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## The Definition of Investment under the ICSID Convention: A Defense of Salini

Alex Grabowski

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# The Definition of Investment under the ICSID Convention: A Defense of *Salini*

Alex Grabowski\*

## Abstract

*ICSID jurisdiction extends to matters of international investment, but the organization's charter never defines what actually qualifies as an investment. Arbitration panels struggled with the issue, and eventually settled on the long-standing Salini test, which defines an investment as having four elements: (1) a contribution of money or assets (2) a certain duration (3) an element of risk and (4) a contribution to the economic development of the host state. More recently, panels have begun questioning the merits of that test, particularly the validity of the fourth prong. But overturning the doctrine would have two negative consequences. It would expand ICSID jurisdiction beyond what is granted by the organization's founding documents, and it would introduce uncertainty into the realm of international investing, which could chill the flow of capital.*

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\* B.S. 2012, Northwestern University; J.D. Candidate 2015, The University of Chicago Law School. The author would like to thank the *CJIL* board and staffers for their helpful feedback and support.

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## I. INTRODUCTION

The International Center for the Settlement of Investment Disputes (“ICSID”) is an organization created by the Washington Convention (“the Convention” or “the ICSID Convention”) to facilitate international investment by creating a body to settle disputes between investors and states that may arise from such investments.<sup>1</sup> The signatories believed that a structured method of dispute resolution would foster international investment, and that such investment would spur economic development. When determining the jurisdiction of such arbitral panels, the signatories extended it to international investment.<sup>2</sup> However, the drafters declined to define the word “investment.”

The signatories opted to leave investment undefined in the final product because they expected state consent to manage the ICSID’s jurisdiction.<sup>3</sup> To this end, they provided a procedure for countries to submit in writing the types of disputes they would or would not consider presenting to the ICSID.<sup>4</sup>

Unfortunately, the signatories’ decision to leave investment undefined has still caused problems. Countries do define what qualifies as an investment in their bilateral investment treaties (BITs) and through the procedure set out by the ICSID Convention. But, arbitrators quickly realized that consent alone could not make something an investment. There had to also be an objective definition of investment to set the outer bounds of ICSID authority. Without such a definition, countries could use BITs to submit any dispute they chose to ICSID arbitration regardless of the subject matter.

This has given rise to a long-standing issue of arbitral panels attempting to develop a workable test for whether something falls under the ambit of “investment.” The first few tribunals to raise this question did so *sua sponte* and came to the conclusion that the objective definition of an investment was met.<sup>5</sup> However, their analyses did not probe the matter in any depth because neither of the parties in the cases had suggested that the issue was of much importance. The first rigorous analysis of the objective definition of investment occurred in

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<sup>1</sup> International Center for the Settlement of Investment Disputes Convention, Oct. 14, 1966, 17 U.S.T. 1270, 575 U.N.T.S. 159. [hereinafter ICSID Convention].

<sup>2</sup> *Id.*, art. 25(1).

<sup>3</sup> *Id.*, art. 25(3).

<sup>4</sup> Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Doc. ICSID/2, 1 ICSID Reports, 1993, 23, ¶ 27.

<sup>5</sup> See, for example, *Kaiser Bauxite Co. v. Jam.*, ICSID Case No. ARB/74/3, 296, 297, Decision on Jurisdiction (Jul. 6, 1975); *Alcoa Minerals of Jam. v. Jam.*, ICSID Case No. ARB/74/2, Decision on Jurisdiction, 2/4 (Jul. 6, 1975).

*Fedax N.V. v. The Republic of Venezuela*.<sup>6</sup> That case laid down elements that would eventually become a four-part test. That test was finally formulated in 2001 by the case of *Salini et al. v. Morocco*, which is currently the leading case on the subject.<sup>7</sup> The *Salini* test defines an investment as having four elements: (1) a contribution of money or assets; (2) a certain duration; (3) an element of risk; and (4) a contribution to the economic development of the host state.<sup>8</sup> Since then, numerous cases have dealt with the same issue. Many accept the *Salini* test,<sup>9</sup> while other panels move in a variety of directions.<sup>10</sup>

Recently, a new case, *Quiborax v. Bolivia*, attempted to advance one of these newer, divergent theories of investment definition.<sup>11</sup> The fundamental debate between *Quiborax* and *Salini* hinges on whether something must “contribute to the economic development of the host state” in order to qualify as an investment.<sup>12</sup> *Quiborax* argues that, while the ICSID Convention attempts to foster economic development via international investment, such development is not a necessary element of investment. *Quiborax*’s divergence from *Salini* is ill advised for two reasons, both of which are grounded in the Vienna Convention on the Interpretation of Treaties (“the Vienna Convention”).<sup>13</sup> First, the *Quiborax* interpretation runs counter to the text of the ICSID Convention and unnecessarily expands ICSID jurisdiction. Second, overturning *Salini* would create uncertainty around investments over which the I.C.S.I.D. has control.

The textual argument references the Preamble to the ICSID Convention, which clarifies that the ICSID exists in order to facilitate international investment and thereby contribute to the economic development of the host state.<sup>14</sup> *Quiborax* misreads this as an ephemeral hope that investments will

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<sup>6</sup> *Fedax N.V. v. Republic of Venez.*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 1381 ¶ 16 (Jul. 11, 1997), 37 I.L.M. 1380 (1998).

<sup>7</sup> *Salini et al. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (Jul. 23, 2001), 42 I.L.M. 609 (2003).

<sup>8</sup> *Id.* ¶ 52.

<sup>9</sup> See, for example, *Joy Mining Mach. Ltd. v. Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction, ¶ 53 (Jul. 23, 2001) 19 ICSID Rev 486 (Aug. 6, 2004).

<sup>10</sup> See, for example, *Quiborax v. Bol.*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, ¶ 220 (Sept. 27, 2012); *Saba Fakes v. Republic of Turk.*, ICSID Case No. ARB/07/20, Award, ¶ 110 (Jul. 14, 2010); *Victor Pey Casado and President Allende Found. v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, ¶ 232 (May 8, 2008); *LESI S.p.A. et Astaldi S.p.A. v. People’s Democratic Republic of Alge.*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, ¶ 72 (Jul. 12, 2006) (Available in French).

<sup>11</sup> *Quiborax*, *supra* note 10, ¶ 220.

<sup>12</sup> Compare *Quiborax*, *supra* note 10, at n.363, with *Salini*, *supra* note 7.

