The Trouble with Salini

(Criticism of and Alternatives to the Famous Test)

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Introduction

The famous *Salini* test, commonly used to determine whether an investment exists, has been put under heavy scrutiny by recent arbitral awards. The present article discusses these awards and their consequences, starting with an explanation of the history of the *Salini* test and the reason why this test was proposed in the first place.

The ICSID Convention does not contain a definition of investment, because it was thought best to leave it to be worked out in the subsequent practice of the States. Emphasizing that "[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre", the Report of the executive directors that accompanied the proposed treaty elaborated:

> No attempt was made to define the term "investment" given the essential requirement of consent by the parties, and the [notification] mechanism through which 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.[1]

The purpose for this lack of definition was, in the *Mihaly's* tribunal words, to "preserv[e] [the Convention's] integrity and flexibility and allow for future progressive development of international law on the topic of investment".[2]

Tribunals however quickly set off to define this term, relying upon the treatise of Christoph Schreuer on the ICSID Convention, who distinguishes five features "typical" to "most operations" that have been the subject of ICSID proceedings: (1) a certain duration of the enterprise, (2) a certain regularity of profit and return, (3) an assumption of risk, (4) a substantial

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1 *Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965*, para 27, in Julian Davis Mortensen, THE MEANING OF INVESTMENT : ICSID'S TRAVAUX AND THE DOMAIN OF INTERNATIONAL INVESTMENT LAW, Harvard International Law Journal Vol. 51, Number 1, Winter 2010, pp. 257-318, 292.

2 *Mihaly International Corp. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award of 15 March 2002 (Sucharitkul, Rogers, Suragar) ¶33.

commitment by the investor and (5) some significance for the host State's development.[3] Schreuer's analysis was followed in the award *Fedax NV v. Republic of Venezuela,*[4] in *CSOB v. Slovakia*[5] and finally in *Salini Construttori S.p.A. and Italstrade S.p.A v. Kingdom of Morocco*,[6] which gave it its commonly used name.

The Expressed Difficulties with the Salini Test

The *Salini* test stands for an attempt to define *objectively* what is an investment under Article 25(1) of the ICSID Convention. But most tribunals have been unable to agree on the content of this objective meaning.[7] Moreover, despite its importance in practice, the *Salini* test has been considerably criticized and has in particular generated much opposition from tribunals who prefer the competing *subjectivist* theory which attributes primary importance to the definition of investments in BITs.

The dichotomy between the *objective* and *subjective* approaches is in particular illustrated by the awards in *Malaysian Historical Salvors SDN, BHD v. The Government of Malaysia,*[8] (hereafter "MHS"), which follows the *objective* approach, by the subsequent decision of the ad hoc Annulment Committee in the same case, and by the *Biwater GAUFF Tanzania Ltd. v. United Republic of Tanzania* case, which both follow the *subjective* approach.[9]

In the *MHS* award, the Tribunal held that a company's contract with Malaysia to undertake the salvage operations of a ship sunk in 1817 in the Strait of Malacca was not an investment within the meaning of Article 25(1) of the ICSID Convention. In reaching this conclusion, the tribunal adopted an objective meaning of "investment" without applying the BIT definition. The tribunal argued that the analysis tended to be an empirical one, and whichever approach was adopted depended on the view of a tribunal on how the facts of the case at hand measure up against the established hallmarks of

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[3] Christoph Schreuer, THE ICSID CONVENTION: A COMMENTARY, 2001, at 140.

[4] ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction of 11 July 1997 (Vicuña, Heith, Owen), 37 ILM 1387 (1998).

[5] *Ceskoslovenka obchodni bank, a.s. (CSOB) v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objection to Jurisdiction of 24 May 1999 (Buergenthal, Bernardini, Bucher).

[6] ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001 (Briner, Cremades, Fadlallah), 42 ILM 609 (2003).

