolated element; instead, it is a dynamic process that may be measured by per capita income difference, efficiency in production, supply and demand concerns, regulatory framework, and commercial infrastructure (Schaub, 2004, p. 7; Ozawa, 1992). The research work on this aspect re-affirm that the subjectivity related to the concept of economic development could itself become a hindrance for any import in the legal framework.

With the aforementioned understanding of the concept of economic development and its relation with foreign investment, the justiciability of 'economic development' in exact legal terms remains a mystery due to the subjectivity and the complexity of the concept.

Significance of the Definition of Investment

The act of investing is an investment. To 'invest' is "*to loan money upon securities of a more or less permanent nature, or to place it in business ventures or real estate, or otherwise lay it out, so that it may produce revenue or income*" (Black, 1968, p. 960). There exist multiple definitions for the term investment; an intelligible reason for such flexibility can be apportioned to the investment agreement's object and purpose. An investment agreement while undergoing a test remains relatively uncontroversial when the definition of investment is interpreted in accordance with the investment agreement (Yannaca-Small and Liberti, 2008). However, the controversy with respect to the definition 'investment' is encountered when the arbitral Tribunal

tends to deviate from what has been stipulated under the investment agreement or if the definition provided under the definition does not lead to precise understanding. Incidentally, in the sphere of International Investment Arbitration, the ICSID Tribunal awards have created a considerable amount of controversy while defining 'investment'.

ICSID Convention's Take on 'Investment'

Chapter 2 of the ICSID Convention provides for the Jurisdictional Scope, wherein under Article 25 (1) it is provided.

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between ...¹²”

The aforementioned Article expresses the kind of dispute that could be brought within the purview of the jurisdiction of the ICSID Tribunal, assuming other conditions being met. The provision does not provide any definition of investment, which dictates its scope or creates an invisible bracket over the term investment. Interestingly, it only lays down, which can bring an issue to the Arbitration Tribunal constituted under ICSID and which kind of dispute to be entertained. The qualification of 'which kind of dispute' and 'who can bring (what?)' are the limitations imposed on exercising jurisdiction.

To remove any confusion and provide clarity, the Report of the Executive Directors in paragraph 27 provided a statement addressing the concern with respect to the definition of investment as.

“No attempt was made to define the term “investment” given the essential requirement of consent by the parties, and the mechanism through which the Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre”.¹³

The paragraph sheds some light on the intention of the Draftsmen for not defining the term 'investment'. It gave the Contracting States the liberty to choose whether or not to consent to any particular activity to be brought before the ICSID Tribunal. The paragraph posits investment in such a way that the draftsmen of the Convention felt that the need for the definition of investment is immaterial because it would finally be subjected to the consent of the Contracting States. However, it must be noted that Professor Schreuer, in his commentary, rightly points out that Paragraph 27 of the Report of Executive Directors on ICSID does not provide the true position of the *Travaux Préparatoires* that “No attempt was made to define the term *Investment...*” (Schreuer, 2002, p. 116). On perusal of *Travaux Préparatoires*, one can easily garner that the Legal Committee and Executive Directors meeting did undertake

¹² Article 25(1), ICSID Convention, Regulation And Rules, 1965.

¹³ Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965.

a fairly elaborate discussion on the definition of Investment under Article 30(i). However, in reality, the participants could not reach to an accepted definition. A definition in the Convention could be held dispensable owing to the other jurisdictional requirement, primarily the feature of the liberty to 'consent'. It was evident from the discussion that the definition of investment could be given effect by the Contracting States while engaging in the agreements for the promotion and protection of investment. Furthermore, apart from Melchor, no other delegates intended to incorporate the concept of the contribution of investment to the host State's development within the definition of investment, even at the drafting stage.

The ICSID Convention further stipulated in Article 25(4) that:

"Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by *paragraph (1)*.¹⁴"

As it can be inferred that from the first part of Article 25(1) that if a dispute needs to be brought within the jurisdictional ambit of the ICSID Convention, it is essential that dispute is of legal nature and must arise directly out of an investment. The paragraph does not define 'Investment', which leads us to question what is meant by investment precisely for the purpose of the Convention. Within the Convention, there is not much explanation provided, other than the Report of the Executive Directors, where it is clearly stated that owing to the essential requirement of "consent" by the parties for the subject matter of jurisdiction, an attempt to define investment was not made.

Genesis of the Debate

It was only a matter of time when the issue with respect to interpretation of the term investment would become a prominent issue under ICSID Jurisprudence. The controversy started with *Fedax Award*¹⁵ award. The Tribunal laid the foundation to the unprecedented criteria-based approach while defining investment *vis-a-vis* Article 25. The Tribunal provided that the essential elements of an investment are the ones that involve certain duration, regularity of profit and return, assumption of risk, a substantial commitment and Significance for the host State's development.¹⁶ While in many subsequent Tribunal decisions, out of the five criteria mentioned above, four (barring certain regularity of profit and return) started becoming a permanent feature. They were dubbed as objective criteria to define investment. The popularity of these four criteria, i.e. substantial commitment, certain duration, assumption of risk, and a

¹⁴ Art 25(4), ICSID Convention.

¹⁵ *Supra* Note 2.

¹⁶ *Ibid*, At Para 43.

significance to host State's development, are owed to the Tribunal of *Salini Award*.¹⁷ The criteria laid by *Salini Award*¹⁸ reached a significant level of popularity, and many subsequent ICSID awards, often dealing with the definition of investment, invoked the objective test and referred to it as *Salini Test*. Thus, Tribunals, while determining the act of investment, often engaged in two tests, (i) how the term is defined under BITs and (ii) examining the term investment from an economics perspective, leading to a Double Key-hole Approach. The Economic Literature provides that direct investment requires the transfer of funds, project for a long duration, the existence of regular income, participation and active involvement of the principal person transferring the fund and business risk.

In other words, the investment has to meet the criteria of the Investment Treaty definition. After it is found to satisfy the definition of investment within the BIT, it would be subjected to an objective test of investment required under Article 25 of the ICSID Convention or vice versa. The Double Keyhole/Double Barrel approach allows the interpretation to be from two perspectives. While the BIT provides a precise definition of investment, Article 25 of ICSID defines investment from an economic perspective. However, due to the non-uniformed approach towards the definition of investment by the Tribunal led to controversy.

The Roots of the Concept of "Contribution to the Host State's Development" As Fourth Prong to Define Investment Under ICSID

Several arbitral awards argued in favour of incorporating the concept of "contribution to the host State's development" as one of the essentials to fulfil the *Salini Test* for an Investment to qualify as an investment under the ICSID.¹⁹ The criterion did not find its root in the potential definition of investment but the Preamble of the ICSID Convention and Report of Executive Directors (Yannaca-Small and Liberti, 2008, p. 55). The *Salini Award*²⁰ Tribunal stated that one "may" add the "contribution to the host State's development" as an additional condition to come within the ambit of the term Investment. In his commentary, Prof Schreuer says that the criterion "contribution to host State's development" is more of a typical characteristic of an investment than jurisdictional (Schreuer, 2002, p. 128). It is well admitted that "contribution to host State's development" as an indicator of investment has raised

¹⁷ Supra Note 1.

¹⁸ Ibid.

¹⁹ See *Railroad Development Corporation v. The Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012; *Millicom International Operations B.V. and Sentel GSM SA v. The Republic of Senegal*, ICSID Case No ARB/08/20, Decision on Jurisdiction of Arbitral Tribunal, 16 July 2010; *IBM World Trade Corporation v. The Republic of Ecuador*, ICSID Case No. ARB/02/10, Decision on Jurisdiction and Competence, 22 December 2003; *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007; *Helnan International Hotels A/S v. The Arab Republic of Egypt*, ICSID Case No. ARB 05/19, Decision of the Tribunal on Objection to Jurisdiction, 17 October 2006.

²⁰ Supra note 1.

most controversy. In *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*²¹ (hereinafter referred as *CSOB v. Slovakia*), the Tribunal interpreted that the preambular reference to "Economic Development of Host State" meant that international private investment is structured in the Convention to promote the host's State Development, and only such transactions could be considered as an investment for the purpose of the Convention.

The Preamble of the ICSID states as follows:

"The Contracting States Considering the need for international cooperation for economic development, and the role of private international investment therein..."

Interpretation of the Preamble of the ICSID Convention is not an isolated act. As discussed earlier in paragraph 2.3, the Preamble of a Convention or Treaty is to be interpreted in accordance with Article 31 of VCLT. However, Gardiner expressed that the Preamble must be handled rather carefully as it is not part of the substantive portion, hence not an operative clause and often has been "cobbled together more or less as after-thought" (Weeramantry, 2012, p. 77). In most cases, reliance on Preamble is made to understand the Convention's object and purpose.