<sup>13</sup> Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

<sup>14</sup> ICSID Convention, *supra* note 1, at Preamble.

contribute to economic development,<sup>15</sup> whereas *Salini* properly views it as a limitation on the ICSID's arbitral jurisdiction since it would be unusual to expand that jurisdiction beyond the organization's stated purpose.<sup>16</sup>

The practical issue surrounding *Quiborax* is the uncertainty that it creates. Both governments and investors are sophisticated parties with a good understanding of settled rules and the ability to plan around them. *Quiborax* disrupts the settled rule of *Salini* and introduces uncertainty, which chills investment and thus harms the economic development of the states. This runs counter to the reason ICSID exists in the first place.<sup>17</sup> This issue also speaks more broadly to the value of precedent in international law. Different international organizations take different views of precedent based on their goals. Strong deference to precedent can be a way of ensuring fair, consistent application of the laws, but it can also hinder the arbitrator's ability to do justice in the individual case. Organizations like the ICSID who deal with well-informed parties would do well to apply precedent more strictly because it can provide a valuable certainty that will foster cross-border investment.

This Comment proceeds according to the following map. Section II provides background on the structure and history of the ICSID as well as the procedures used in its arbitration. Section III discusses the Vienna Convention and lays out the pertinent provisions with regard to the interpretation of treaties. Section IV.A details the history of the definition of investment under ICSID up through the *Salini* ruling, and Section IV.B provides a survey of different panels' reactions to the *Salini* test. Section V supplies an overview of *Quiborax* and its rationale for diverging from *Salini*. Section VI explains a pair of arguments for rejecting *Quiborax's* definition of investment, with Section VI.A detailing the textual reasons and Section VI.B covering the practical issues with the shift.

## II. THE INTERNATIONAL CENTER FOR THE SETTLEMENT OF INVESTMENT DISPUTES

The international community founded the ICSID in 1966 in response to a growth in cross-border investments, which require a special international body to facilitate dispute resolution.<sup>18</sup> The organization began with twenty states

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<sup>15</sup> *Quiborax*, *supra* note 10, at 222 (quoting *Victor Pey Casado*, *supra* note 10) (emphasis added).

<sup>16</sup> *Salini*, *supra* note 7, ¶ 52.

<sup>17</sup> ICSID Convention, *supra* note 1, at Preamble.

<sup>18</sup> ABOUT ICSID, <https://icsid.worldbank.org/ICSID/Index.jsp> (follow "About ICSID" hyperlink) (last visited Apr. 18, 2014).

ratifying the founding Convention, and over the years membership has risen to 158 countries.<sup>19</sup>

Structurally, two main parts comprise ICSID, an Administrative Council and a Secretariat.<sup>20</sup> The Administrative Council acts as ICSID's governing body.<sup>21</sup> One member represents each of the Contracting States, and the group convenes once per year.<sup>22</sup> The Administrative Council votes on issues like rules for ICSID arbitrations and the annual budget.<sup>23</sup> The Secretariat is a group of staff members who support the Administrative Council and groups engaging in ICSID arbitration.<sup>24</sup> They are led by a Secretary General whom, as one of its duties, the Administrative Council appoints.<sup>25</sup>

The drafters of the ICSID Convention wanted to increase the certainty surrounding international investment dispute resolution in order to increase the ease with which people could conduct such investments.<sup>26</sup> They chose to accomplish this by laying out a set of standard procedures that arbitrators could follow in order to bring uniformity to the proceedings. However, ICSID does not control the arbitrators.<sup>27</sup> Instead, the arbitrations take place before *ad hoc* panels of different arbitrators.<sup>28</sup> Panels may consist of any uneven number of arbitrators that the parties can agree upon, selected by a variety of methods.<sup>29</sup> In the event that the parties did not agree beforehand, the panel will consist of three arbitrators, one chosen by each party and the third selected by the other two.<sup>30</sup> ICSID rules also require that “[t]he majority of the arbitrators [ ] be nationals of States other than the State party to the dispute and of the State

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<sup>19</sup> LIST OF CONTRACTING SIGNATORIES TO THE CONVENTION, ICSID, (Nov. 1, 2013), *available at* <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English> (last visited Jan. 16, 2014).

<sup>20</sup> ORGANIZATIONAL STRUCTURE OF ICSID, <https://icsid.worldbank.org/ICSID/Index.jsp> (follow “About ICSID” hyperlink, then follow “Organizational Structure” hyperlink) (last visited Jan. 16, 2014).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> ICSID Convention, *supra* note 1, at Preamble.

<sup>27</sup> ICSID DISPUTE SETTLEMENT FACILITIES, <https://icsid.worldbank.org/ICSID/Index.jsp> (follow “About ICSID” hyperlink, then follow “Dispute Settlement Facilities” hyperlink) (last visited Jan. 16, 2014).

<sup>28</sup> *Id.*

<sup>29</sup> ICSID Convention, *supra* note 1, art. 37 ¶ 2(a).

<sup>30</sup> ICSID Convention, *supra* note 1, art. 37 ¶ 2(b).

whose national is a party to the dispute,” unless the panel is appointed by the agreement of the parties.<sup>31</sup>

The parties involved in ICSID arbitrations also make them somewhat unique. ICSID panels hear investor-state arbitration, meaning that the disputes take place between a country and a foreign investor.<sup>32</sup> This means that the parties involved tend to possess high levels of sophistication. They are often well funded, experienced investors or independent countries that have access to good legal counsel and the ability to analyze their investment decisions based on the applicable international law. International investment is not a trivial undertaking, and the value of these cases can act as a good proxy for the parties’ savvy. The amounts in controversy in these cases can reach upwards of a billion dollars, and even the cases with the lowest stakes still place hundreds of thousands of dollars in dispute.<sup>33</sup> Furthermore, ICSID arbitrations tend to cost participants hundreds of thousands if not millions of dollars.<sup>34</sup>

The ICSID Convention also presents an unusual issue. The signatories to the convention purposefully left the term “investment” undefined when granting the body jurisdiction over matters of international investment.<sup>35</sup> They did this in order to allow tribunals to develop a definition themselves, since they were closer to the facts on the ground and consequently were better equipped to write a useful and accurate test.<sup>36</sup> However, this has provoked a considerable amount of controversy. A variety of tribunals have applied a plethora of different tests, making this area of international law challenging for businesses to predict.<sup>37</sup>

### III. TREATY INTERPRETATION

Determining the proper definition of investment requires arbitrators to engage in an interpretation of the ICSID Convention. Fortunately, the international community has reached something of a consensus as far as the

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<sup>31</sup> International Center for the Settlement of Investment Disputes [ICSID], *Rules of Procedure for Arbitration Proceedings (Arbitration Rules)*, at I(1)(3).

<sup>32</sup> ICSID Convention, *supra* note 1, at Preamble.

<sup>33</sup> Inna Uchkunova, *ICSID: Curious Facts*, KLUWER ARBITRATION BLOG (OCT. 25, 2012), <http://kluwerarbitrationblog.com/blog/2012/10/25/icsid-curious-facts/> (last visited Jan. 16, 2014).