[7] Jean Ho, THE MEANING OF "INVESTMENT" IN ICSID ARBITRATIONS, Arbitration International, 2010 Vol. 26 Issue 4 pp. 633-647.

[8] ICSID Case No. ARB/05/10, Decision on the Application for Annulment of 16 April 2009 (Schwebel, Shahabudeen, Tomka).

[9] ICSID Case No. ARB/05/22, Award of 24 July 2008 (Born, Landau, Hanotiau).

"investment". It further held that "the classical *Salini* hallmarks are not a punch list of items which, if completely checked off, will automatically lead to a conclusion that there is an investment".[10]

The ad hoc Annulment Committee constituted pursuant to Article 51(1)(b) of the ICSID Convention followed the subjective position in annulling the *MHS* award.[11] The majority of the Committee considered that the tribunal in *MHS* had manifestly exceeded its powers by employing an erroneous interpretative approach to the ICSID Convention. The Annulment Committee thus considered that the definition of investment as set forth in the relevant BIT suffices when determining if an investment under the ICSID Convention exists.

The *subjective* position of the *MHS* Annulment Committee was further followed by the tribunal in *Biwater*, who reasoned that "if very substantial numbers of BITs across the world express the definition of "investment" more broadly than the *Salini* test, and if this constitutes any type of international consensus, it is difficult to see why the ICSID Convention ought to be read more narrowly".[12] The Tribunal in *Biwater* criticized *Salini* for its inflexibility, stating that "the *Salini* test itself is problematic if, as some tribunals have found, the typical characteristics of an investment as identified in that decision are elevated into a fixed and inflexible test, as if transactions are to be presumed excluded from the ICSID Convention unless each of the five criteria are satisfied".[13] Rather, the Tribunal defined the concept of investment by reference to the parties' agreement.[14]

Moreover, even within the *objectivist* camp, tribunals disagree as to the weight to grant to the four elements of the *Salini* test.[15] The tenants of the "typical characteristics" approach consider that in a case where one or more of the hallmarks of an investment are missing, a tribunal may approach the issue from a holistic perspective and determine whether there is other evidence in support of the other hallmarks of "investment" which is so strong as to off-set the weakness in the other hallmarks of investment.[16] In other

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10 *MHS,* ¶106; *see also* P. Vargiu, BEYOND HALLMARKS AND FORMAL REQUIREMENTS: A "JURISPRUDENCE CONSTANT" ON THE NOTION OF INVESTMENT IN THE ICSID CONVENTION, (2009) 10 Journal of World Investment and Trade 753, 754.

11 ICSID Case No. ARB/05/10, Decision on the Application for Annulment of 16 April 2009 (Schwebel, Shahabudeen, Tomka).

12 *Biwater GAUFF (Tanzania Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of 24 July 2008 (Born, Landau, Hanotiau), ¶at 314.

13 *Biwater,* ¶314.

14 *Biwater ¶*317

15 *MHS*, ¶70

16 *MHS* ¶106.

words, where one of the elements of an investment was indubitably there, it could make up for the absence of others. On the contrary, under the "jurisdictional characteristics" approach (as set forth in *Joy Mining*),[17] it would probably be exceptional for a tribunal to conclude that there was an "investment" where one or more of the hallmarks of "investment" were completely missing.

Some tribunals have followed a hard line in advocating scrupulously the objective jurisdictional approach. In the ad hoc Annulment Committee decision on *Mr Patrick Mitchell v. the Democratic Republic of Congo*,[18] the Committee noted:

> [T]he parties to an agreement and the States which conclude an investment treaty cannot open the jurisdiction of the Centre to any operation they might arbitrarily qualify as an investment. It is thus repeated that, before ICSID arbitral tribunals, the Washington Convention has supremacy over an agreement between the parties or a BIT.[19]