According to *Salini Award*²² Tribunal, one may invoke the Preamble to catapult "contribution to host State's development" as an essential criterion to define 'investment', a concept the framers of the Convention deliberately left undefined. It is correct that often Preamble represents the object and purpose of the Convention. The question that arises is how far that principle is fit for borrowing "contribution to host State's development" within the ambit of definition of investment under the ICSID convention. Further, in the Report of Executive Director, it is stated in Para 9 that "*In submitting the attached Convention to governments, the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development. The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors...*" If noted carefully, it is evident that the concept of economic development could be mistakenly elevated to the standard of object and purpose, whereas economic development was understood as a mere product of the "desire". The very term "desire" represents wish and aspiration. One could take a step back and ask if the economic development was the object and purpose of the ICSID Convention.

The ICSID Convention itself further bolsters the doubt cast upon the root of the controversy, i.e. incorporation of economic development of host State under the pretext of object and purpose of the Convention. Art 1(2) of Convention states:

"The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between the Contracting States and nation-

²¹ *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objection to Jurisdiction, 24 May 1999.

²² *Supra* note 1.

als of other Contracting States in accordance with the provisions of this Convention..²³”

Unlike many legal documents, the ICSID Convention has expressly provided the purpose of the Convention. Resorting to the Preamble of a Convention on most occasions has turned beneficial to understand the object and purpose of the Convention. However, one must act with caution before resorting to elevate Preamble to the object and purpose (Weeramantry, 2012, p. 77). Prof. Schreuer, in his commentary, noted that the purpose of the Convention was to facilitate Dispute Resolution. The idea behind the Convention was more administrative than judicial (Schreuer, 2002, p. 10). It is interesting to note that by associating an isolated interpretation of the Preamble of the Convention and Report of Executive Directors with the object and purpose of the Convention, the substantive provision of the Convention could get defeated. For instance, if an alleged investment fails to meet the criteria of “contributing to the host State’s development”, then the claimant could be robbed of the right to use the dispute settlement mechanism. As per Article 1(2), The Centre’s purpose is to facilitate conciliation and arbitration of investment dispute in accordance with the provision of the Convention. However, this very ‘purpose’ is potentially defeated when the Tribunal relies on a Principle laid by an Arbitral Tribunal that has not reached *Jurisprudence Constante*’s standard.²⁴

It is not denied that the States have their share of interest for becoming a party to the International Investment Agreement, but some of such intentions are aspirational, economic development is a desire, an aspiration. If a State wishes to have economic development as a justiciable criterion to define investment, the States may incorporate a provision with respect to it (Garcia-Bolivar, 2004). Similar veins, it is proposed by Genevieve Fox that BITs have great potential to make a significant contribution to the economic development of the host State, which is yet to be realised (2014). The realisation, however, would be subjected to a substantial modification to the current BIT regime, keeping the socio-economic and other interest of the State (Fox, 2014). This approach could be an answer to resolve the controversy surrounding the criteria of “contribution to the host State’s development”. However, it is difficult to reconcile with the idea that the Tribunals should be assigned with the responsibility of determining the methodology to ascertain economic development, as the concept is a subject of debate within the realm of economics itself and is capable of delivering diverse results depending on the indicators as discussed in the aforementioned paragraph. Even if consensus is achieved on certain indicators, it will involve substantial research and should be considered at the merit stage rather than the jurisdictional.

²³ Art. 1(2), ICSID Convention.

²⁴ *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. The Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013.

Analysis of the Arbitral Awards

The primary contributors to the controversy relating to the inclusion of the "contribution to host State's development" were the arbitral Tribunal created under the aegis of ICSID. There have been over 400 arbitral awards.²⁵ However, in this paper, about 174 cases were studied based on the result obtained by the following Steps: www.italaw.com > Search > Decision on Jurisdiction > 174 numbers of cases. The sampling data was obtained as of 31.12.2016. As represented in Figs. 1, 2, Table 1, out of 174 awards, 21 awards were in foreign languages,²⁶ 21 awards were not public,²⁷ 85 awards did not substantially discuss the fourth prong, i.e. "contribution to the host State's development".²⁸ In contrast, a total number of 47 cases mentioned economic development in the context of the definition, and some discussed the relevance of the criterion to define 'investment'.²⁹

Diverse Approach of the Arbitral Tribunals Towards the Criterion "Contribution to the Host State's Development"

One would be mistaken if he /she were to conclude that the discussion on "contribution to the host State's development" yielded similar or uniform result across the arbitral awards. Within ICSID itself, it could be seen that diverse rulings have been laid by the Tribunals. The 34 out of the 42 ICSID and 4 out of the 5 Non-ICSID awards which made conclusive remarks upon the Salini Test or the criterion "contribution to the host state's development" are analysed hereunder.

The variations based could be clubbed under multiple headings, such as:

- a. Tribunals expressly included "contribution to the host State's development" as an integral criterion to define investment,
- b. Tribunals debated on the extent of "contribution to the host State's development", questioning if the contribution needed to be of significant value,
- c. Tribunals chose not to discuss the *Salini Test* in detail, instead mechanically applied the test,
- d. Tribunals chose to discard the *Salini Test* in its totality; hence, implicitly discarded the criteria "contribution to the host State development",
- e. Tribunals discussing the concept of "contribution to host State's development" in detail and rejected its relevance.
- f. Tribunal took note of the criteria being not much of Significance but chose to pit the alleged 'investment' against the *Salini Test* on a factual scale and nevertheless

²⁵ See Investment Dispute Settlement Navigator, Known Treaty-based Investor-State Arbitration, <http://investmentpolicyhub.unctad.org/ISDS>, As Accessed on 04 May 2017.

²⁶ See Decision on Jurisdiction, <[https://www.italaw.com/search/site/?f\[0\]=sm_field_case_document_type%3Adecision](https://www.italaw.com/search/site/?f[0]=sm_field_case_document_type%3Adecision)>, As Accessed On 31.12.2016.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

Graphical representation of Awards analysed

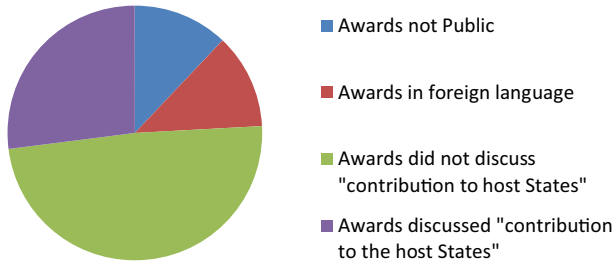
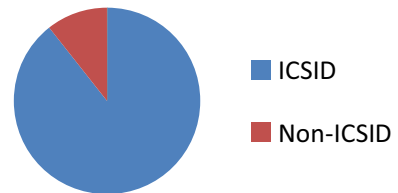


Fig. 1 Depicting the share of cases addressed the issue

Fig. 2 Depicting the ICSID and non-ICSID cases deliberated upon "contribution to the host state's development."

Awards discussing "Contribution to the host State's development"



verify the existence of the criteria "contribution to the host State's development", giving it undue impetus.

- g. Non-ICSID Tribunals ruled on the issues, even after taking cognisance of the fact that the *Salini Test* has no application in the Non-ICSID proceeding.

These forthcoming analyses would reflect that the practices are far leading to uniformity in accepting any definition, instead only contributing to the existing conflicts.

Case Laying the Foundation of Objective Criteria Including "Contribution to the Host Development"

The relevance of the criteria "contribution to the host State's development" in the investment could be traced to the *Fedax Award*,³⁰ wherein the Respondent questioned the meaning of 'investment' within Article 25(1) of the ICSID Convention while contesting that promissory notes did not qualify as foreign direct investment.

³⁰ Supra note 2.