<sup>34</sup> *Id.*

<sup>35</sup> ICSID Convention, *supra* note 1.

<sup>36</sup> *Biwater Gulf (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, ¶ 312 (Jul. 24, 2008).

<sup>37</sup> See, for example, *Quiborax*, *supra* note 10, ¶ 220; *Saba Fakes*, *supra* note 10, ¶ 111; *Phoenix Action, Ltd. V. Czech Republic*, ICSID Case No. ARB/06/5 ¶ 39 (Apr. 15, 2009); *Victor Pey Casado*, *supra* note 10, ¶ 232; *Joy Mining Mach.*, *supra* note 9, ¶ 53; *Lesi S.p.A.*, *supra* note 10, ¶ 72.



proper method of treaty interpretation, which they laid down in the Vienna Convention.<sup>38</sup>

The Vienna Convention was signed in 1969 and went into effect in 1980.<sup>39</sup> The international community drafted the convention in response to a proliferation in the number and scope of international treaties, in order to provide a more uniform set of rules for their treatment.<sup>40</sup> For the purposes of interpreting the word “investment” in the ICSID Convention, the most important piece of the treaty is Article 31, which covers the general rules of treaty interpretation.<sup>41</sup>

Article 31 requires that courts and panels interpret treaties “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>42</sup> The Vienna Convention goes on to more clearly define both what qualifies as text and what qualifies as context. The Vienna Convention explicitly states that the preamble and the annexes qualify as part of the text for the purposes of interpretation.<sup>43</sup> The Convention also specifies that context includes “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”<sup>44</sup>

The rules of textual interpretation laid out in the Vienna Convention have an important impact on choosing between *Salini* and *Quiborax* moving forward. The Vienna Convention explicitly requires tribunals to consider the full text of the treaty, including its preamble. The two cases diverge on their treatment of the ICSID Convention’s Preamble. *Salini* fully accepts the Preamble’s language about fostering economic development and uses that language in the test. Conversely, *Quiborax* acknowledges that language’s existence, but opts not to use it in the definition of investment, which seems to run counter to the ICSID Convention’s text and purpose.

The inclusion of subsequent practice in the Vienna Convention matters because it opens the door for the use of precedent in the interpretation of treaties, which counsels for the retention of *Salini*.<sup>45</sup> While precedent occupies

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<sup>38</sup> Vienna Convention, *supra* note 13.

<sup>39</sup> VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS §10:16, 10-152 (2d ed. 2013).

<sup>40</sup> Vienna Convention, *supra* note 13, at Preamble.

<sup>41</sup> *Id.* art. 31.

<sup>42</sup> *Id.* art. 31(1).

<sup>43</sup> *Id.* art. 31(2).

<sup>44</sup> *Id.* art. 31(3)(b).

<sup>45</sup> *Id.*

something of an uneasy space for purposes of international law,<sup>46</sup> international bodies are largely free to make their own decisions regarding the amount of weight to afford it.<sup>47</sup> The strength of deference that organizations provide to precedent varies wildly, and often relates to the organization's goals.<sup>48</sup> In the case of ICSID, its goals align with a strong deference to precedent. ICSID arbitration involves sophisticated parties who understand the arena of law they work in and use those laws to plan their actions. Providing them with more settled law to work around will encourage investment and thereby foster economic development. Additionally, many states appear to value precedent in these sorts of cases since they often expend disproportionate resources on cases that only make sense if they fear how the outcome will affect future litigation they could find themselves involved in.<sup>49</sup>

#### IV. BACKGROUND OF THE TERM "INVESTMENT"

When the signatories drafted the ICSID Convention, they opted not to make investment a defined term. This has led to a variety of cases attempting to interpret it in a sensible way. Although some early cases did raise the question of whether something qualified as an investment, they did not develop a rigorous test.<sup>50</sup> The first case in which a party raised the issue was *Fedax N.V. v. The Republic of Venezuela*.<sup>51</sup>

##### A. The Definition of Investment through *Salini*

*Fedax* centered on a set of debt instruments that Venezuela issued to Fedax N.V., a company located on the island of Curaçao.<sup>52</sup> Fedax held six promissory notes issued to Venezuela, which Venezuela refused to honor.<sup>53</sup> Venezuela

<sup>46</sup> Sean D. Murphy, *The Relevance of Subsequent Agreement and Subsequent Practice for the Interpretation of Treaties*, in THEORIES AND SUBSEQUENT PRACTICE 82, 84 (Georg Nolte ed., 2013).

<sup>47</sup> Georg Nolte, *Subsequent Practice as a Means of Interpretation in the Jurisprudence of the WTO Appellate Body*, in THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION 138, 140 (Enzo Cannizzaro ed., 2011).

<sup>48</sup> For instance, the International Court of Justice places a high premium on its ability to apply the law consistently across different cases, so they afford precedent a large amount of weight. On the other hand, the World Trade Organization focuses much more on the individual case at bar, and will find precedent much less compelling unless they happen to agree with the reasoning that lies behind it. See Murphy, *supra* note 46, at 85.

<sup>49</sup> Anthea Roberts, *Power and Persuasion in Investment Treaty interpretation*, 104 AM. J. INT'L L. 179, 189 (2010).

<sup>50</sup> See, for example, *Kaiser Bauxite Company*, *supra* note 5; *Alcoa Minerals of Jam.*, *supra* note 5.

<sup>51</sup> See *Fedax N.V.*, *supra* note 6, ¶ 1.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* ¶ 16.

contended that the notes did not constitute an investment under the definition of ICSID. They argued that:

[T]his transaction does not amount to a direct foreign investment involving “a long term transfer of financial resources—capital flow—from one country to another (the recipient of the investment) in order to acquire interests in a corporation, a transaction which normally entails certain risks to the potential investor.”<sup>54</sup>

In rejecting this argument, the panel in *Fedax* did not produce a clear test for the definition of investment, but it did lay out several important principles, like the certain duration and the contribution to the development of the host state, that would go on to form the foundations of the current investment definition.<sup>55</sup>

That investment definition was finally conceived in its current form in *Salini et al v. Morocco*.<sup>56</sup> The *Salini* case revolved around two Italian companies, Salini Costruttori and Italstrade, and their dispute with the Moroccan government. The government of Morocco, through a private company, went through a bidding process for the construction of a fifty-kilometer highway. The two Italian companies jointly submitted a bid, and won the contract for construction of the highway. The two companies completed the highway thirty-six months later, going four months over the timetable laid out in their bid, which made the Moroccan government unwilling to pay for the highway.<sup>57</sup> After going through the domestic channels, the Italian companies submitted the dispute to ICSID arbitration.