The tribunals that adhere with the typical characteristics approach, such as for example the tribunal in *MCI Power Group LC and New Turbine, Inc v. Republic of Ecuador,*[20] consider that the requirement of the duration and risk of the alleged investment must be considered as mere examples and not necessarily as elements that are required for its existence. The tribunal in *Saba Fakes v. Republic of Turkey* for instance considered that the criteria of a contribution, a certain duration and an element of risk are necessary and sufficient to define an investment within the framework of the ICSID Convention.[21] The tribunal was "not convinced, on the other hand, that a contribution to the host State's economic development constitutes a criterion of an investment within the framework of the ICSID Convention. The tribunal commented that "[t]hose 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

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[17] The tribunal in the *Joy Mining v. Egypt* case considered the jurisdictional approach by opposition to the typical characteristics approach based on the elements set forth in Schreuer's Commentary of the ICSID Convention. Applying the jurisdictional approach, the tribunal applied the *Salini* test by treating the four hallmarks as necessary requirements for the acceptance of jurisdiction by an ICSID tribunal (*Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction of 6 August 2004 (Vicuña, Craig, Weeramantry).

[18] ICSID Case No. ARB/99/7, Decision on the Application for the Annulment of the Award of 9 February 2004 (Dimolitsa, Dossou, Giardina), ¶30-31.

[19] *Mitchell* Annulment Decision, ¶31.

[20] ICSID Case No. ARB/03/6, Award of 31 July 2007 (Vinuesa, Greenberg, Irarràzabal).

[21] ICSID Case No. ARB/07/20, Award of 14 July 2010 (Van Houtte, Lévy, Gaillard), ¶110.

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. The 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 investor itself; certain might not. Certain investments expected to be fruitful may turn out to be economic disasters. They do not fall, for the same reason alone, outside the ambit of the concept of investment".[22]

It appears from the above that the element of the *Salini* test with which the tribunals are less at ease is that of the contribution to the host State's economic development. This element will be discussed in more details below.

The Outer Limits Principle and the Double-Barreled Test as a Narrower Application of the Salini Test

Another line of decisions has found yet another manner to approach the issue of the definition of investment. Criticizing the majority's sole reliance on the BIT definition of investment in the *MHS* annulment decision, Guyanese judge Shahabuddeen stressed that the term investment is not meaningless and that logic requires the existence of some outer limits beyond which party consent is ineffectual to create an ICSID investment.[23] These limits represent therefore "ultimate boundaries" within which the contracting states can exercise their prerogative to define "investment".[24] This means also that one considers that the term investment has a core meaning that distinguishes it from an ordinary commercial transaction, and that the inability to exhaustively pinpoint all the elements that make up an investment should not obstruct the identification of certain key features that every

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[22] *Saba Fakes v. Republic of Turkey,* ICSID Case No. ARB/07/20 of 14 July 2010 (van Houtte, Lévy, Gaillard), ¶111

[23] *MHS* Annulment Decision, Shahabudddeen Dissenting Opinion of 19 February 2009, ¶8; Ho, *op. cit.,* at 637.

[24] *MHS* Annulment Decision, Shahabudddeen Dissenting Opinion of 19 February 2009, ¶11.

"investment" under the Convention should possess.[25] Judge Shahabuddeen's opinion was followed by Professor Abi-Saad in his dissent to the majority's award in *Abaclat and others v. The Argentine Republic*. In the words of this arbitrator:

> […] That the ICSID Convention does not provide an express definition of investment does not automatically imply that the definition is totally left to the BITs. This is because words have an intrinsic meaning, hence a limited and limiting one, however large and vague it may be (although there is always a penumbra around the limits which provides the margin of interpretation). Without limits, words would be meaningless, because undistinguishable from one another. The intrinsic meaning of a word, which is its "ordinary" meaning, is further specified by the way it is used and the context in which it is used; and if it figures in a treaty, by the object and purpose of the treaty.
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> […]
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> The purpose for using the term "investment" in Article 25/1 was thus to set objective outer-limits to the types of disputes that can be treated within the ICSID; […]. It is true that these outer-limits bound a vast ambit, to the point of not being clearly visible to some. But they exist all the same.
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> Differently put, the term "investment" in article 25/1 of the ICSID Convention, whilst flexible enough, is not infinitely elastic. It leaves much latitude and a wide margin of interpretation and further specification to States in their BITs; but not to the point of rendering it it totally vacuous, without any legal effect. In other words, the term has a hard core that cannot be waived even by agreement of States parties to a BIT.
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> […]
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> The fact that the *Salini* criteria or the other similar formulations are not expressly laid down in the ICSID Convention does not mean that they do not articulate, perhaps imperfectly, an obligatory requirement of article 25, or that this requirement has no constraining effect if States parties to the ICSID Convention chose to ignore it in their BITs, […].[26]

