

**Redefining Investment for the Benefit of Host States: Incorporating the *Salini* test into
Kyrgyz Investment Law**

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Abstract

The absence of a uniform concept of “foreign investment” creates different interpretations of investment by the states. Some states define the term “investment” too broadly in order to create a friendly investment environment, which is hardly correct from the point of view of protecting the interests of the state receiving the investment.

The broad concept of foreign investment raises a debate about the effectiveness of economic development in the host state since international investment treaties entitle foreign investors who do not even bring any contributions to the economy of the host state, with the right to sue the state. Due to certain circumstances, developing States receive more investment claims than the contribution to the economy of the host state.

The Kyrgyz Republic is a party to many investment protection treaties. In these treaties, the concept of investor is defined broadly, and pays more attention to protecting the interests of the investor and creating investment guarantees, and has less interest of the state itself. Many investors already have lawsuits against the Kyrgyz Republic, using the state's investment legislation.

The qualification of the concept of investment plays a key role in the resolution by arbitrators of the subject matter jurisdiction *ratione materiae* of the International Settlement Investment Disputes (ISID). The most well-known approach is that the so-called *Salini* test is used to qualify the concept of investment under Article 25(1) of the ICSID Convention. According to this test, the disputed transaction must have contribution to the economic development of the host state.

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Introduction

The definition of “investment” has an important role in determining the scope of the rights and obligations of foreign investors contained in investment legislation, IIAs, and BITs¹. The international investment agreements do not have a uniform definition of the term ‘investment’². In order to attract foreign investment, most BIT and IIA provide a broad definition of investment, where every kind of asset established or acquired by a foreign investor can be considered as an investment³. This broad concept raises a debate about the effectiveness of the investment and its contribution to the economy of the host state.

One of the main conventions on the protection of investment is the ICSID Convention, in which the definition of investment was not qualified⁴. According to the case law of ICSID tribunals, several approaches exist. One such approach is the application of so-called *Salini* test, which helps to qualify the term “investment” under article 25 of the ICSID Convention⁵. According to the *Salini* test, the following requirements should be met for economic activity to constitute and investment: 1) Contribution, 2) duration, 3) a risk, 4) contribution to the host state economic development⁶.

The Kyrgyz Republic, a developing country, is hoping to attract more investment in order to develop the economy of the state, including in its BITs, IIAs, and its legislation. These instruments contain a very broad definition of “investment”⁷ and do not obligate the investor

¹ U.N.C.T.A.D. SCOPE AND DEFINITION: UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS, AT P.1, UNCTAD/ITE/IIT/11 (VOL. II), U.N. SALES No E.99.II.D.9 (1999)

² OECD, *Chapter 1 Definition of Investor and Investment in International Investment Agreements* in INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS (CATHERINE YANNACA-SMALL ED. 2008), P.54

³ Lyuba Zarsky, *The Governance of International Investment*, in INTERNATIONAL INVESTMENT FOR SUSTAINABLE DEVELOPMENT: BALANCING RIGHTS AND REWARDS (Luke Eric Peterson ed., 2005), p. 126

⁴ OECD, *supra* note 2, at p.9

⁵ Christoph Schreuer, *Investments, International Protection* ¶39 (2013), available at Oxford Public International Law

⁶ Peter Tzeng, *Salini Test* (2020) available at Jus Mundi, <https://jusmundi.com/en/document/wiki/en-salini-test>

⁷ Roeline Knottnerus & Ryskeldi Satke, *Kyrgyz Republic’s experience with investment treaties and arbitration cases*, TransnationalInstitute (2017)

to fulfill some requirements to be protected by investment legislation. Until this day, the Kyrgyz Republic has faced 15 investment claims, which are publicly available. The investment claims against the Kyrgyz Republic amount is 1 billion dollars, equal to 13 percent of the whole GDP of the State. Therefore, the definition of “investment” is crucial to the viability of the Kyrgyz Republic’s investment regime.