*Salini* introduced a clear four-pronged test that arbitrators were to use to determine whether the two companies had in fact made an investment for the purposes of ICSID arbitration. The test required: (1) a contribution of money or assets; (2) a certain duration over which the project was to be implemented; (3) an element of risk; and (4) a contribution to the host state’s economy.<sup>58</sup> In order to develop this test, the arbitrators examined a variety of evidence. They looked at older decisions relating to international investment and found that the first three prongs of their test stemmed from international law concepts implicit in the decisions of those older decisions.<sup>59</sup> However, the arbitrators in *Salini* felt that the largely tacit nature of the test up to this point—that is, its first three

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<sup>54</sup> *Id.* ¶ 19.

<sup>55</sup> *Id.* ¶ 43.

<sup>56</sup> See *Salini*, *supra* note 7.

<sup>57</sup> *Id.* ¶ 4.

<sup>58</sup> *Id.* ¶ 52. See also note 8 and accompanying text.

<sup>59</sup> The *Salini* board surveyed past decisions and found that the majority of them did not explicitly raise the concept of investment. Instead, the *Salini* tribunal attempted to back out a consistent rationale from those cases that arbitral boards took. See *Salini*, *supra* note 7, ¶ 52 (noting that seldom does a case turn on the notion of investment).

prongs—left it incomplete. They believed that *Fedax's* requirements of a transfer of goods or services for a certain duration with an element of risk did not fully capture the notion of investment.<sup>60</sup> Consequently, they added the fourth prong after the examination of the ICSID Convention's preamble, which makes special mention of the role of private investment in the economic development of host states.<sup>61</sup>

Over the years this test has proven fairly controversial, especially the fourth prong pertaining to the host state's economy.<sup>62</sup> However, no matter how controversial the test is, even arbitral boards that end up modifying the test regularly use it as the starting point from which to base their analysis, which demonstrates that the test has gained no small degree of legitimacy.

## B. Other Panels' Treatment of the *Salini* Test

Numerous panels have grappled with the *Salini* test over the years, and they came to a variety of results. Many have simply adopted the test as it stands. Some have removed prongs or recharacterized them, while others added more elements on top of the ones that *Salini* originally had.

### 1. Accepting *Salini*.

*Joy Mining Machinery v. The Arab Republic of Egypt*<sup>63</sup> is an example of a case that accepts the *Salini* test completely. The dispute arose between Joy Mining, a British company, and the Egyptian government surrounding a contract to provide mining equipment for a phosphate mining project.<sup>64</sup> Joy Mining was supposed to replace a mining system that was already in place at the site, and supply a new, second mining system as well.<sup>65</sup> Problems arose with the equipment, which both sides blamed on the other. Egypt contended that this dispute was outside the purview of the ICSID panel because it was a simple contract for sale.<sup>66</sup> Conversely, Joy Mining contended that it met the four requirements under *Salini*<sup>67</sup>. The panel agreed with Joy Mining and in doing so adopted the *Salini* test.<sup>68</sup>

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> See, for example, *Victor Pey Casado*, *supra* note 10, ¶ 232.

<sup>63</sup> *Joy Mining Mach.*, *supra* note 9, ¶ 53.

<sup>64</sup> *Id.* ¶ 15.

<sup>65</sup> *Id.* ¶ 16.

<sup>66</sup> *Id.* ¶¶ 31–35.

<sup>67</sup> *Id.* ¶¶ 36–40.

<sup>68</sup> *Id.* ¶ 53.

The panel in *Jan de Nul N.V. v. Arab Republic of Egypt* also accepted the *Salini* test completely, and applied the four factors.<sup>69</sup> The case involved a dredging company, hired by the Egyptian government to widen and deepen portions of the Suez Canal.<sup>70</sup> The dredging company brought the arbitration claim alleging that the government withheld certain material facts related to the work.<sup>71</sup> The tribunal agreed that this constituted an investment under *Salini*, but the more important point is why they opted to use the *Salini* test. The opinion had very little in the way of first principles reasoning, and instead chose to adopt the test out of pure respect for the value of precedent.<sup>72</sup>

## 2. Removing the fourth prong.

One common reaction among arbitrators who opt to reject *Salini* is to remove its fourth prong. However, even among those cases the rationales for adjusting the test varies significantly. Some cases provide interpretive grounds on which they disagree with *Salini*, while others make more practical or procedural points. For instance, one case argues that on an interpretive level, the fourth prong is not a condition of the investment as laid out in the Convention, while other cases make the point that it is difficult to establish an “economic contribution to the host state” on a practical level.

### a) *Saba Fakes v. The Republic of Turkey*.

*Saba Fakes* revolves around Mr. Fakes, a Dutch investor in a Turkish company.<sup>73</sup> The Turkish government began an investigation into the company, and froze Mr. Fakes shares during the course of that investigation.<sup>74</sup> After freezing the shares, the Turkish government sold them, which Mr. Fakes contended was a violation of a BIT.<sup>75</sup> In the course of deciding whether Mr. Fakes made an investment, the arbitral board decided that the final prong of the *Salini* test need not be applied.<sup>76</sup> They based their decision on a pure textual interpretation of the basic meaning of the word investment, declaring that the

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<sup>69</sup> *Jan de Nul N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, ¶ 91 (Jun. 16, 2006).

<sup>70</sup> *Id.* ¶¶ 2–9.

<sup>71</sup> *Id.* ¶ 14.

<sup>72</sup> *Id.* ¶ 91.

<sup>73</sup> *Saba Fakes*, *supra* note 10, ¶ 3.

<sup>74</sup> *Id.* ¶ 37(d).

<sup>75</sup> *Id.* ¶ 37(h).

<sup>76</sup> *Id.* ¶ 110.

first three prongs of the *Salini* test were both necessary and sufficient to make something an investment.<sup>77</sup>

b) *Victor Pey Casado and President Allende Foundation v. The Republic of Chile.*

The *Victor Pey Casado* case relates to events occurring during the Pinochet dictatorship in Chile.<sup>78</sup> The Republic of Chile improperly nationalized a pair of newspapers that the plaintiff held stakes in.<sup>79</sup> The arbitrator, once again, started from the *Salini* test to attempt to determine whether the plaintiff had made an investment in the newspapers under the meaning of the ICSID Convention.<sup>80</sup> The arbitral board reexamined the text of the statute, and paid particular attention to the preamble, which is where the board in *Salini* drew its controversial fourth prong from.<sup>81</sup> The *Victor Pey Casado* board came to a different conclusion. While they kept the first three *Salini* prongs, they decided that the “contribution to a host state’s economy” is hopefully the outcome of an investment, but it is not a quality required for something to be an investment.<sup>82</sup>

c) *LESI S.p.A. et Astaldi S.p.A. v. People’s Democratic Republic of Algeria.*

The dispute in the *LESI S.p.A.* case took place between a pair of Italian investors and a construction company in Algeria.<sup>83</sup> The investors were financing the building of a dam and the Algerian government continually created difficulties for the construction project.<sup>84</sup> The parties again put forth the *Salini* test for the arbitrators to consider.<sup>85</sup> In this case, the arbitrators once again rejected the fourth prong.<sup>86</sup> This time they chose to do it for procedural reasons. They felt that the fourth prong was “difficult to establish, and implicitly covered by the other three elements.”<sup>87</sup>

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<sup>77</sup> *Id.*

<sup>78</sup> *Victor Pey Casado Ltd.*, *supra* note 10, ¶ 76.