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[25] Ho, *op. cit.,* at 641.

[26] ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility of 4 August 2011, Dissenting Opinion of Professor Georges Abi-Saad, ¶¶ 40, 45-46, 52.

The application of the *Salini* test as safeguard if the BIT's definition of investment is overreaching (in the sense that the definition of investment in a BIT captures a transaction that would not normally be characterized as an investment under any reasonable definition) has been followed by other tribunals.[27] The classic example is that a contract for the sale of goods cannot be an investment, even if is is defined as such in the BIT or in the contract itself. While it is appropriate, as a principle, to defer to the State parties' articulation in the BIT of what constitutes an investment, the ICSID Convention constitutes the outer limit. A State's definition of investment, as set forth in its BIT, cannot exceed what it permissible under the Convention.[28] .

The outer limits principle has led to the application of the so-called "double-barreled test" according to which the investment has to fit both the definition of the BIT and that of the ICSID Convention, and which was defined by the majority of the tribunal in *Abaclat* as follows:

– "On the one hand, the alleged investment must fit into the definition of investment as provided by the relevant BIT, which reflects the limits of the State's consent.
– On the other hand, the alleged investment must also correspond to inherent meaning of investment as contemplated by the ICSID Convention, which sets the limits of ICSID's jurisdiction and the Tribunal's competence".[29]

Truncated Salini: Towards the Abandon of the "Contribution to the Host State's" Criterion

While many tribunals continue to apply *Salini* to this date, in light of the criticism that such a test faces, an increasing number of tribunals refuse to apply it or apply it in a truncated way. The difficulty with the test seems to be, for many tribunals, the requirement of the contribution to the host State. This element is particularly criticized for the *post hoc* nature of the evaluation conducted by the tribunal:

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[27] *SGS v. Paraguay,* ICSID Case No. ARB/07/29, Decision on Jurisdiction of 12 February 2010 (Alexandrov, Dononvan, Garcia Mexia),¶ 108; *Inmaris Perestroika Sailing Maritime Services GmbH and others v Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction of 8 March 2010 (Alexandrov, Cremades, Rubins), ¶131.

[28] *SGS v. Paraguay,* ¶94; *BIVAC v. Paraguay,* Decision of the Tribunal on Objections to Jurisdiction of 29 May 2009 (Knieper, Fortier, Sands), ¶94

[29] ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility of 4 August 2011 (Tercier, Abi-Saad, Van den Berg), ¶344.

> The Tribunal is particularly reluctant to apply a test that seeks to assess an investment's contribution to a country's economic development. Should a tribunal find it necessary to check whether a transaction falls outside any reasonable understanding of "investment", the criteria of resources, duration, and risk would see, fully to serve that objective. The contribution-to-development criterion, on the other hand, would appear instead to reflect the consequences of the other criteria and brings little independent content to the inquiry. At the same time, the 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. [30]

In the same line, Zachary Douglas considers that "[i]f the fundamental objective of an investment treaty is to attract foreign capital, then the concept of an investment cannot be one in search of meaning in the pleadings submitted to an investment treaty tribunal that is established years, perhaps decades, after the decision to commit capital to the host state was made".[31]

Perhaps as a reaction to this criticism, some tribunals have recently decided not to take into account the contribution to the host State's development as one characteristic of investment.