Some authors suggested that the definition of “investment” in the ICSID Convention, should be limited by using *Salini* test requirements⁸. They have argued that if the term “investment” was not limited in this way, it would have two negative consequences⁹. The first negative consequence would be an expansion of the jurisdiction of ICSID tribunals beyond that was granted by the organization’s founding documents. The second negative consequence would be introducing vagueness into the field of international investment, which, in the opinion of some authors, could slow down the movement of capital¹⁰.

Other authors have focused on the investment disputes that the Kyrgyz Republic is facing. In their view, if the Kyrgyz Republic continues to lose investment cases, then it would have a serious impact on the state’s budget¹¹.

None of these works discusses the possible re-definition of the Kyrgyz Republic’s investment laws, nor do they explore the specific inclusion of the *Salini* test in determining the term “investment” in those laws.

Therefore, this paper mainly focuses on the effectiveness of the *Salini* test in the development and protection from investment claims of the Kyrgyz Republic. The paper, there will hypothetically apply the *Salini* test on existed investment cases against the Kyrgyz Republic.

⁸ Alex Grabowski, *The Definition of Investment under the ICSID Convention: A Defense of Salini*, CJIL (2014) Vol. 15: No. 1, Article 13.

⁹ *Id.* at 302-304

¹⁰ *Id.* at 304-308

¹¹ Roeline Knottnerus & Ryskeldi Satke, *supra* note 7

By doing so, it seeks to help the Kyrgyz government to analyse the best approach to define the investment in order to have real economic development.

The paper is based on desk research methodology, i.e., the collection of information about the *Salini* test, and it's an interpretation by arbitral tribunals. Having done so, the paper engages in comparative analysis and assess how effective the *Salini* test would be in existing cases against the Kyrgyz Republic.

This paper divided into two main chapters. The first chapter will discuss the *Salini* test and the general implication of the *Salini* test in international investment law. Moreover, in this chapter, the main focuses would be on each element of the *Salini* test and analyze the decision of the tribunals in using the *Salini* test in investment arbitration.

The second chapter mainly focuses on the Kyrgyz Republic. The first subchapter will discuss the experience of the Kyrgyz Republic in investment disputes with and analyze current investment legislation of the Kyrgyz Republic. The main part of the second chapter will be the second subchapter, where will be hypothetical inclusion of the *Salini* test, which will give an answer to the research question of how effective will be the inclusion of the *Salini* test.

Chapter 1: Definition of the investments before and after appearance *Salini* test

1.1 The occurrence of *Salini* test in defining the meaning of investment

The determining of the concept of investment plays a key role in resolving the issue of subject-matter jurisdiction of an investment dispute by arbitrators. Each country defines in its legislation, in international treaties and bilateral agreements on investment protection, what exactly will be qualified by the concept of investment. When defining investment in legislation and investment protection agreements, countries give a broad definition of investment in order to attract investment.

One of the main documents on investment protection is the ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1956. In turn, the ICSID Convention gives jurisdiction to International Centre for Settlement of Investment Disputes to consider disputes between the state and the investor in the event of an investment dispute. However, there is no definition of the term “investment” in the ICSID Convention¹². Both the doctrine and law enforcement practice do not agree on unified criteria for qualifying the concept of investment. This ambiguity is due to among the Convention’s negotiators was the existence of a variety of forms and types of investment, as well as their goals¹³. In the process of preparing the ICSID Convention, several definitions of investment were proposed, but none of them was approved by a majority of delegates¹⁴. Developed countries argued that the concept of investment should not be enshrined in the ICSID Convention, implying that any legal dispute could be referred to ICSID. By contrast, developing countries sought to narrow the jurisdiction of ICSID by insisting on the inclusion

¹² Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Oct.14, 1966, International Centre for Settlement of Investment Disputes World Bank Group [ICSID] 575 U.N.T.S. 159

¹³ Gavrilov V.V., Subocheva V.V., *Some Legal Issues Of Settlement of State-Private Investor Dispute By International Arbitration in Modern Private International Law*, Economics and Business (2012) No. 6. pp. 73—78.