<sup>79</sup> *Id.* ¶¶ 70–73.

<sup>80</sup> *Id.* ¶ 231.

<sup>81</sup> *Id.*; *Salini et al.*, *supra* note 7, ¶ 52.

<sup>82</sup> *Victor Pey Casado Ltd.*, *supra* note 10.

<sup>83</sup> *Lesi S.p.A.*, *supra* note 10, ¶¶ 1–2.

<sup>84</sup> *Id.* ¶ 10.

<sup>85</sup> *Id.* ¶ 70.

<sup>86</sup> *Id.* ¶ 72.

<sup>87</sup> *Id.* ¶ 72(iv).

### 3. Adding to *Salini*.

Some cases, like *Phoenix Action Ltd. v. The Czech Republic*, even propose that *Salini* did not go far enough, and add more prongs to its test. The *Phoenix Action* case also deals with ownership interests in a company; this time an Israeli company's ownership of two Czech companies.<sup>88</sup> However, *Phoenix Action* case differs from *Saba Fakes* in that the Israeli company's ownership interest in the other companies was alleged to be in bad faith.<sup>89</sup> This led to the arbitrators accepting the *Salini* test, and then adding a new prong requiring that the investment also be "bona fide."<sup>90</sup> They chose to add this requirement out of a fear that a lack of this good faith requirement would lead to ICSID resources being used to protect illegal investments or those bargained for dishonestly.<sup>91</sup>

These cases represent just a sampling of the different ways that panels have handled the *Salini* test, and their rationales for doing so. Among the cases that chose to diverge from *Salini*, there is no real consensus on a good new test nor a reason for such divergence. Some choose to add factors, while others remove them, and the panels' rationales for the changes vary greatly.<sup>92</sup> Additionally, there is a large group of other panels that examined the test and chose to simply accept the original panel's reasoning and test.<sup>93</sup> This core group of cases accepting *Salini* combined with the scattered reasoning and solutions among those panels that reject it show that *Salini* is currently a good baseline for the definition of investment under the ICSID Convention.

## V. *QUIBORAX V. BOLIVIA*: ATTEMPTING TO SYNTHESIZE A DISSENT

*Quiborax v. Bolivia* is a recent case that attempts to grapple with the *Salini* test, eventually opting to discard the fourth prong.<sup>94</sup> *Quiborax* is a Chilean company that mines non-metallic minerals, most specifically ulexite, from which boron can be extracted.<sup>95</sup> It is the largest supplier of borates (minerals containing

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<sup>88</sup> *Phoenix Action Ltd.*, *supra* note 37.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* ¶ 100.

<sup>91</sup> *Id.*

<sup>92</sup> See, for example, *Quiborax*, *supra* note 10, ¶ 220; *Saba Fakes*, *supra* note 10, ¶ 110; *Phoenix Action*, *supra* note 37, ¶ 39; *Victor Pey Casado*, *supra* note 10, ¶ 232; *Lesi S.p.A.*, *supra* note 10; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02 ¶ 294 (Oct. 31, 2012).

<sup>93</sup> See, for example, *Joy Mining Mach.*, *supra* note 9, ¶ 53.

<sup>94</sup> *Quiborax*, *supra* note 10, ¶ 220.

<sup>95</sup> *Id.* ¶¶ 1–2, 7.

boron) in South America.<sup>96</sup> Quiborax initially mined minerals in Chile, but it operated on land near the Bolivian border.<sup>97</sup> In an effort to increase production of ulexite, which has seen a recent growth in demand, Quiborax wanted to expand operations into Bolivia, which has large deposits of high quality ulexite.<sup>98</sup> They were particularly interested in the deposit at Salar de Uyuni, then owned by Compañía Minera Rio Grande Sur S.A. (“Rio Grande”).<sup>99</sup> Quiborax made some deal to secure a supply of ulexite from Salar de Uyuni, but the nature of the arrangement is unclear.<sup>100</sup> The dispute over the nature of that agreement formed the basis of the case.<sup>101</sup>

*Quiborax* acted as a good representative for the cases opposed to *Salini* because it simply rejected the fourth prong, and it did so on textual grounds, which appears to be the most common reason for doing so, to the extent that commonality exists at all.<sup>102</sup> Furthermore, the *Quiborax* panel was heavily influenced by the reasoning of other panels that chose to modify the *Salini* test, so in some sense it can be viewed as a culmination of that line of decisions.

The *Quiborax* panel rejected the fourth prong because it found that the preamble to the ICSID Convention merely states that economic development is a goal of investment, not an inherent characteristic of it. To that end it relied on *Victor Pey Casado*, saying:

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 development of the host State. *This does not mean that the development of the host State becomes a constitutive element of the concept of investment.*<sup>103</sup>

The panel also gave a small nod to the *LESI S.p.A.* decision’s regard to the practical difficulties of ascertaining whether an investment leads to the economic development of the host state, saying:

It further stated that it did not appear necessary to also meet the element of contribution to the economic development of the country, “a requirement that is any event [sic] difficult to establish and implicitly covered by the other elements reviewed.”<sup>104</sup>

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<sup>96</sup> *Id.* ¶ 7.

<sup>97</sup> *Id.* ¶ 8.

<sup>98</sup> *Id.* ¶ 9–10.

<sup>99</sup> *Id.* ¶ 10.

<sup>100</sup> *Id.* ¶ 12.

<sup>101</sup> *Id.*

<sup>102</sup> *Quiborax*, *supra* note 10, ¶ 220.

<sup>103</sup> *Quiborax*, *supra* note 10, ¶ 222 (quoting *Victor Pey Casado*, *supra* note 10) (emphasis added).

<sup>104</sup> *Quiborax*, *supra* note 10, ¶ 221 (quoting *LESI S.p.A.*, *supra* note 10).