In *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplun v. Plurinational State of Bolivia*, the tribunal found that "[a] contribution may well be the consequence of a successful investment; it does not appear as a requirement".[32] According to the *Quiborax* tribunal, the commitment of resources, risk and duration are all part of the ordinary definition of an investment, while a contribution to the development of the host State, conformity with the laws of the host State and respect of good faith are not. In applying the element of contribution or commitment of resources to one of the Chilean shareholders of the local corporation holding mining concessions in Bolivia, the tribunal agreed with the distinction made by the respondent "between the objects of an investment, such as shares or concessions […] and the action of investing".[33] In particular, the tribunal considered that "while

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[30] *Alpha Projektholding GMBH v. Ukraine*, ICSID Case No. ARB/07/16, Award of 8 November 2010 (Robinson, Alexandrov, Turbowicz), ¶ 312.

[31] *The International Law of Investment Claims* (2009) at 190.

[32] ICSID Case No. ARB/06/2, Decision on Jurisdiction of 27 September 2012 (Kaufmann-Kohler, Lalonde, Stern), ¶220; for other tribunals following this view, s*ee Saba Fakes* ¶ 110.

[33] *Quiborax,* ¶232.

shares or other securities or title may be the legal materialization of an investment, mere ownership of a share is, in and of itself, insufficient to prove a contribution of money or assets".[34] In that case, there was no evidence of an original contribution (ie, an original payment for the share) nor of a subsequent contribution of that shareholder to the exploitation of the mining concessions.

The element of contribution to the economic development of the State was also abandoned in *L:E:S:I - DIPENTA v. People's Democratic Republic of Algeria*[35] and *Mitchell*'s annulment decision. In the latter case, contribution to economic development of the country is depicted as essential although not sufficient characteristic or unquestionable criterion, which is extremely broad but also variable depending on the case.

In *Phoenix Action Ltd v. The Czech Republic*,[36] the tribunal stated that the contribution of an international investment to the development of the host State is impossible to ascertain – the more so as there are highly diverging views on what constitutes "development". Instead, "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 the elements of contribution/duration/risk, and should therefore in principle by presumed".[37] Presumption can be reversed if the investor carries out no economic activity.[38] This tribunal created a revised test for an investment: (1) a contribution in money or other assets; (2) a certain duration; (3) an element of risk; (4) an operation made in order to develop an economic activity in the host State; (5) assets invested in accordance with the laws of the host State; (6) assets invested bona fide, the last criteria being specific to this case.

In *Caratube International Oil Company v. Kazakhstan (CIOC),*[39] the tribunal had to consider whether a contract to carry out exploration and production of hydrocarbons within a field in Kazakhstan, which was later terminated by Kazakhstan, constituted an investment under the Kazakhstan – US BIT. The investment was defined by the tribunal as an "economic arrangement requiring a contribution to make profit, and thus involving some degree of risk". The tribunal found "no plausible economic motive" to explain the US national's investment in CIOC, no evidence of a contribution

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[34] *Quiborax*, ¶232.
[35] ICSID Case No. ARB/03/8, Award of 10 January 2005 (Tercier, Faurès, Gaillard).
[36] ICSID Case No. ARB/06/5, Award of 15 April 2009 (Stern, Bucher, Fernández-Armesto), ¶85.
[37] *Ibid.*
[38] *Id.* at ¶ 86.
[39] ICSID Case No. ARB/08/12, Award of 5 June 2012, (Böckstiegel, Griffith, Hossain), ¶455

of any kind (the US national's personal guarantees for a loan received by the company from a Lebanese bank were not considered as constituting a sufficient contribution in this case) or any risk undertaken by the US national, and no capital flow between the US national and CIOC.[40]