Table 1 Representing the cases dealt with the issue of "economic development"

1	2	3	4	5
Award not public	Awards in Foreign Language (Other than English)	Awards did not substantially discuss the significance of "contribution to host State's development" in the Definition of Investment	Awards discussed Significance of "contribution to host State's development" in the Definition of Investment	Total number of Cases
21	21	ICSID-53	ICSID 42 Non-ICSID 32	174
			Non-ICSID 5	

*Salini Award*³¹ further refined the criteria determining the concept of Investment within the ICSID Convention. The Tribunal acknowledges that barring *Fedax Award*, there was no other case tackling with the issue of the definition of ‘investment’ under Article 25(1). The Tribunal took cue primarily from the commentary of E. Gailard to reflect upon the requirement of objective condition of investment to be met under ICSID and list contribution, a certain duration, the involvement of risk as three different consideration for investment, and went on to add that “the contribution to the economic development of host State of the investment as an additional condition” deriving through the Preamble.³² It is critical to note that *Salini Award* categorised the criteria “contribution to the host State’s development” as an *optional* one, as the criteria were qualified with the word ‘*may*’. The Tribunal stated that these elements are interdependent and only for the “sake of reasoning” the Tribunal undertook them individually.³³ While considering the “contribution to host State’s development”, the Tribunal’s reasoning in ruling favour of the existence of “contribution to host State’s Development” with a simpliciter observation, that the activities of construction of infrastructure are primarily undertaken by the State themselves hence the investment in question fulfilled the criteria.³⁴ The Award, other than the preambular reference, does not provide any other substantial reasoning or parameters or methodology to measure “economic development of the host State”, which could be analysed objectively to ascertain its role and relevance in the definition of ‘investment’ under ICSID. Instead, the Tribunal chose to rely on ‘mechanical’ import and assumption that an activity which provides for infrastructure development must contribute to the economic development, without ascertaining what is meant by economic development or what indicators are relevant to the concept, or if the concept could have a been at all be imported in a legal context and imposed on the concept “investment” under Article 25 of ICSID Convention.

Awards Inspired from the Principles Laid in Awards, Forming Foundation of the Criterion “Contribution to the Host State’s Development” Without Providing Substantial Reasoning or With Minor Twists before Adoption

Post-*Fedax* and *Salini* Awards, the debate favouring objective interpretation of the term ‘investment’ was re-energised, and the controversy with respect to the definition of investment was resurrected, which was laid to rest during the drafting stage of the ICSID Convention. The objective criteria were often re-christened as ‘*Salini Test*’, ‘*Double Barrel Test*’ or ‘*Double Key Test*’. In some instances, the Tribunals have been mechanically relying on the *Salini Test*, as was witnessed in *Railroad Development Corporation v. the Republic of Guatemala*³⁵ (hereafter referred as *Railroad v.*

³¹ Supra note 1.

³² Ibid.

³³ Ibid, At Para 52.

³⁴ Ibid, At Para 57.

³⁵ *Railroad Development Corporation v. the Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012.

Guatemala Award), wherein the Tribunal did not feel the need to analyse or consider the jurisprudence which discussed the characteristics of investment or if such characteristics are jurisdictional in nature. Nonetheless, the Tribunal did affirm that the activity did meet the requirements of the *Salini Test*, including "economic development of the host State".³⁶ A similar approach was taken by *IBM World Trade Corporation v. The Republic of Ecuador*³⁷ (hereafter referred as *IBM v. Ecuador Award*), where the Tribunal, while determining what is understood by 'investment', blatantly referred to the *Salini Test*, under the garb of rationale that the Convention had not defined 'Investment'. However, ICSID Jurisprudence considered the objective criteria of 'Investment'.³⁸

In *Ioannis Kardassopoulos v. The Republic of Georgia*³⁹ (hereafter referred as *Kardassopoulos v. Georgia*), the Tribunal did not find much challenge in applying the *Salini Test* as the fact did fulfil the criteria, and Respondent did not object to it.⁴⁰ Hence, the Tribunal chose to read the term under the *Salini Test* without testing whether such a test should even be considered to define investment in the light of the ICSID Convention and its *Travaux Préparatoires*.⁴¹ In *AES Corp v. the Argentine Republic*⁴² (hereafter referred as *AES Award*), the Tribunal infers that the definition provided under Article I(1)(a) was broad enough to bring the investment within its ambit. Nevertheless, the Tribunal observed that the act of the company of producing and distributing electricity does fulfil the economic understanding, including "contribution to the economic development of the host State".⁴³ However, the economic test was read out under the same breath, making it part and parcel of the whole test. Incidentally, the Tribunal did not provide appropriate economic reasoning or possible indicators or method for concluding how an activity could successfully "contribute to the economic development of host State". Instead, it invoked the concept for the purpose of the definition of Investment under Article 25(1) of the ICSID Convention. Incidence of mechanical import to the facts of a dispute was also evidenced

³⁶ Also See *Milicomm v. Senegal* (2010), where the Tribunal not only chose to rely on *Salini Test* to define 'Investment' rather it expressly stated that the Tribunal was not a place to discuss on the condition as it was apparent that the activity did fulfil the *Salini Test* including the criterion 'contribution to the host State's development.; Similarly *Niko Resources (Bangladesh) Ltd. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/10/11 and ARB/10/18, Decision on Jurisdiction, 19 August 2013, At Para 352: the Tribunal opined that it was apparent that the investment fell within the framework of investment as expressed by the scholars and existing jurisprudence and admittedly chose to steer clear from the question and controversy if the criteria under *Salini Test* must be treated as a jurisdictional requirement instead of examining elements of *Salini Test*.

³⁷ *IBM World Trade Corporation v. The Republic of Ecuador*, ICSID Case No. ARB/02/10, Decision on Jurisdiction and Competence, 22 Decemeber 2003.

³⁸ *Ibid*, At Para 39.

³⁹ *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007.

⁴⁰ *Ibid*, At Para 116–117.

⁴¹ *Ibid*.

⁴² *AES Corp v. the Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005.

⁴³ *Ibid*, At Para 33and 88.

in *Helnan International Hotels v. The Arab Republic of Egypt*⁴⁴ (hereafter referred as *Helnan Award*), wherein the Tribunal concurred with the *Salini Test*, Prof Schreuer Commentary and subjected the issue tourism-related investment to the test of the criterion ‘contribution to host State’s development’ along with other criteria.⁴⁵ It was eventually, concluding that such investment does lead to the economic development of the host state without any rationale for such adaptation.⁴⁶

There are few cases that made minor or added little modification to the *Salini Test*. However, the so-called modification was not ground-breaking in terms of the development of the principle or law. The modifications merely amounted to an understanding that the criteria of the *Salini Test* were to be understood in totality and much depend on case-to-case factual position. In *Noble Energy, Inc and the Machalapower Cia Ltd v. the Republic of Ecuador and Consenjo Nacional de Electricidad*⁴⁷ (hereafter referred as *Noble Energy and Machalapower Award*), the Tribunal chose to concur with the *Salini Test* including the criterion ‘contribution to the host State’s Development’ with a minor modification that it was to be understood in totality, as they are inter-related and each case comes with their peculiarities.⁴⁸ In *Jan De Nul Award*,⁴⁹ the Tribunal chose to have a qualified agreement with the *Salini Test*, the qualification being that the examination of the *Salini Test* must be done in totality and taking factual consideration of each case. The criterion of “contribution to host State’s development” was not challenged; the Tribunal chose not to probe into factors that precisely defined the criteria.⁵⁰

While the aforementioned paragraphs evidence the arbitral Award, which has incorporated the *Salini Test* without dwelling into the rationale behind the inclusion of the criteria “contribution to the host State’s development” with or without minor modification, in *Malicorp Ltd v. the Arab Republic of Egypt*,⁵¹ Tribunal takes some steps forward to rationalise the importation of the criteria. The Tribunal admits that the criterion laid by *Salini Test* and Prof Schreuer Commentary is followed by many Arbitral Tribunal albeit disputed findings in ICSID Jurisprudence.⁵² The Tribunal comments that the criteria are not absolute. However, ‘investment’ within ICSID as a concept is to be understood in two complementing terms of ‘promotion’ and ‘protection’ of ‘economic development’ and ‘investment’.⁵³ The Tribunal derived this complimentary role from the Preamble of the ICSID Convention,⁵⁴ hence, found the

⁴⁴ *Helnan International Hotels A/S v. The Arab Republic of Egypt*, ICSID Case No. ARB 05/19, Decision of the Tribunal on Objection to Jurisdiction, 17 October 2006.

⁴⁵ *Ibid*, At Para 77.

⁴⁶ *Ibid*, At Para 77–80.

⁴⁷ *Noble Energy, Inc and the Machalapower Cia Ltd v. the Republic of Ecuador and Consenjo Nacional de Electricidad*, ICSID Case No ARB/05/2012, Decision on Jurisdiction, 5 March 2008.

⁴⁸ *Ibid*, Para 128–135 and Para 161.

⁴⁹ *Supra* note 9.

⁵⁰ *Ibid*, At Para 91–93, 106.

⁵¹ *Malicorp Ltd v. the Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011.

⁵² *Ibid*, At Para 109–114.

⁵³ *Ibid*, At Para 110.

⁵⁴ *Ibid*.

rationale to be critical enough for the incorporation of the fourth prong of the *Salini Test*.

Awards Swung Towards the Other End from Salini Test

The reflection of the objective criteria in the *Fedax, or Salini*, were not absolute, as the ICSID Jurisprudence has a fair share of awards reflecting upon the other end of the spectrum, where the Tribunal either was of the opinion that 'contribution to the host state's development' do not form an essential part of the objective test or have rejected the *Salini Test* in totality. These arbitral awards have expressly and categorically discarded the mandatory inclusion of economic development as an essential element in the definition of "investment" or were of the view that "economic development of the host State" as an optional or dispensable criterion for determining if an activity or projects qualify as an investment.