¹⁴ Babkina E.V., *International Centre for Settlement of Investment Disputes as an effective mechanism of settling disputes between investor and host state*, in HANBOOK: CURRENT PROBLEMS OF PUBLIC AND INTERNATIONAL PUBLIC AND PRIVATE INTERNATIONAL LAW: COLLECTION OF SCIENTIFIC WORKS. (2016) pp. 61—82.

of the concept of investment in the text of the ICSID Convention. As a result of the vote, the majority of delegates supported the approach of developed countries, while in order to balance interests, it was also accepted that the Contracting parties have the right to notify ICSID at any time of the categories of disputes that are included or excluded from its competence¹⁵.

As appears from the preparatory documents of the ICSID Convention, its developers intended to exclude from the competence of ICSID only such disputes that are simple commercial transactions, namely the purchase and sale of goods and services¹⁶. However, this was not clearly reflected in the ICSID Convention¹⁷. Thus, in order to establish a connection between a dispute and an investment, arbitrators need to make sure that the transaction they are examining is not intended merely for the purpose of purchase and sale. This approach was first applied by the arbitrators in *Fedax v. Venezuela*¹⁸ and laid the foundation of the *Salini* test proposed by the arbitrators in *Salini v. Morocco*¹⁹.

At the initial stage of ICSID activity, the issue of the connection of the dispute with investments was either not considered at all²⁰, or the arbitrators concluded *sua sponte* that the dispute fell under the jurisdiction of ICSID. Thus, in *Alcoa Minerals v. Jamaica*²¹ and *Kaiser Bauxite v. Jamaica*²², the arbitral tribunal decided on the subject-matter jurisdiction of ICSID as follows:

¹⁵ HISTORY OF THE ICSID CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES VOL. II-1, ICSID PUB., (2009), 412p

¹⁶ *Id.* at p. 149

¹⁷ ICSID Convention, *supra* note 12

¹⁸ *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Objections to Jurisdiction, ¶¶ 42-43 (July 11, 1997)

¹⁹ *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶52 (July 31, 2001), 6 ICSID Rep. 400 (2004)

²⁰ PIERRE LALIVE, THE FIRST 'WORLD BANK' ARBITRATION (*HOLIDAY INNS v. MOROCCO*)—SOME LEGAL PROBLEMS, BRITISH YEARBOOK OF INTERNATIONAL LAW, VOLUME 51, ISSUE 1, (1980), pp 123–162

²¹ *Alcoa Minerals of Jamaica, Inc. v. Jamaica*, ICSID Case No. ARB/74/2, Decision on Jurisdiction and Competence (July 6, 1979) (excerpts), 4 Yearbook of Commercial Arbitration 206, 207 (1979)

²² *Kaiser Bauxite Company v. Jamaica*, ICSID Case No. ARB/74/3, Decision on Jurisdiction (July 6, 1975), 1 ICSID Reports 296, 303 (1993)

“in which a mining company had invested substantial amounts in a foreign state reliance upon an agreement with that state, is among those contemplated by the [ICSID] Convention.”²³

In the case of *Fedax v. Venezuela*, the arbitral tribunal, for the first time, pointed out the need to distinguish between ordinary commercial transactions and investments in the meaning of the ICSID Convention²⁴. Having emphasized that the purchase of promissory notes is not a short-term transaction in order to obtain a quick profit, the arbitral tribunal concluded that the transaction is an investment and does not mediate the purchase and sale²⁵.

One of the most sharply debated versions of the concept of investment was established in the decision in *Salini v. Morocco*, the arbitrators highlighted the criteria for qualifying the concept of investment. Thus, the disputed transaction is subject to assessment for compliance with the following criteria: 1) contribution, 2) duration, 3) whether the investor has a risk on the transaction, and 4) contribution to the economic development of the host state²⁶.