Other recent decisions focus their attention principally on three factors regarding the definition of "investment" for purposes of establishing jurisdiction under Article 25 of the ICSID Convention contribution, risk and duration. For example, the tribunal in *Electrabel S.A. v. The Republic of Hungary* noted that "while there is incomplete unanimity between tribunals regarding the elements of an investment, there is a general consensus that the three objective criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk are necessary elements of an investment".[41] The tribunal also noted that, while the economic development of the host State was one of the objectives of the ICSID Convention (and a desirable consequence of the investment), it was not necessarily an element of an investment.[42]

Other Definitions of Investment

In light of the difficulties posed by the *Salini* test, some authors have proposed alternative definitions, either indigenous to investment arbitration or relating to definitions of investment as found in other treaties.

In the first category, Douglas proposes a synthesis which excludes the use of the unacceptably subjective elements of duration and contribution to the host State's development: "The economic materialization of an investment requires the commitment of resources to the economy of the host State by the claimant entailing the assumption of risk in expectation of a commercial return".[43]

In the second category Devanish Krishan, considering that the *Salini* test is "ideological and therefore presents a putative crisis to all involved in ICSID", suggests that the definition of investment provided by the IMF may be used for the purposes of determining the objective meaning of the notion

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40 *Caratube*, ¶¶424-467.

41 ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012 (Kaufmann-Kohler, Stern, Veeder), ¶5.43

42 *Ibid.*

43 *See also Pantechniki SA Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award of 30 July 2009 (Paulsson), ¶46.

of investment under the ICSID Convention.[44] The IMF distinguishes between foreign direct investment, portfolio investment and other investment:

> Direct investment is the category of international investment that reflects the objective of a resident entity in one economy obtaining a lasting interest in an enterprise resident in another economy… The lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise and a significant degree of influence by the investor on the management of the enterprise…. The components of direct investment capital transactions are equity capital, reinvested earnings, and other capital associated with various intercompany debt transactions.
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> Portfolio investment includes, in addition to equity securities and debt securities in the form of bonds and notes, money market instruments and financial derivatives such as options… The major companies of portfolio investment which are classified under assets and liabilities, are equity securities and debt securities…. Debt securities are subdivided into bonds and notes, money market instruments, and financial derivatives that include a variety of new financial instruments. Equity securities cover all instruments and records acknowledging, after the claims of all creditors have been met, claims to the residual values of incorporated enterprises.
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> Other investment is a residual category… classified primarily on an instrument basis. The instrument classification comprises trade credits, loans, currency and deposits, and other assets and liabilities.

Other authors suggest looking at FTAs. For example, Mavluda Sattorova[45] refers to Article 45 of the Mexico-EFTA FTA which defines an investment as follows:

> An investment made in accordance with the laws and regulations of the Parties means direct investment, which is defined for the purpose of establishing lasting economic relations with an undertaking such as, in particular, investments

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[44] A NOTION OF ICSID INVESTMENT, in Todd Weiler (ed.), Investment Treaty Arbitration and International Law (Vol. 1, JurisNet LLC 2008) 61.

[45] DEFINING INVESTMENT UNDER THE ICSID CONVENTION AND BITS: OF ORDINARY MEANING, TELOS, AND BEYOND, Asian Journal of International Law, Vol. 2/Issue 2, July 2012, pp. 267-290, 286.

which give the possibility of exercising an effective influence on the management thereof.

The same author also refers to the case law of the European Court of Justice, which lists the following principal categories of foreign direct investment:

1) Establishment and extension of branches or new undertakings belonging solely to the person providing the capital, and the acquisition in full of existing undertakings;
2) Participation in new or existing undertakings with a view to establishing or maintaining lasting economic links; and
3) Long-term loans with a view to establishing or maintaining lasting economic links.