Post *Salini Award*, *LESI –Dipenta Award*⁵⁵ award happened to be one of the significant awards, which have been often referred to, in the debate to include or exclude "contribution to host State's development" from the definition of investment. The Tribunal stated that in the view of the ICSID Convention and Report of the Executive Directors, 'Investment' was a central issue to the regime. However, the definition of the term is not an issue to be expounded by the Arbitral Tribunals in general. Instead, the Tribunal should engage in verifying the alleged investment if it can fulfil the condition envisaged by the Convention.⁵⁶ The Tribunal undertook a close study of *Fedax Award*,⁵⁷ *Salini Award*,⁵⁸ *SGS Société Générale de Surveillance S.A. v. the Islamic Republic of Pakistan*⁵⁹ (hereafter referred as *SGS v. Pakistan*), and concluded that the awards did not provide any guidelines rather was determined on a case-by-case basis.⁶⁰ However, the Tribunal admitted that three conditions which evolved through the aforementioned cases were significant for determining the objective criteria and chose to leave out the criterion "contribution to the host State's development" from the realm of objective test, as it was difficult to ascertain and implicitly addressed by the remaining criteria namely, the contribution of money/assets, certain duration, elements of risk for the contributor.⁶¹

In *Phoenix Action Ltd v. The Czech Republic*⁶² (hereafter referred as *Phoenix Award*), the Tribunal, on the one hand, thought that, just because the ICSID Convention does not define 'investment', it meant that any kind of activity could be brought within the purview of ICSID, on the other, the Tribunal observed that *Salini Test*

⁵⁵ Supra note 8.

⁵⁶ Ibid, Award, At Para 13–14.

⁵⁷ Supra note 2.

⁵⁸ Supra note 1.

⁵⁹ *SGS Société Générale de Surveillance S.A. v. the Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objection to Jurisdiction, 6 August 2003.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² *Phoenix Action Ltd v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2005.

needs to be supplemented, as in its entirety it is not appropriate.⁶³ The Tribunal noted that the arbitral Tribunal had not consistently adopted the criterion "economic development of the host State".⁶⁴ While some Tribunals have insisted on the criterion's importance, others approached it with suspicion.⁶⁵ The Tribunal opined that it is impossible to ascertain 'contribution to the host State's development' by the alleged 'investment'.⁶⁶ Further, the Tribunal added that the concept of 'development' is in itself suffering from diverging views, hence, urging to resort to a less ambitious approach involving contribution to the economic development of host State, and a standard shaped by elements of contribution, risk and duration.⁶⁷ However, if there exists a situation where a foreign investor undertakes the activity, but the investor does not carry out the activity, leading to no contribution to the development of the host State, in such a situation, even if such activity had met other criteria of *Salini Test* it cannot be termed as 'investment' in accordance with the Article 25 of ICSID Convention.⁶⁸ Finally, the Tribunal added a criterion an operation made in order to develop economic activity in the host State' along with five other criteria to fulfil the definition of investment.⁶⁹

In *Saba Fakes Award*,⁷⁰ the Tribunal faced with a situation where they had to make the following determination: *a.* if the ICSID Convention provides for the independent definition of investment apart from what is defined in the BIT; *b.* examine whether the independent ICSID definition can override the definition under BIT; *c.* if it is found that such definition exists, then what is its scope and contents; and *d.* if the claimant's transaction meet such definition laid by ICSID Convention? The Tribunal noted that in *MCI v. Ecuador*, it chose the characteristics of investment as 'mere example' not to be elevated as 'elements' reflecting investment.⁷¹ The Tribunal noted that some Tribunals were of the opinion that the objective criteria of investment would require certain elements to constitute a transaction as an investment.⁷² The Tribunal notes two schools of thought emerged from the Tribunal awards listing out elements required to meet objective criteria.⁷³ While the *Salini Test* included "contribution to host State's development" as the fourth element, the other school was of the opinion that the "contribution to host State's development" is not a criterion as evidenced in *LESI-Dipenta*.⁷⁴ There exists a third school, which suggests that the criterion "contribution to host State's development" should

⁶³ Ibid, At Para 82.

⁶⁴ Ibid, At Para 84–85, 114.

⁶⁵ Ibid.

⁶⁶ Ibid, At Para 85.

⁶⁷ Ibid.

⁶⁸ Ibid, At Para 87.

⁶⁹ Ibid, At Para 114.

⁷⁰ Supra note 5.

⁷¹ Ibid, At Para 94.

⁷² Ibid, At Para 95–114.

⁷³ Ibid, At Para 83–114.

⁷⁴ Ibid, At Para 102.

be significant.⁷⁵ The Tribunal noted a trend that tends to revert to the idea inclined towards defining ‘investment’ as found in the ICSID Convention. This change in approach was due to the complicated and numerous elements being associated with an economic understanding of the term ‘investment’.⁷⁶ The Tribunal opined that investment must be understood from an objective perspective in the absence of its definition in the ICSID Convention.⁷⁷ However, the criteria “contribution to host State’s development” must be excluded from an objective understanding of the term “investment”.⁷⁸ The Tribunal thought that the other three criteria, namely duration, risk, contribution, are derived from the ordinary meaning of the term ‘investment’, and they suffice the need for objective criteria and importing economic development criteria through Preamble is rather excessive.⁷⁹ The Tribunal further added that protection and promotion of investment are expected to contribute to economic development. This aforesaid contribution is a consequence of the investment activity and not a determining factor of its existence and remains uncertain by nature.⁸⁰

In a similar vein, the Tribunal in *Quiborax S.A., Non-Metallic Minerals S.A. and Allan Fosk Kaplún v. The Plurinational State of Bolivia*⁸¹ (hereafter referred as *Quiborax Award*) notes that the term investment is left undefined under ICSID, but that does not mean that it could be left as an unruly horse. Concurring with *Saba Flakes Award*, the Tribunal states that ‘investment’ must be understood in ordinary terms, and such ordinary meaning would be an objective one.⁸² As in the given case, the claimant questioned if the definition under BIT was so ‘off the chart’ that it could not be encompassed within Article 25, implicitly admitting that there exists a ‘chart,’ i.e., the objective definition, within which the Article 25 operates.⁸³ The Tribunal drew inspiration from several case laws before quoting *GEA v. Ukraine* that investment per se has an objective meaning, irrespective of where it is found—whether in Article 25 of ICSID or BIT. The Tribunal went beyond the arbitral Award of the ICSID, as they reflected upon *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*⁸⁴ (hereafter referred as *Romak Award*), which was a UNCITRAL proceeding, wherein the Tribunal stated that investment in itself has

⁷⁵ Ibid, At Para 101.

⁷⁶ Ibid, At Para 106.

⁷⁷ Ibid, At Para 108.

⁷⁸ Ibid At Para 110.

⁷⁹ Ibid, At Para 121; Also See *Giovanni Alemanni v. The Argentine Republic* [2015], ICSID Case No. ARB/07/08, the Tribunal noted that if one has to interpret ‘investment’ under the Convention, it must be done broadly, as the Convention does not provide any definition. Hence the arbitrators should rather refer for guidance to the typical characteristics as identified in case laws and commentary by scholars, rather than imposing fixed criteria.

⁸⁰ Ibid.

⁸¹ *Quiborax S.A., Non Metallic Minerals S.A. and Allan FoskKaplún v. the Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012.

⁸² Ibid, At Para 198 and 212.

⁸³ Ibid, At Para 203.