It should be noted that the idea laid down in the *Salini* test in 2001, can be seen in the decision of the US Supreme court in the case *SEC v. Howey*. In this case, in 1946, the judges developed the Howey test, which determined whether a certain transaction was an investment agreement for the purpose of registering it as a security. Thus, the transaction was checked for compliance with the following criteria: 1) investment of funds; 2) the investor's expectation of income from investment; 3) investment in a common enterprise; 4) dependence of income on a third party²⁷.

²³ Roberto Castro de Figueiredo, *Chapter 3: The Notion of Investment and Economic Development under the ICSID Convention*, in *ICSID CONVENTION AFTER 50 YEARS: UNSETTLED ISSUES*, KLUWER LAW INTERNATIONAL (Crina Baltag ed., 2016) p.80

²⁴ *Fedax*, *supra* note 18, at ¶¶42-43

²⁵ *Id.*, at ¶43

²⁶ *Salini*, *supra* note 19, at ¶52

²⁷ *Securities and Exchange Commission v. W. J. Howey Co. et al*, 328 U.S. 293 (1946)

The *Salini* test is still used in the practice of international investment arbitration. At the same time, it is necessary to note the ambiguity of the practice of applying its criteria. In some cases, the test was applied without any changes²⁸; in other disputes, the arbitrators refused to apply the criterion of contribution to the economic development of the host state²⁹. There were also cases when the test was supplemented with a fifth-the regularity of profit and refund³⁰ and the sixth criterion-investment “*bona fide*” (good faith investment)³¹.

Let us now look at the four factors of the *Salini* test in greater detail.

The first element of the *Salini* test is the contribution. The tribunal found that a contribution can take a monetary, an in-kind, and/ or an industrial form³². The tribunal came to the conclusion that the Salini used its know-how, provided the necessary equipment and qualified personnel to perform the work, created a production tool on the building site, obtained loans enabling them to finance the purchase necessary for the execution of works and payment of wages labor force, and finally agreed on the issuance of bank guarantees in the form of a provisional guarantee equal to 1.5% of the total amount of the tender, and then, at the end of the tender process, in the form of a certain guarantee, fixed at the rate of 3% of the value of the disputed contract³³.

The second element of the *Salini* test is duration. According to the decision of the tribunal, the duration is understood as a temporary value. In the decision, the tribunal specified that the

²⁸ Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction, ¶¶91-92 (June 16, 2006); Joy Mining Machinery Limited v. The Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, ¶53 (Aug. 6, 2004)

²⁹ Grabowski, *supra* note 8

³⁰ Helnan International Hotels A/S v. Arab Republic of Egypt, ICSID Case No. ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction, ¶77 (Oct. 17, 2006)

³¹ Phoenix Action Limited v. Czech Republic, ICSID Case No. ARB/06/5, Award, ¶100 (Apr. 15, 2009)

³² Salini, *supra* note 19, at ¶53

³³ *Id.*

duration should be at least two years³⁴. Accordingly, for the duration criterion, it is sufficient to engage in investment activity for at least two years.

The third element of the *Salini* test is a risk. According to the tribunal's decision, the risk is defined as any unforeseen incident that cannot be considered force majeure and, therefore, does not qualify for compensation³⁵. In accordance with the economic definition of investment, the risk criterion is that the investor expects to receive a certain profit, but does not know its amount in advance³⁶.

These three elements of the *Salini* test are relatively uncontroversial, and numerous scholarly articles support their use by arbitral tribunals. The fourth element, however, has attracted considerable criticism from scholars, arbitrators, and practitioners. This element is the contribution to the economy of the host state, which is found in the preamble of the ICSID Convention³⁷. This is discussed in the next subchapter.