Broadening the Definition: Abaclat and Deutsche Bank

Two recent cases underline the breadth that the definition of investment has recently taken. In *Abaclat and others v. the Argentine Republic*,[46] the tribunal held that it had jurisdiction to hear claims brought by numerous Italian bondholders against Argentina following Argentina's default and restructuring of its sovereign debt. In order to rule on its jurisdiction, the tribunal examined first whether the claimants had a merely contractual claim. The tribunal found that while Argentina's failure to comply with the terms of the bonds could raise contractual claims, these were not purely contractual claims, because Argentina's behavior derived from an exercise of sovereign power. Hence, Argentina's unilateral modification of its payment obligations towards creditors was an expression of State power and not of contractual rights and obligations. [47] Thus, the Argentina – Italy BIT covered these claims.

As to the second factor of the double-barreled test, the tribunal acknowledged the value of the *Salini* factors, but found that the criteria set forth in *Salini* did not create a limit on the types of financial transactions that may constitute an investment. Instead, the tribunal, as indicated above, applied the double-barreled test according to which an investment must satisfy the conditions of the BIT and the ICSID Convention, but it deemed not necessary that the definition provided in the BIT fits within the scope of the ICSID Convention.

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[46] ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility of 4 August 2011 (Tercier, Abi-Saab, Van den Berg).

[47] *Abaclat,* ¶ 323, 333.

> If Claimants' contributions were to fail the *Salini* test, those contributions – according to the followers of this test – would not qualify as investment under Article 25 ICSID Convention, which would in turn mean that Claimants' contributions would not be given the procedural protection afforded by the ICSID Convention's aim, which is to encourage private investment while giving the Parties the tools to further defined what kind of investment they want to promote. It would further make no sense in view of Argentina's and Italy's express agreement to protect the value generated by these kinds of contributions. In other words – and from the value perspective – there would be an investment, which Argentina and Italy wanted to protect and submit to ICSID arbitration, but it could not be given any protection because – from the perspective of the contribution – the investment does not meet certain criteria. Considering that these criteria were never included in the ICSID Convention, while being controversial and having been applied by tribunals in varying manners and degrees, the Tribunal does not see any merit in following and copying the *Salini* criteria. The *Salini* criteria may be useful to further describe what characteristics contributions may or should have. They should, however, not serve to create a limit, which the Convention itself nor the Contracting Parties to a specific BIT intended to create.
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> The other approach consists in verifying that Claimants made contributions, which led to the creation of the value that Argentina and Italy intended to protect under the BIT. Thus the only requirement regarding the contribution is that it be apt to create the value that is protected under the BIT.[48]

Turning to the question of whether the investments were made in Argentina, the tribunal held that the relevant inquiry for determining the place where an investment is made is whether the invested funds were ultimately made available to the host State. In this respect, the Tribunal considered whether the funds "served to finance Argentina's economic development:

> There is no doubt that the funds generated through the bonds issuance process were ultimately made available to Argentina, and served to finance Argentina's economic

[48] *Abaclat*, ¶¶364-365.

> development. Whether the funds were actually used to repay pre-existing debts of Argentina or whether they were used in government spending is irrelevant. In both cases, it was used by Argentina to manage its finances, and as such must be considered to have contributed to Argentina's economic development and thus to have been made in Argentina.[49]

The tribunal in *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka,* [50] had to decide whether a hedging agreement entered into between Deutsche Bank and a wholly-owned Sri Lanka petroleum company concluded in order to protect Sri Lanka against the impact of rising oil prices was an investment. The tribunal also applied the double-barreled test. It held that the hedging agreement fell within the definition of investment under the BIT, because the hedging agreement was an asset and the requirement that a nexus exists with Sri Lanka was also present, because "the reality of today's banking business is that major banks operate all over the world. The fact that one subsidiary or branch does the paperwork does not mean that the financial instrument is located in the country concerned".[51] With respect to the application of Article 25(1) of the ICSID Convention, the tribunal held that there was "no basis for a strict application in every case of the five criteria that were originally suggested by the Arbitral Tribunal in *Fedax v. Venezuela* and restated (notably) in *Salini v. Morocco*. […]. These criteria are not fixed or mandatory as a matter of law. They do not appear in the ICSID Convention. If transactions were to be presumed excluded from the ICSID Convention unless each of the five criteria were satisfied, this would entail the risk of arbitrarily excluding certain types of transactions from the scope of the Convention".[52] The tribunal concluded that "the development of ICSID case law suggests that only three of the above criteria, namely contribution, risk and duration should be used as the benchmarks of investment, without a separate criterion of contribution to the economic development of the host State and without reference to a regularity of profit and return. It should also be recalled that the existence of an investment must be assessed at its inception and not with hindsight".[53] Applying these criteria to the hedging agreement at issue, the tribunal found that all of them were fulfilled. In particular, it found that the hedging agreement involved a contribution to Sri Lanka (noting that a contribution can take any form and is not limited to