⁸⁴ *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, 26 November 2009, Para 104.

a meaning which cannot be ignored while interpreting the term investment even in BIT.⁸⁵ The Tribunal then turned to examine the elements which formed objective elements as were reflected in ICSID Jurisprudence; while interpreting Article 25 of the ICSID Convention and concluded that the fourth criteria, i.e. “economic development of host State” was unfounded, as in that case, only a successful investment can bring in contribution to the host State development as opposed to the failed investment. In contrast, in reality, the investor project or activity remains an investment, albeit its success or failure.⁸⁶ The Tribunal found *LESI-Dipenta Award*,⁸⁷ *Victor Pey Casado and President Allende Foundation v. Republic of Chile*⁸⁸ (hereafter referred as *Casado Award*), *Phoenix Award*,⁸⁹ *Saba Flakes Award*⁹⁰ opinion on the issue persuasive enough to keep the criterion “contribution to host State’s development” away from the objective test of Investment.⁹¹ The Tribunal further added that the concept of “contribution to host State’s development” is rather an ‘aspiration’ and is best counted as an aspirational objective of the international investment regime.⁹² However, Alex Grabowski found that the argument forwarded in *Quiborax Award* that “contribution to the host State’s development” not a necessary element of investment is flawed, as it runs counter to the Preamble of ICSID Convention and creates uncertainty over investment on which the ICSID has control, as *Salini Award* limits the jurisdiction to the extent of the purpose of the ICSID Convention (2014, p. 290). However, it is difficult to reconcile with Alex Grabowski’s interpretation on at least two counts: First, it is wrong to suggest that the divergent theory is new. It is not doubted that the theory is ‘newer’ than *Salini Test* as it was formulated post-*Salini Award*. However, the theory developed over several other cases like *Casado Award*,⁹³ *LESI Dipenta Award*,⁹⁴ *Phoenix Award*,⁹⁵ Etc. Second, the approach taken by the *Quiborax Award* cannot be disregarded as flawed or wrong as the Preamble and Report of the Executive Directors do not reflect the object and purpose of the ICSID Convention as Economic Development. Rather it could be at best be termed as aspirational.⁹⁶

The school of thought, which did not consider “contribution to the host State’s development” as essential criteria of the definition of Investment, was further

⁸⁵ Supra note 81, At Para 215.

⁸⁶ Ibid, At Para 216.

⁸⁷ Supra note 8.

⁸⁸ *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Jurisdiction, 8 May 2002.

⁸⁹ Supra note 62.

⁹⁰ Supra note 5.

⁹¹ Supra note 81, At Para 235–236.

⁹² Ibid.

⁹³ Supra note 88.

⁹⁴ Supra note 8.

⁹⁵ Supra note 62.

⁹⁶ See *Pantechniki S.A. Contractors and Engineers (Greece) v. The Republic of Albania*, ICSID Case No. 07/21, Award, 30 July 2009, At Para 43, wherein the Tribunal says that although *Salini Test* attempt is respectable, it tends to transform arbitrators as policymakers and increase unpredictability about the availability of ICSID to settle given dispute.

bolstered by the Award in *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. the Oriental Republic of Uruguay*.⁹⁷ The Tribunal faced an inspired argument from the Respondent that economic development is the paramount objective of the ICSID Convention and cannot be discarded while interpreting the term 'investment'.⁹⁸ Further, the argument was forwarded that if the foreign investor's activity led to negative economic development, it would fail the *Salini Test*, which requires a significant contribution to the host State's economy to qualify as an investment under ICSID Convention.⁹⁹ The claimant responded to the argument of the Respondent by expressing that drafters of the Convention had no intention of limiting the definition of the term investment. Hence, it was left to be decided by the Contracting States, and even if the term was to be confined within a limit, it did not warrant the mandatory application of jurisdictional criteria laid down by another Tribunal.¹⁰⁰ Further, the *Salini Test* Criteria could not be elevated to a jurisdictional level, as it only talked about the being typical characteristics, which is also re-affirmed by Prof.Schreuer.¹⁰¹ The criterion "contribution to host State's development" is rather a subjective one that may transform the arbitrators into policymakers.¹⁰² The Tribunal noted that the absence of the definition of the term 'investment' in the ICSID Convention does not rule out the possibility of interpreting the term under VCLT, as an investment must be confined within the outer limits as stated by Alan Broaches during the negotiation process.¹⁰³ Reflecting upon the *Salini* Award, the Tribunal expressed that even if it is assumed that arbitral awards are 'judicial decisions' in accordance with Article 38(d) of ICJ, only when such Award which has received sufficient publicity and is part of '*jurisprudence constante*' could it be commonly accepted. However, the Tribunal could not find the *Salini* Award to have reached a level of '*jurisprudence constante*'.¹⁰⁴ Further, In *Salini v.Morocco*, the Tribunal qualified the addition of the criteria "contribution to the host State's development" with the word 'maybe included'.¹⁰⁵ The Tribunal concurred with *Casado v.Chile* Tribunal on its statement on "contribution to the development of host State".

"An investment could prove useful or not for a country without losing its quality [as an investment]. It is true that the Preamble to the ICSID Convention mentions 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: by protecting investments, the Convention facilitates the develop-

⁹⁷ Supra note 24.

⁹⁸ Ibid, At Para 178.

⁹⁹ Ibid, At Para 180.

¹⁰⁰ Ibid, At Para 184.

¹⁰¹ Ibid, At Para 185.

¹⁰² Ibid.

¹⁰³ Ibid, At Para 199.

¹⁰⁴ Ibid, At Para 204.

¹⁰⁵ Ibid, At Para 206.

ment of the host State. This does not mean that the development of the host State becomes a constitutive element of the concept of investment.”¹⁰⁶

In *Alpha v. Ukraine*, the Tribunal was unenthusiastic about applying one of the criteria of the *Salini Test*, i.e., “contribution to the host State’s development”.¹⁰⁷ The Tribunal subscribed to the idea that investment must be understood in reasonable terms, and the criterion of “contribution to the host State’s development” is rather a consequence of the other three criteria without having much of independent existence to the cause. Further, the Tribunal expresses that criterion ‘contribution to the host State’s development’ summons, “a Tribunal to engage in a post hoc evaluation of the business, economic, financial and/or policy assessments that prompted the claimant’s activities,” which the Tribunal considered inappropriate.¹⁰⁸

In *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*¹⁰⁹ (hereafter referred as *SGS v. Paraguay*), the Tribunal succinctly expressed that a Tribunal must undertake the task to determine if an alleged investment falls beyond the reasonable understanding of the term or not.¹¹⁰ The three criteria, duration, risk, contributions of resources fulfil the objective criteria, and “contribution to host State’s development”, is rather a consequence of the other three criteria. The fourth prong of the *Salini Test*, on its own, does not bring much to the table in terms of content.¹¹¹ Hence, any Tribunal needs to undertake due care and caution before they summarily resort to testing an investment, with the test of contribution to economic development.¹¹² The subjectivity element of the fourth prong of the *Salini Test* was examined in *Pantehniki S.A. Contractors and Engineers v. The Republic of Albania*.¹¹³ The Tribunal expressed that it would be wrong to define ‘investment’ in accordance with the *Salini Test* cause the test lists five typical characteristic elements of Investment.¹¹⁴ Drawing support from Douglas’ argument, the Tribunal said that two of the elements, i.e., “certain duration” and “contribution to the host State’s development” within the *Salini Test*, are extremely subjective and must be left outside as characteristic elements.¹¹⁵ The Tribunal observed that elevating that test as Jurisdictional Requirement—specifically the subjective criteria of “duration” and

¹⁰⁶ Ibid, At Para 208.

¹⁰⁷ Ibid, At Para 312.

¹⁰⁸ Ibid, At Para 312.

¹⁰⁹ *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010.

¹¹⁰ Ibid, At Para 107.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Supra note 96.

¹¹⁴ Ibid Para 36–48: It is important to note that *Salini Test* had only 4 Criteria and not five as observed by the Tribunal.

¹¹⁵ Ibid, At Para 36.

“contribution to host State’s development”—maybe a bit of an overstretch, as it elevates arbitrators as policymakers and raises the concern of unpredictability within the ICSID to settle the dispute, which was the primary purpose of the Convention.¹¹⁶ Holding a prominent place amongst the awards, the annulment proceeding in *Malaysian Salvors Award*,¹¹⁷ contributed significantly to the jurisprudence on the “contribution to the host State’s development”¹¹⁸ as a detailed study of the relevant documents and scholarly work led the opinion that the objective criteria as typical characteristics and not jurisdictional.¹¹⁹ The committee concluded that the Tribunal in *Salini Award* had manifestly exceeded powers bestowed upon it. It failed to take account of the broad definition of investment in the BIT between the UK and Malaysia and raised the *Salini* criteria as jurisdictional in nature. Furthermore, it failed to take into account the *Travaux Préparatoires* on the issue of investment, which under Article 32 of the Vienna Convention of the Law of Treaties, 1986 has worthwhile importance in a situation of ambiguity.¹²⁰

There have been instances of awards wherein the Tribunal thought it was appropriate to examine the impact of any investment in terms of economic development at the merit stage, as only in that stage a detailed analysis could be undertaken. As was seen in *H andH Enterprises Investments, Inc v.the Arab Republic of Egypt*,¹²¹ the Respondent contested the jurisdiction of the Tribunal on the ground that the investment must meet the requirement of ICSID and BIT requirement including the economic development test.¹²² It is contended that “Option to Buy” falls short in satisfying the ICSID Convention Criteria.¹²³ According to the Respondent, the “option to buy”, exercised at claimant’s good judgment further, involved single lump-sum payment, and an act which is limited to a single transaction without any affirmative in the transfer of know-how, technology or equipment does not contribute to the development of the host State.¹²⁴ The Tribunal expressed that the question of the validity of “option to buy” should be decided at the merit stage as it required an overall assessment.¹²⁵

The Extreme Opposites

There were several awards by the Tribunals constituted under ICSID Convention wherein the *Salini Test* in totality was rejected or discarded, which had an implicit outcome that the ‘contribution to the host State’s development’ along with other criteria were not applicable while interpreting the term ‘investment’ under ICSID

¹¹⁶ Ibid, At Para 43.