This reasoning for rejecting *Salini* is understandable, but contains two flaws. First, it failed to grapple with the full implications of the ICSID Convention's Preamble, which is required under the Vienna Convention.<sup>105</sup> While it is not unreasonable in a vacuum to say that a contribution to the economy of a host state is merely a goal of an investment, this does not match well with the stated purposes of ICSID, to foster economic development, and it broadens ICSID jurisdiction beyond the range necessary to serve those purposes. Second, determining whether something makes an economic contribution to the host state may be practically difficult, but that ignores the practical issues stemming from the continued and unpredictable variations on the *Salini* test that make it difficult for companies to plan their international operations. The parties to the arbitration had no way of knowing prior to this decision whether the arbitrators would diverge from *Salini*, and even if they knew that, they could not know in which direction that divergence would run. This unpredictability runs counter to the stated goals of ICSID signatories because they were attempting to streamline international investments.

## VI. ARGUMENTS FOR RETAINING THE *SALINI* TEST

The *Salini* test for determining what transactions arbitrators should consider an investment still constitutes controlling law, or at the very least persuasive precedent from which to start reasoning, as far as ICSID arbitrators are concerned.<sup>106</sup> The case is widely cited across a variety of different arbitrations spanning the twelve years since it was originally decided.<sup>107</sup> Often, arbitral boards simply adopt the *Salini* test in its entirety, leaving it untouched.<sup>108</sup> Additionally, even though some cases do choose to stray from *Salini*, they still feel a need to account for it as the beginning of their analysis.<sup>109</sup> Furthermore, those who depart from the test seldom scrap it entirely. Instead, they simply revise it, and

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<sup>105</sup> Vienna Convention, *supra* note 13, at Preamble.

<sup>106</sup> See, for example, *Quiborax*, *supra* note 10, ¶ 220; *Saba Fakes*, *supra* note 10, ¶ 110; *Phoenix Action*, *supra* note 37, ¶ 39; *Victor Pey Casado*, *supra* note 10, ¶ 232; *Joy Mining Mach.*, *supra* note 9, ¶ 53; *Lesi S.p.A.*, *supra* note 10, ¶ 72.

<sup>107</sup> See, for example, *Quiborax*, *supra* note 10, ¶ 220; *Saba Fakes*, *supra* note 10, ¶ 110; *Phoenix Action*, *supra* note 37, ¶ 39; *Victor Pey Casado*, *supra* note 10, ¶ 232; *Joy Mining Mach.*, *supra* note 9, ¶ 53; *Lesi S.p.A.*, *supra* note 10, ¶ 72.

<sup>108</sup> See, for example, *Joy Mining Mach.*; *supra* note 9, ¶ 53.

<sup>109</sup> See, for example, *Quiborax*, *supra* note 10, ¶ 220; *Saba Fakes*, *supra* note 10, ¶ 110; *Phoenix Action*, *supra* note 37, ¶ 39; *Victor Pey Casado*, *supra* note 10, ¶ 232; *Joy Mining Mach.*, *supra* note 9, ¶ 53; *Lesi S.p.A.*, *supra* note 10, ¶ 72; and *Deutsche Bank AG*, *supra* note 92, ¶ 294.

even those revisions tend to disagree, varying in many different directions with *Salini* as a common center point.<sup>110</sup>

This staying power and the deference that other arbitrators afford to *Salini* give rise to a pair of arguments for retaining it on a more permanent basis, both of which have ample support from the Vienna Convention. First, part of *Salini*'s longevity is attributable to its strong foundation in the text of the ICSID Convention.<sup>111</sup> The ICSID Convention specifically calls out the facilitation of private investment to bring about greater economic development of the host state as the purpose of ICSID.<sup>112</sup> While some boards have found this to simply espouse a general hope rather than a limitation on the jurisdiction of the ICSID,<sup>113</sup> that view has only come about more recently and not gained general acceptance.<sup>114</sup> The second reason to retain *Salini* is more practical; the unpredictability of the panels that seek to replace or alter it both harms individual parties and impedes the purpose that ICSID was created for, facilitating international investment.<sup>115</sup>

### A. The Textual Argument in Support of the *Salini* Test

The fundamental difference between the test advanced in *Salini* and the one advanced in *Quiborax* and cases like it, with regard to the text of the ICSID Convention, is how they perceive the Preamble's view on an investment's economic contribution to the host state. The pertinent portion of the ICSID Convention's Preamble reads, "[t]he Contracting States [c]onsidering the need for international cooperation for economic development, and the role of private investment therein; . . . Have agreed as follows . . ." <sup>116</sup> It then proceeds to lay out the actual articles of the Convention. *Salini* takes this language to mean that ICSID investments must contribute to the economic development of the host state. Otherwise, the arbitral tribunals would be exceeding their jurisdiction

<sup>110</sup> See, for example, *Quiborax*, *supra* note 10, ¶ 220; *Saba Fakes*, *supra* note 10, ¶ 110; *Phoenix Action*, *supra* note 37, ¶ 39; *Victor Pey Casado*, *supra* note 10, ¶ 232; *Joy Mining Mach.*, *supra* note 9, ¶ 53; *LEST S.p.A.*, *supra* note 10, ¶ 72; and *Deutsche Bank AG*, *supra* note 92, ¶ 294.

<sup>111</sup> See *Salini*, *supra* note 7, and ICSID Convention, *supra* note 1.

<sup>112</sup> Report of the Executive Directors *supra* note 4, ¶ 12.

<sup>113</sup> See, for example, *Quiborax*, *supra* note 10, ¶ 221 (quoting *LEST S.p.A.*, *supra* note 10).

<sup>114</sup> See, for example, *Joy Mining Mach.*, *supra* note 9, ¶ 53.

<sup>115</sup> David M. Becker, *Debunking the Sanctity of Precedent*, 76 WASH. U. L.Q. 853, 856–57 n.8 (1998) (espousing the value of certainty and detailing the costs that uncertainty exposes on actors); ICSID Convention *supra* note 1, at Preamble. (explaining that the goal of ICSID is to facilitate international investment).