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49 *Abaclat*, ¶378.
50 ICSID Case No. ARB/09/02, Award of 31 October 2012 (Ali Khan, Williams, Hanotiau).
51 *Deutsche Bank*, ¶291.
52 *Id.,* ¶294
53 *Id.,* ¶296.

financial terms but also includes know-how, equipment, personnel and services). The tribunal also found that the investment was of a certain duration, even if the commitment was originally for twelve months and despite the fact that it was terminated after 125 years (noting that short-term projects are not deprived of "investment" status solely by virtue of their limited duration and that duration is to be analyzed in light of all the circumstances and of the investor's overall commitment).

Conclusion

The various discussions about the *Salini* test might reflect the broader tension that exists between the rise of investment arbitrations and the backlash by States against it, as evidenced by the growing number of States who are stepping away from their commitments in this context.[54] The fear by States seems to be that too often tribunals deem an investment something that should not be. The approach of some of the drafters of the ICSID Convention, that you "know one when you see one", is clearly perceived by States as not being a position to be relied upon anymore.[55]

It is not the purpose of the present paper to start a discussion about the risks of consistency in investment arbitration. Others have more aptly discussed the subject.[56] However, given the current States' distrust towards investment arbitration, a different approach to the issue of investment might render a better service to investment arbitration than the current one. First, it might be useful for tribunals to walk away from tests and return to the drafters' "you know it when you see it" approach. Arbitral tribunals, and in particular investment arbitration tribunals, are mostly constituted of renowned jurist with a long experience in international business law who are certainly able to recognize an investment when they see one.

Second, for those who prefer to rely on tests, but do not abide in the "contribution to the host State" criterion, another criterion might be found. Obviously, the "contribution to the host State" is the criterion that translates the intent to ground the investment into the host State. But clearly this criterion is too narrow in today's world, and might better be served by a

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[54] Mortensen, *op. cit.*, at 313.

[55] *Documents Concerning the Origin and the Formulation of the ICSID Convention* (1968), pp. 957, 972, *cited in* Williams & Foote, RECENT DEVELOPMENTS IN THE APPROACH TO IDENTIFYING AN "INVESTMENT" PURSUANT TO ARTICLE 25(1) OF THE ICSID CONVENTION, in Evolution in Investment Treaty Law and Arbitration (Brown & Miles ed.), pp. 42.

[56] Ten Cate, THE COSTS OF CONSISTENCY : PRECEDENT IN INVESTMENT TREATY ARBITRATION, 51 Colum. J. Transnat'l L. 418; Di Pietro, THE USE OF PRECEDENTS IN ICSID ARBITRATION. REGULARITY OR CERTAINTY? Int.A.L.R. 1/2007

criterion which includes better the variety of economic contributions that an investment might effect on a host State.

The third way, that of looking at definitions of investment provided by other international regulations, might therefore provide helpful – and too rarely used – guidance for tribunals who are looking to better serve the image of investment arbitration. This type of interpretation is, moreover, in principle supported by the treaty interpretation provisions of the Vienna Convention on the Law of Treaties.[57]

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[57] *See* Vienna Convention on the Law of Treaties, dated 23 May 1969, Article 31(3)(c).