¹¹⁷ Supra note 4.

¹¹⁸ Ibid.

¹¹⁹ Ibid, At Para 80.

¹²⁰ Ibid, Para At 80.

¹²¹ *H andH Enterprises Investments, Inc v.the Arab Republic of Egypt*, ICSID Case No. ARB/09/15, The Tribunal’s Decision on Respondent’s Objections to Jurisdiction, 5 June 2012.

¹²² Ibid.

¹²³ Ibid, At Para 22.

¹²⁴ Ibid, At Para 23.

¹²⁵ Ibid, At Para 43.

Convention. *Biwater Gauff (Tanzania) Ltd. v. The United Republic of Tanzania*¹²⁶ (hereafter referred as *Biwater Gauff Award*) is one of the leading awards in this regard. The Tribunal expresses that the Parties have resorted to Fedax or Salini Award more often than not while contesting or claiming the jurisdiction under Article 25 of the ICSID Convention.¹²⁷ The Tribunal was of the opinion that the criteria under *Salini* are not binding law; the ICSID Convention does not provide for such criteria.¹²⁸ Furthermore, the *Travaux Préparatoires* reflects that since the drafters could not define, the definition was left to the Contracting Parties to decide on each case. The Tribunal notes that the characteristics laid by *Salini* have been elevated to jurisdiction characteristics by few Tribunals.¹²⁹ The Tribunal refused to examine the instant case strictly under the light of the *Salini Test*, rather chose to adopt a more pragmatic analysis.¹³⁰ The Tribunal expressed that “*even if the Republic could demonstrate that any, or all, of the Salini criteria, are not satisfied in this case, this would not necessarily be sufficient—in and of itself—to deny jurisdiction*”.¹³¹ Further, even if the alleged investment was a ‘lost leader’ as claimed by the Respondent, the Tribunal failed to understand how it could be denied jurisdiction under the ICSID Convention.¹³² *Biwater Gauff* was not the only instance that disregarded *Salini Test*. In *Abaclat and Other v. The Argentine Republic*,¹³³ the Tribunal classified investment into two broad segments: Contribution, which establishes ‘investment’, and rights and values derived from such contribution while analysing the concept of Investment.¹³⁴ The definition of ‘Investment’ under Article 25 of the ICSID Convention was relatable with the former segment. The Tribunal noted that the act of Draftsmen of the ICSID Convention left ‘investment’ without any definition in order to leave room for the investors to decide upon the concept.¹³⁵ The Tribunal expresses that the definition under BIT reflects the types of investment that need to be protected. Whereas the double-barrel test suggests that the definition incorporated within the BIT must also successfully accommodate itself within the spirit of Article 25 of the ICSID Convention.¹³⁶ The Tribunal admitted that even though the *Salini Test* may appear to be correct in its approach, it would not be appropriate to use the criteria, as it would translate into denial of procedural mechanism to the claimant under ICSID, which incidentally is an explicit object and purpose of

¹²⁶ *Biwater Gauff (Tanzania) Ltd. v. The United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*, At Para 312.

¹²⁹ *Ibid.*, At Para 312–313.

¹³⁰ *Ibid.*, At Para 316.

¹³¹ *Ibid.*, At Para 318.

¹³² *Ibid.*, At Para 319–321.

¹³³ *Abaclat and Other v. The Argentine Republic*, ICSID Case No. ARB/07/5 (formerly *Giovanna a Becara and Others v. The Argentine Republic*), Decision on Jurisdiction and Admissibility, 4 August 2011.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*, At Para 347.

¹³⁶ *Ibid.*, At Para 349.

the ICSID Convention.¹³⁷ While in *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*¹³⁸ (hereafter referred as *Inmaris Perestroika Award*), the Respondent had argued that the alleged investment should significantly contribute to the host State's development, inspired by *Salini Test* and ICSID jurisprudence. The Tribunal could not find the ICSID Convention compatible with that line of argument¹³⁹ and imposed a mandatory and limited definition of the term 'investment' development by Arbitral Tribunals.¹⁴⁰ However, the Tribunal did express that *Salini Test* may be useful in certain circumstances where the BIT definition of investment is so extraordinarily broad that it is beyond the reasonable understanding of the term Investment.¹⁴¹

One of the most appropriate methods of interpretation was used in *Ambiente Ufficio S.P.A. and Ors v. The Argentine Republic*¹⁴² (hereafter referred as *Ambiente Award*), wherein the Tribunal was of the opinion that one should resort to supplementary means only if the interpretation rules under Article 31 of VCLT failed to yield a conclusive, unambiguous, or certain result. However, the situation herein recommends understanding the drafting history of Article 25 of the ICSID Convention, as it has the potential to create the platform to aptly analyse 'investment' in the light of Article 31 of VCLT.¹⁴³ The *Travaux Préparatoires*, Report of the Executive Director, reflects upon that the term 'investment' as to be interpreted liberally, however, subject to the specific restriction as provided in the ICSID Convention.¹⁴⁴ The Tribunal turned to examine the term 'investment' in the light of Article 31 of VCLT, wherein the Tribunal noted that genesis of Article 25 could not be decisive for the purpose of interpretation in International Law unless Article 31 gave rise to the inconclusive or ambiguous definition.¹⁴⁵ However, the Tribunal analysed the alleged investment in the backdrop of the *Salini Test* and was of the opinion that the *Salini Test* must not be subjected to an unduly restrictive application or be construed as expressing jurisdictional requirement.¹⁴⁶ The Tribunal did not directly express any opinion on the validity or relevance of the criterion "contribution to host State development" and left it to be part of the *Salini Test*, which must be treated typical in characteristics, hence implying that even an act of investment not contributing to the host State's development, can amount to an investment.

¹³⁷ Ibid At Para 363–364.

¹³⁸ *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010.

¹³⁹ Ibid, At Para 126–134.

¹⁴⁰ Ibid, At Para 129.

¹⁴¹ Ibid, At 131.

¹⁴² *Ambiente Ufficio S.P.A. and Ors v. The Argentine Republic*, ARB/08/09, Decision on Jurisdiction and Admissibility, 8 February 2013.

¹⁴³ Ibid, At Para 441–445.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid, At Para 441–487.

On the Length of Spectrum

The ICSID Jurisprudence could not be termed as stuck in time, with *Salini Test*. It is not denied that some Tribunals preferred mechanically adaptation of the *Salini Test* to verify if objective criteria were being fulfilled or not. Undoubtedly, a wind of change could be anticipated, as several Tribunals introduced little modification and twists within the *Salini Test*. A step towards development could be apportioned to the *Joy Mining Award*,¹⁴⁷ as the Tribunal took note of the jurisprudence as laid by various cases, types of investment which were declared by the ICSID jurisprudence and scholarly works which included “contribution to host State’s Development” along with other criteria to catapult an activity as an investment. The Tribunal added that cautionary steps to be taken with respect to the determination of the “extent” to which these criteria have adhered for the fulfilment of objective criteria.¹⁴⁸ The Tribunal adds that each case in issue would typically depend on circumstances and may be peculiar from case to case.¹⁴⁹ Serious questions were raised on the ‘extent’ of the “contribution to the host State’s development” as *Fedax Award*¹⁵⁰ had laid that the contribution to the host State development should be of Significance, a suit blatantly followed by the *SGS v. Pakistan Award*¹⁵¹ without any examination in the possible legality of the criteria along with other criteria. Incidentally, in another case involving Pakistan, i.e., *Bayinder- Pakistan Award*,¹⁵² the Tribunal noted that to qualify as an investment under ICSID Jurisprudence, the contribution must be significant. The development of roads by the Respondent’s own admission was of significance to the development of the host State. Hence, the Tribunal upheld the criteria being fulfilled.¹⁵³ However, it is interesting to note that while expressing its opinion on the criteria of contribution being significant, the Tribunal did take note of the finding in *LESI* that the criteria “contribution to the host State’s development” is covered by the other three tests under *Salini Test*. However, the observation had no lasting impact or any effect on the decision of the Tribunal on the issue.¹⁵⁴ In *Jan De Nul Award*,¹⁵⁵ the Tribunal found dredging operation on Suez Canal was of ‘paramount significance’ to Egypt’s economy; however, the observation was rather inspired from the nature of the investment, a fact-based observation, which did not enquire or reflect upon whether contribution to host State was a criterion. Even if it is a criterion, which parameters could be used to determine its extent of significance?¹⁵⁶ In one of the earlier cases at a period when the objective definition of Investment under

¹⁴⁷ Supra note 7.