<sup>116</sup> ICSID Convention, *supra* note 1, at Preamble.

under the Convention.<sup>117</sup> The Preamble also supports *Salini's* interpretation by making clear that ICSID falls under “the auspices of the International Bank for Reconstruction and *Development*.”<sup>118</sup> This choice of organization to oversee ICSID clearly demonstrates the importance of economic development to the signatories. Unlike *Salini*, the arbitrators in *Quiborax* took the language more as words of purpose. They felt that the economic development of the host state was certainly the desired goal of an investment, but that something would not *need* to bring about such development to fall under ICSID’s jurisdiction.<sup>119</sup>

### 1. The ICSID Convention and related works.

There are numerous sources that counsel for the resolution of the dispute in favor of the *Salini* board. The first is the text of the Preamble itself, which lays out that the purpose of ICSID is to promote economic development.<sup>120</sup> It would be odd to expand the organization’s jurisdiction beyond the bounds necessary to do that, which means that the economic development prong ought to remain. Beyond the text, the Vienna Convention allows for the examination of a treaty’s circumstances, context, and preparatory work in order to resolve cases where the text of the treaty is possibly ambiguous.<sup>121</sup> To that end, the preparatory work and other documentation surrounding the preparation of the treaty similarly supports the idea that the economic development of a host state is central to the goals of the ICSID Convention.<sup>122</sup> The report of the Executive Directors also repeatedly emphasizes the goal of ensuring a flow of capital into a country, saying “adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of private international investment into its territories, which is the primary purpose of the Convention.”<sup>123</sup> Moreover, there is a strong contextual link between ICSID and the economic development of signatory countries in that ICSID is a member of the World Bank Group, and

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<sup>117</sup> See *Salini*, *supra* note 7, ¶ 52.

<sup>118</sup> ICSID Convention, *supra* note 1, at Preamble (emphasis added).

<sup>119</sup> See *Quiborax*, *supra* note 10, ¶ 222.

<sup>120</sup> ICSID Convention, *supra* note 1, at Preamble.

<sup>121</sup> Vienna Convention, *supra* note 13, art. 31.

<sup>122</sup> *Malaysian Historical Savors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10 (Apr. 16, 2009) Dissenting Opinion of Judge Mohamed Shahabuddeen, Annulment Decision, ¶ 22.

<sup>123</sup> Report of the Executive Directors, *supra* note 4, ¶ 12.

has strong ties to the World Bank.<sup>124</sup> The World Bank's mission is to facilitate economic development, and it holds ICSID out as a partner in this mission.<sup>125</sup>

## 2. The United Nations Charter.

In addition to the Vienna Convention, another important international instrument pushes for the retention of *Salini*'s fourth prong, the United Nations Charter. The UN Charter contains within it the concept of sovereign equality, a broad principle that underlies large portions of international law.<sup>126</sup> The Charter states that the UN "is based on the principle of the sovereign equality of all its Members."<sup>127</sup> Although the U.N. Charter does not govern ICSID, the fact that such an important document features the concept of sovereign equality, the belief that all countries should have unimpeded control of domestic affairs, so prominently shows that this principle can provide clarity during the textual interpretation of international laws.

Broadly speaking, the principle of sovereign equality states that all countries have an equal right to control the goings on within their borders.<sup>128</sup> That sovereignty, in most cases, cannot be removed without their permission.<sup>129</sup> This principle pushes for a narrow interpretation of the textual basis of ICSID jurisdiction. The existence of sovereign equality evinces a strong preference for allowing nations to manage their own affairs. International organizations like ICSID chip away at this sovereignty since they have the authority to bind countries to their decisions. Consequently, when disputes arise over the breadth of such organizations' power panels should resolve them in favor of the narrower interpretation, lest they force the country to cede more of its sovereignty than it actually consented to.

## B. The Stability Argument in Favor of the *Salini* Test

In addition to the strong textual rationale for *Salini*'s retention, *Salini* also benefits the parties involved and furthers the signatories' goals because it provides a more predictable and uniform rule for the parties to operate

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<sup>124</sup> For instance, the annual meeting of ICSID's Administrative Council takes place as a part of the yearly World Bank and International Monetary Fund Meeting. Furthermore, the World Bank President is also the chairman of the ICSID Administrative Council. ORGANIZATIONAL STRUCTURE OF ICSID, *supra* note 20.

<sup>125</sup> *Id.*

<sup>126</sup> UN Charter art. 2, ¶ 1.

<sup>127</sup> UN Charter art. 2, ¶ 1.

<sup>128</sup> Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*, 53 YALE L. J. 207, 209 (1944).

<sup>129</sup> *Id.*

around.<sup>130</sup> This benefit stems, essentially, from the fact that *Salini* is somewhat settled law. At least, it is as close to settled as the current culture of ICSID arbitration tribunals allows.<sup>131</sup> While ICSID arbitrators do not officially respect precedent as binding, the Vienna Convention allows them to consider it and to afford it as much weight as they choose.<sup>132</sup> In fact, the panel in *Jan de Nul N.V.* opted to follow the *Salini* test almost exclusively due to its weight as precedent.<sup>133</sup> Having a settled, predictable rule of jurisdiction like this would be a great benefit to investors and states involved in these sorts of arbitrations.<sup>134</sup> This is because those sorts of parties are quite sophisticated and consequently plan their moves in relation to the rules.<sup>135</sup> The better the rules are, the better they can plan.<sup>136</sup>

Furthermore, investors are often willing to sacrifice value in order to achieve a more certain outcome.<sup>137</sup> This concept is embodied by the twin ideas of a risk premium and a certainty equivalent. A risk premium is the amount of money by which a risky proposition's expected value must exceed a sure value for a risk-averse person to take the risk.<sup>138</sup> A certainty equivalent is just the inverse of that, the sure value that a risk-averse investor<sup>139</sup> would take over the

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<sup>130</sup> Andrea K. Schneider, *Democracy and Dispute Resolution: Individual Rights in International Trade Organizations*, 19 U. PA. J. INT'L ECON. L. 587, 614 (1998).

<sup>131</sup> Even the cases that choose to diverge from *Salini* start with it for their analysis. See, for example, *Quiborax*, *supra* note 10; *Saba Fakes*, *supra* note 10; *Phoenix Action*, *supra* note 37; *Victor Pey Casado*, *supra* note 10; *LESI S.p.A.*, *supra* note 10.

<sup>132</sup> See, Vienna Convention, *supra* note 13, art. 31; Nolte, *supra* note 47, at 140.

<sup>133</sup> *Jan de Nul N.V.*, *supra* note 69, ¶ 91.

<sup>134</sup> Schneider, *supra* note 130, at 614.

<sup>135</sup> Governments and international investors are inherently sophisticated parties given the level of skill required to engage in such activities. Beyond that, the costs and amounts in controversy for ICSID cases are quite large. Even low awards for ICSID cases are hundreds of thousands of dollars, and the highest ever was 1.7 billion dollars. Furthermore, the fees involved in ICSID arbitrations range average in the mid six to high seven figure range. These stakes can act as a good proxy for the sophistication of the actors involved. See Uchkunova, *supra* note 33.

<sup>136</sup> Schneider, *supra* note 130, at 614.

<sup>137</sup> Becker, *supra* note 115, at 857.

<sup>138</sup> Karel Janecek, *What is a Realistic Aversion to Risk for Real World Investors*, 13 (2004), available at <http://www-stat.wharton.upenn.edu/~steele/Courses/434/434Context/RiskAversion/RiskAversion.pdf>.