1.2 Contribution to the host state's economy

The issue of applying the criterion of contribution to the economic development of the host state is discussed in the doctrine of international investment arbitration. The first reference to development as an element of investment was made in *Fedax v. Venezuela* when the arbitrators pointed out that "... significant relationship between the transaction and the development of the host State" as a basic characteristic of investment³⁸. The criterion of economic development was later included in the *Salini* test with reference to the doctrine, namely, the opinion of the Austrian scholar C. H. Schreuer, who pointed that the reference in the first sentence of the preamble of the ICSID Convention that "... the need for international cooperation for economic

³⁴ *Id.*, at ¶54

³⁵ *Salini*, *supra* note 19, at ¶55

³⁶ Sébastien Manciaux, *The Notion of Investment: New Controversies* (2008), p.443

³⁷ ICSID Convention, *supra* note 12

³⁸ *Fedax*, *supra* note 18, ¶43

development, and the role of private international investment therein” is the only objective limitation of the ICSID jurisdiction³⁹. Moreover, the reference to the economic development of the host state in the preamble of the ICSID Convention confirms that this element forms part of the Convention’s purpose⁴⁰.

In *Salini v. Morocco*, which involved the construction of the highway, the tribunal stated that “the contribution of the contract to the economic development of the Moroccan State cannot seriously be questioned. In most countries, the construction of infrastructure falls under the tasks to be carried out by the state or by other public authorities.”⁴¹ In this case, a contract was concluded between Salini and ADM (the company that represents the interests of the state of Morocco)⁴² for the construction of the road, and in this case, the company Salini fulfilled its obligations under the contract, and for the fulfillment of an obligation, the Moroccan government had to pay, which means that this contract on services. Therefore, here the question arises, can a contractual obligation under which the company will receive a certain amount of money for the work done, be considered a contribution to the economy of the host state or not? This question arises from the fact that in the end, the Moroccan government itself built the highway since, at the end of the contract, the government will pay the full amount of money for the companies’ services.

In addition, the concept of “economic development” is too abstract for a tribunal to ascertain the existence of such development, including when making purchase and sale transactions between a state and a foreign investor.

³⁹ CHRISTOPH H. SCHREUER, LORETTA MALINTOPPI, AUGUST REINISCH, ANTHONY SINCLAIR, *THE ICSID CONVENTION: A COMMENTARY* (2009), p.117

⁴⁰ History of ICSID Convention, *supra* note 15, p.134

⁴¹ *Salini*, *supra* note 19, at ¶57

⁴² *Id.*, at ¶2

Thus, in most cases, the arbitrators refuse to apply the approach proposed by Schreuer, pointing out that the criterion of contribution to the economic development of the host state is not a qualifying feature of investment, it is difficult to prove and is covered by the other three criteria of the *Salini* test⁴³. Despite this, there are cases in ICSID practice in which arbitrators have applied this criterion⁴⁴.

The disadvantage of contribution to the economic development of the host state approach from a practical point of view is that it is not possible to develop common thresholds for economic development criteria for all States. In practice, those arbitral tribunals that applied this criterion in most cases did not fully substantiate the fact that the investor's contribution had a positive impact on the economy of the host state. For instance, *Jan de Null v. Egypt*, in which the justification for meeting the criterion of contribution to economic development was that "...there can be no question that an operation of such magnitude and complexity involves risk and one cannot seriously deny that the operation of the Suez Canal is of paramount significance for Egypt's economy and development"⁴⁵. In the case of *Helnan v. Egypt*, which was involved in the hotel industry in Egypt, the tribunal pointed out that the development of the tourism sector for Egypt is one of the important sectors for the development of the Egyptian economy⁴⁶, respectively, it can be considered as an economic contribution, since this business contributes to the state's economy in tourism. The contribution to the economic development of the host state approach does not contribute to the implementation of the principle of legal certainty and allows arbitrators to decide on the existence of ICSID jurisdiction without properly justifying their position.