¹⁴⁸ Ibid, At Para 53.

¹⁴⁹ Ibid.

¹⁵⁰ Supra note 2.

¹⁵¹ Supra note 59, At Para 133.

¹⁵² Supra note 6.

¹⁵³ Ibid, At Para 137.

¹⁵⁴ Ibid.

¹⁵⁵ Supra note 9.

¹⁵⁶ Ibid, At Para 92.

ICSID had not developed, *CSOB v. Slovakia Award*¹⁵⁷ Tribunal had decided that the 'Consolidation Agreement' therein was meant to be 'continuing and expanding' activity of CSOB and was envisioned to contribute significantly to the host State development. However, it could be noted from the Arbitral Jurisprudence that on the point of "significant contribution to the host State's development", the Tribunals were not always rigid. In the annulment proceeding in *Patrick Mitchell Award*,¹⁵⁸ the *ad-hoc* committee (annulment committee) recommended a broader interpretation of investment and required 'some' form of a contribution to the economy of the Host State in one way or another.

Dwindling, But Not Effectively

It is an established principle of *stare desicis* that it does not operate in international arbitration, and the Tribunal may or may not follow the ruling or Award of other Tribunals. Nonetheless, many Tribunals did consider the extreme approaches with respect to the criteria "contribution to the host State's development". In *Bayinder v. Pakistan*,¹⁵⁹ the Tribunal, on the one hand, took note of the fact that the arbitral Tribunals often resorted to the Preamble of ICSID Convention to import the concept of 'significant contribution to the host State's development' to the definition of investment, on the other hand, the Tribunal considers the opinion of *LESI*. However, the consideration of the *LESI- Dipenta Award* by the *Bayinder- Pakistan Award* Tribunal had little or no impact on the decision. The Tribunal explains that Respondent had confirmed that the activity of the claimant was part of infrastructural development. Hence, the Tribunal thought the criteria being best left unexamined.¹⁶⁰ In *Toto Costruzioni Generali S.P.A. v. The Republic of Lebanon*¹⁶¹ (hereafter referred as *Toto Costruzioni Award*), the Tribunal observed that *Salini Test* is not gospel truth and expressed reluctance to follow it. Nonetheless, the Tribunal observed that all the criteria under *Salini Test* were met by the alleged investment in the instant case.¹⁶² It was understood that the ICSID Convention intended to keep the investment as a subject to be defined between contracting states and not let arbitral Tribunals constituted lay principles be applied in subsequent cases.¹⁶³ However, it is interesting to note that the Tribunal nonetheless relied on *Salini Test* with limited reasoning. It stated that due to the absence of specific criteria of the concept of investment within ICSID, one needs to take note of the underlying concept of investment, which is rooted in economics and observed that the alleged investment was involving major

¹⁵⁷ Supra note 21, At Para 88.

¹⁵⁸ Supra note 3, At Para 27.

¹⁵⁹ Supra note 6, At Para 137.

¹⁶⁰ Ibid.

¹⁶¹ *Toto Costruzioni Generali S.P.A. v. The Republic of Lebanon*, ICSID Case No ARB/07/12, Decision on Jurisdiction, 11 September 2009.

¹⁶² Ibid, At Para 81–87.

¹⁶³ Ibid.

Table 2 On approaches of ICSID tribunal on *salini* test and "contribution to the host State's development"

The approach of ICSID tribunals	Strongly support <i>Salini</i> approach	Debated on the approach, finally, apply <i>Salini</i> approach	Mechanical application or application with limited modification of <i>Salini</i> Test	Completely disregarded <i>Salini</i> test/implicitly rejection of economic development criterion	Rejection of economic development criterion supported with rationale
Share	3	4	11	4	12
Percentage	9%	12%	32%	12%	35%

Table 3 On non-ICSID tribunal discussing salini criteria

Non-ICSID tribunal discussing <i>Salini</i> test criteria	Acceptance of <i>Salini</i> test	Rejected <i>Salini</i> test explicitly
Share	3	1
Percentage	75%	25%

ICSID Awards on Salini Test/ "Contribution to the host state's development"

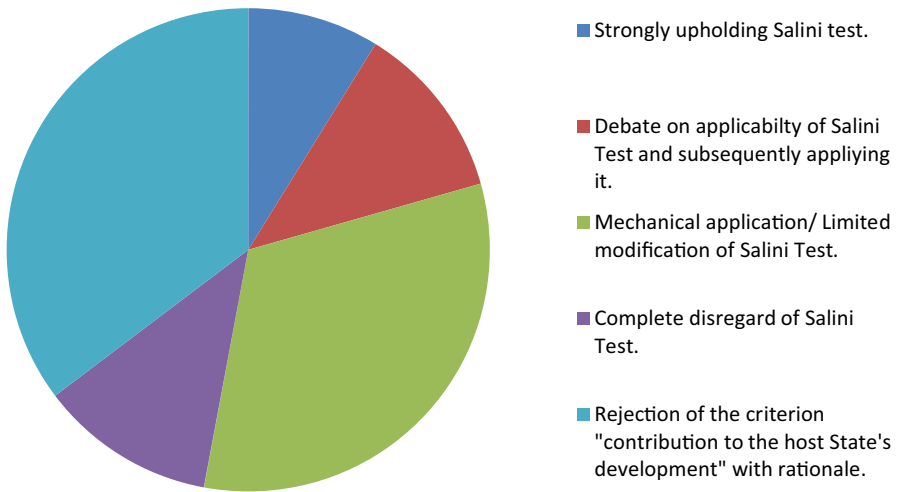


Fig. 3 Depicting the share of awards on salini test/"contribution to the host State's development."

Non -ICSID Awards deliberating upon Salini Test

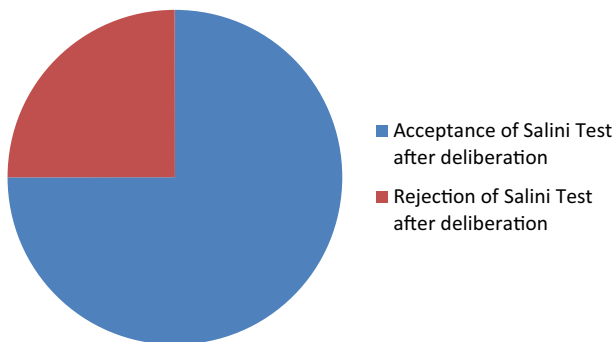


Fig. 4 Depicting non-ICSID tribunal deliberating salini criteria

construction work facilitating transportation between Lebanon, Syria and other Arab countries.¹⁶⁴

Non-ICSID Tribunal Awards Which Discussed the Salini Test, Including the Criteria “Contribution to the Host State’s Development”

The debate with respect to the definition of ‘Investment’ and the list of elements constituting the *Salini Test*, including the controversial element ‘contribution to the host State development’ was the outcome of Article 25 of the ICSID Convention and the Report of Executive Directors to the ICSID Convention, wherein, the term ‘investment’ was not defined. However, the *Salini Test* could not be limited to operate within the ambit of ICSID. Various Non-ICSID Tribunals, on several occasions, took inspiration from the *Salini Test* and took note of the objective definition of investment. Without fail, the Tribunals took note of the fact that the *Salini Test* was the product of ICSID jurisprudence and did not apply in Non-ICSID Tribunals. Nonetheless, the Non-ICSID Tribunals tested the facts against the criteria laid in *Salini Test*, which was neither mandated nor warranted.

In *Romak Award*,¹⁶⁵ the Respondent relied on the *Salini Test*, including the lack of ‘contribution to the host State’s development’ to contest the existence of Investment. The Respondent argued that the claimant had not made a significant contribution to the development of the host State due to the negligible impact of a single contract for the sale of goods.¹⁶⁶ The Tribunal acknowledged that it is positioned differently from the ICSID Tribunals. It noted that three approaches could be broadly be found in the ICSID jurisprudence with respect to *Salini Test*: strict application, expressed criticism of *Salini Test*, embracing the concept of *Salini Test*. However, it refused to endorse all the elements as laid by *Salini Test*.¹⁶⁷ However, the Tribunal was of the opinion that it was not mandated to engage in the interplay between ICSID Convention and Instrument providing the consent and subscribed to the view that the Contracting States can have incorporated abroad and free understanding of the term ‘Investment’. However, such ‘free understanding’ must be qualified by the wording of the BIT and reflecting the intent of the parties.¹⁶⁸ Further, the Tribunal stated that the term ‘investment’ needs to be understood in the light of ordinary meaning, object, purpose, which provides a premise for the inherent meaning of the term ‘investment’ which continues to be absolute, irrespective of the forum chosen by the parties the agreement. The Tribunal expressed that it felt easier to develop the ‘inherent’ meaning of the term due to the rationale provided by ICSID jurisprudence which consistently incorporated contribution, duration and risk as elements of investment.¹⁶⁹ In *Romak Award*, the Tribunal chose to avoid ICSID jurisprudence

¹⁶⁴ Ibid.