<sup>139</sup> Risk aversion is often measured using a Constant Relative Risk aversion utility function, where the higher the value of  $\gamma$  the more risk averse a person is. This takes the following form:

$$U(C) = \frac{C^{1-\gamma}}{1-\gamma}$$

*Id.* at 2.

risky investment.<sup>140</sup> A positive risk premium means that an investor is risk-averse and thus would require some sort of inducement for them to take a risk. Conversely, a negative risk premium would mean that the investor actually seeks risk. Because most investors are significantly risk-averse,<sup>141</sup> they tend to have positive risk premiums. This means that they would be willing to sacrifice some of a test's accuracy for certainty. In this case, that means that they would rather know they were going to fall under the *Salini* test than have courts continuously refine it to get slightly better resolution on exactly what qualifies as an investment. This concept is often cited as one of the biggest benefits of precedent despite its imperfect accuracy.<sup>142</sup> And, the sophisticated nature of the parties magnifies this benefit. They have the resources and knowledge to understand the law, so they actually benefit its predictability. This predictability is particularly important since whether something qualifies as an investment is a jurisdictional issue, so uncertainty here means uncertainty around the entire system that the investor operates in. While in a vacuum investors may or may not prefer to have a more expansive set of rules for jurisdiction, it would still be more important to have consistent set of rules for jurisdiction, so that investors can better understand what systems of dispute resolution will apply to any claims they may have.

The fact that this benefits the investors also aligns well with the purpose of the ICSID Convention. The Preamble explains that ICSID is in place in order to facilitate international investment.<sup>143</sup> Indeed, the Executive Director's report refers to that as ICSID's "primary purpose."<sup>144</sup> This goal can be furthered by the stabilization of ICSID jurisdiction, which will increase investors' confidence in what expenditures of theirs will fall under the purview of ICSID, and thus facilitate international investment.

Some people could argue that settling the law around the new *Quiborax* decision would work just as well, but that approach contains several problems.

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<sup>140</sup> *Id.*

<sup>141</sup> The exact amount of risk aversion for the average person is a subject of some debate. Some studies of the general populace place it between  $\gamma=1$  and  $\gamma=4$ . However, one study targeted specifically towards experienced investors found that the average risk aversion for skilled investors appears to be around  $\gamma=30$ . For a sense of scale, if someone with a level of risk aversion of  $\gamma=30$  had an equal chance of receiving either \$100,000 or \$50,000 they would be willing to take a sure thing valued at \$51,209, a risk premium of \$23,791 compared to their \$75,000 expected value. A person with a risk aversion of  $\gamma=2$  who received a similar offer would need \$66,667 to sell their chance. *See id.* at 1–2.

<sup>142</sup> This is embodied in the famous quote that, "it is more important that the applicable rule of law be settled than that it be settled well." *See Burnett v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis J., dissenting).

<sup>143</sup> ICSID Convention, *supra* note 1, at Preamble.

<sup>144</sup> Report of the Executive Directors, *supra* note 4, ¶ 12.

First, *Salini* is already settled law. Many panels defer to it on the value of precedent alone, and even the ones that reject it begin by considering it. While one could argue that the stability issue would be eliminated by using *Quiborax* as the precedent, shifting to a *Quiborax* regime would require introducing a long period of uncertainty while arbitrators slowly shift their use of the two tests. Moreover, it would weaken the very idea of having a settled test for investment, because the *Quiborax* test could be changed just as adopting *Quiborax* would mark a change from *Salini*. Second, as discussed in Subsection A, *Quiborax* does not interpret the text as faithfully as *Salini*, which makes it a worse choice to settle as law going forward.

## VII. CONCLUSION

The current leading decision on the definition of investment in ICSID arbitration, *Salini et al. v. Morocco*, has existed for more than a decade.<sup>145</sup> It laid down a test that requires an “investment” to have four qualities. According to *Salini*, an investment involved (1) a contribution of money or assets; (2) a certain duration over which the project was to be implemented; (3) an element of risk; and (4) a contribution to the host state’s economy.<sup>146</sup> Although not all decisions in the intervening twelve years have chosen to follow this test, many have.<sup>147</sup> Furthermore, even those decisions that chose to diverge from the *Salini* test use it as the starting point of their analyses, and the ways in which they decided to alter the *Salini* test often conflict with each other just as much as they do with the original test. More recently, a new case, *Quiborax v. Bolivia*, attempts to form these divergent cases into a new test for what qualifies as an investment under ICSID arbitration by removing *Salini*’s fourth prong.<sup>148</sup>

This nascent trend of attempting to replace *Salini* is mistaken for two reasons. First, the text of the ICSID Convention pushes for retention of *Salini*’s fourth prong, “a contribution to the economic development of the host state.”<sup>149</sup> The Preamble of the Convention makes it clear that the purpose of ICSID is the fostering of economic development by way of encouraging private investment.<sup>150</sup> It would be unusual to extend ICSID’s jurisdiction beyond what would be necessary to foster such economic development. Moreover, such an extension of arbitral jurisdiction may violate principles of sovereign equality by

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<sup>145</sup> See *Salini*, *supra* note 7.

<sup>146</sup> *Id.* ¶ 52.

<sup>147</sup> See *Joy Mining Mach.*, *supra* note 9, ¶ 53.

<sup>148</sup> See *Quiborax*, *supra* note 10, ¶ 222.

<sup>149</sup> See *Salini*, *supra* note 7, ¶ 52.

<sup>150</sup> ICSID Convention, *supra* note 1, at Preamble.

removing control of dispute resolution from the states involved.<sup>151</sup> Second, *Salini* should be retained on practical grounds in order to further the goals of ICSID. ICSID should introduce a stronger respect for precedent into its jurisprudence. Upsetting a decades old doctrine would create unnecessary uncertainty in the field of international investment. This would have a chilling effect on international investment and consequently slow economic development. Since the growth of both international investment and economic development are the goals of ICSID, moving away from *Salini* would be the wrong way to go about achieving those goals.

While adhering to the *Salini* test is probably the best method of solving those problems, it may not be possible to truly provide concrete stability within the framework of ICSID. It would certainly be easiest to simply have the panels all continue to apply the test of their own volition, but in the event that they do not, the drafters could also move to define “investment” within the statute. Choosing to use the *Salini* test as the definition would certainly be the optimal move from a consistency standpoint. However, even codifying *Quiborax* or one of the other tests would at least provide investors more predictability moving forward, although that solution could still result in problems in the interim period where investments made before the codification begin coming to arbitration.

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<sup>151</sup> UN Charter art. 2 ¶ 1.