¹⁶⁵ Supra note 84, Para 104.

¹⁶⁶ Ibid, At Para 105.

¹⁶⁷ Ibid, At 198–204.

¹⁶⁸ Ibid, At 205–207.

¹⁶⁹ Ibid.

debate on *Salini Test* but took inspiration to lay down inherent characteristics of investment in general.

The Tribunal constituted under UNCITRAL framework in *Jan Oostergetel, and Theodora Laurentius v. The Slovak Republic*¹⁷⁰ (hereafter referred as *Jan Oostergetel Award*), analysed the alleged investment under the relevant BIT and decided that the transaction disqualifies under the relevant BIT. The Tribunal expressed that *Salini Test* was developed based on Article 25 of the ICSID Convention and the present Tribunal being constituted under UNCITRAL Rules.¹⁷¹ Although there have been diverse opinions in the applicability of the *Salini Test*, the Tribunal chose to go ahead and verify the fulfilment of the test on all of the criteria, including "contribution to the host State's development".¹⁷² The Tribunal expressed that the criteria of the *Salini Test* must be analysed and examined in totality and will depend upon the state of affairs of each case. Unlike *Romak Award*, the Tribunal did not provide any legal rationale for testing the investment under *Salini Test*.

In 2011, *White Industries Award*,¹⁷³ the Tribunal encountered the issue of treatment of 'Investment' with respect to *Salini Test*, the Tribunal reflected upon the issue not at any jurisdictional stage but a merit stage. At the outset, the Tribunal expresses that the so-called *Salini Test* was "simply not applicable here", and the higher standard of Double Barrel test is not required.¹⁷⁴ However, the Tribunal, after making a sweeping declaration about the non-applicability of the *Salini test*, stated that the elements of *Salini* were appropriate measure in the instant case and concluded that White Industries had met the criteria of *SaliniTest* including the criteria "contribution to host State's development".¹⁷⁵ On the other hand, the inconsistent practice also crept in Non-ICSID Tribunal through *Flemingo Award*,¹⁷⁶ wherein the arbitral Tribunal expressed the precise position. The Tribunal's jurisdiction was not to be guided by Article 25 of the ICSID Convention. Hence, the ICSID jurisprudence and *Salini Test* has no application in *Flemingo Award*.¹⁷⁷

Conclusionary Remarks

The issue identified for the research, i.e., "significance of the concept of Economic development in the definition of Investment..." has been subject of debate elaborately addressed by the *Travaux Preparatoires* of ICSID Convention, The ICSID Convention, and The Report of the Executive Directors and to a great extent by ICSID Jurisprudence. After significant deliberation, ICSID, at the institutional level, felt

¹⁷⁰ *Jan Oostergetel, and Theodora Laurentius v. The Slovak Republic*, UNCITRAL Rules, Decision on Jurisdiction, 30 April 2010.

¹⁷¹ *Ibid*, At Para 44, 160–172.

¹⁷² *Ibid*, At 159–161.

¹⁷³ *Supra* note 10.

¹⁷⁴ *Ibid*, At Para 7.4.9.

¹⁷⁵ *Ibid*, At Para 7.4.10.

¹⁷⁶ *Supra* note 11.

¹⁷⁷ *Ibid*, At Para 298.

that the definition of an investment should be best left for the States to determine in their treaty. However, the ICSID Jurisprudence had a different story to share. ICSID Arbitral Tribunals engaged interpretation of the term “investment” provided under Article 25(1) of the Convention, which led to the identification of essential elements of investment, fulfilling the economic understanding of the term “investment”. The issue was primarily highlighted by the *Salini* Award, which recommended a double key-hole test to qualify as an investment under the regime. In addition to the investment treaty definition, the act of alleged investment must meet the essential objective requirements of duration, risk, commitment and contribution to the host State’s development.

The present research focused on the fourth prong of the objective criteria, i.e., “contribution to the host State’s development”, as conceptually it poses significant challenges in terms of theoretical approach, quantification and practicability. The study undertook an examination of ICSID awards and also Non-ICSID awards to examine the Tribunals’ approach in the determination of “contribution to the host State’s development” as provided in Tables 2, 3 and Figs. 3 and 4. The empirical study revealed that an almost equal percentage of awards accepted *Salini Test* and rejected the criterion “contribution to the host State’ development” as an essential element to define investment in the regime. However, unlike the awards which accepted the *Salini Test*, the awards which explicitly rejected the criterion “contribution to the host State’ development” provided a rationale for rejection of the criterion. Only a handful of awards accepted the *Salini Test* provided a rationale for applying the criterion “contribution to the host State’s development,” mostly relying upon the Preamble that is aspirational in nature.

Analyses of the awards reflect that seldom methodical approach, based on the indicators, was undertaken to determine the fulfilment of the criteria. Hence, the question arises as to how an investment can be subjected to criteria which demand risk and uncertainty on the one hand and, on the other, can compulsorily be obligated to make a positive impact on the host State’s economy. Business risk is inherent in part of the investment, which cannot be operational if the other criterion demands a certain and particular result, which is subjective in nature, i.e., “contribution to the host State’s development”. Investment indeed has an inherent meaning which can also be termed as an objective definition. However, as discussed above, especially in the paras discussing the challenges associated with the quantification of economic development, such inherent meaning may not need “contribution to host State’s development” as an essential criterion due to the existing debate circling with the concept in its parent domain, i.e., economics, subjective nature of the concept, challenges with respect to the quantification of the concept, diverse and ever-changing economic policies of States.

The criterion “contribution to the host State’s development” is a complex concept. ICISD Arbitral Tribunals on several occasions categorised it as an essential element to define investment to incorporate the economic understanding of the term in the legal realm at the jurisdictional stage, often without undergoing the rigours of ascertaining the concept and relying upon the mere mention of the term in the Preamble, which by nature is aspirational. Tribunals that rejected the inclusion of the concept of “contribution to the host State’s development” as an

essential criterion to define investment engaged in a doctrinal study and provide a rationale for non-inclusion. Thus, from a legal standpoint, exclusion of the "contribution to the host State's development" criteria to define investment unless otherwise provided in the treaty could be considered appropriate. Economic development is part of the inherent nature of humankind. Hence, it is evident that every State is aspiring for Economic Development and one of the several steps towards it is by participating in an international investment regime. However, to have legal import of the term as substantial obligation upon the investor, reference to the Preamble may not be enough; the States need to remove the existing challenges of subjectivity, quantification, established parameters which continues to plague the concept. One way to remove the challenges could be incorporating the concept as an essential criterion to define investment. However, mere incorporation may not solve the challenge in its entirety, as along with the incorporation, well-defined parameters addressing the economic development should be made part of the treaty. For instance, if the concept is incorporated without taking into consideration the methodology to ascertain it, we would be back to square one, only worse, as it would amount to a substantial obligation but plagued by existing challenges. If the States intend to use economic development as a justiciable criterion, then it is imperative that the concept of economic development of the host State be transformed from a subjective identity to an objective one. In absence of such elaborate progress towards the development of the concept, by no measure could the concept of economic development be treated as part of a jurisdictional issue to define investment.

The objective criteria have found significant popularity in the Model investment Treaties. Certain States approached the incorporation of the Salini Test with caution, such as in Colombia and USA Model BIT, where the safeguarding approach was evidenced as they included the three criteria as minimum characteristics of investment: duration, risk, commitment. On the other hand, the Indian Model BIT of 2016 incorporated all four criteria as essential criteria to define investment, including the criterion "contribution to the host State's development". Interestingly, the India Brazil BIT of 2020, which India negotiated through the Model BIT of 2016, did not have the criterion "contribution to the host State's development" as an essential criterion to define investment. However, the other three criteria, namely, duration, risk, and commitment, found a place in the India-Brazil BIT of 2020. The absence of the "contribution to the host State's development" criterion in the negotiated treaty evidences the existing challenges and complexity of the concept of economic development and further emphasises the need for elaborate engagement and ascertainment of the quantifiable parameters to effectively be considered as essential criteria to define investment.

Declaration

Conflict of interest On behalf of all authors, the corresponding author states that there is no conflict of interest.

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