⁴³ Sébastien, *supra* note 36, p. 444

⁴⁴ See *supra* note 28

⁴⁵ Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction, ¶92 (June 16, 2006)

⁴⁶ Helnan, *supra* note 30

Another question also arises: how is the contribution to the economy measured, and what standard is applied? In the case of *Mitchell v. Congo*, which arose from the military takeover of a law firm owned by a United States citizen in the Congo, the Special Committee concluded that the existence of a contribution to the economic development of the host state does not mean that this contribution must always be significant to the economy of the state⁴⁷. This, in principle, means that the element of contribution to the state's economy will be considered found if the investor just registered their legal entity since there is a certain payment that must be paid by the person who registers the legal entity. For instance, in the law of the Kyrgyz Republic, there established payment for registration of the legal entity⁴⁸.

However, in *Joy Mining v. Egypt*, the tribunal stated that these investments must represent a significant contribution to the development of the host state⁴⁹. and in assessing whether the investment made a significant contribution to the economic development of the host state, the tribunal found a direct link to the amount of money involved in the transaction, since the price was paid in full at an early stage⁵⁰.

A similar decision was made by the sole arbitrator in *MHS v. Malaysia*, where he stated that the value of the contribution to the economy of the host state must be significant⁵¹, since if there was no requirement of significance, then any contract that increases the gross domestic product of the economy by any amount, even the smallest, could be qualified as an "investment." The arbitrator also added that "Any contract would have made some economic contribution to the place where it is performed. However, that does not automatically make a

⁴⁷ Mr. Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, ¶¶30-31 (Nov.1,2006)

⁴⁸ Zakon Kirgizskoy Respubliki 'O Gosudarstvennoy registratsiyi uridicheskikh lic, filialov (predstavitel'stv)' [Law Of The Kyrgyz Republic On State Registration of Legal Entities, Branches (Representative offices)] (Feb. 20, 2009) No.57 Art. 9

⁴⁹ Joy Mining Machinery Limited v. The Arab Republic of Egypt: Award on Jurisdiction: ICSID Case No. ARB/03/11, Award on Jurisdiction, ¶53 (Aug. 6, 2004)

⁵⁰ *Id.*

⁵¹ Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶124 (May 17, 2007)

contract an “investment” within the meaning of Article 25(1). As stated by Schreuer, there must be positive impact on a host State’s development. Schreuer cites CSOB in concluding that an “investment” must have a positive impact on a host State and, in CSOB, the tribunal stated that there must be significant contributions to the host State’s economic development.”⁵².

On the other hand, if the criteria for contribution to the economy of the host state are established, and the condition for the significant contributions is established, this criterion will limit the jurisdiction of ICSID. It should also be noted that if the tribunal refers to the preamble of the ICSID Convention, it will reveal a certain contradiction in the text of the ICSID Convention. Thus, the preamble of the Convention, among other things, establishes the need for the consent of a Contracting State to settle a dispute in ICSID. At the same time, a separate article has been introduced in the text of the Convention, which requires the consent of the state to submit the dispute to ICSID. If the developers believed that the text of the preamble established jurisdictional restrictions, it would not make sense to introduce an additional article for these purposes. Accordingly, if the drafters of the ICSID Convention had intended to limit the jurisdiction of ICSID to only those investments that contribute to the economic development of the host state, this should have been further indicated in the rules of the main text of the ICSID Convention, and not just in the preamble.

Thus, the criteria for contribution to the economy of a state are ambiguous when making a jurisdictional decision of the tribunal, since the tribunal may not take into account the preamble of the Convention, and not consider the criteria for contribution to the economy of the host state, arguing that the text of the Convention itself does not contain such a requirement. Therefore, countries that consider that the contribution to the economy of the host state is a

⁵² *Id.*, at ¶125

significant criterion should specify this element in the agreement itself, in the law, etc. when entering into the agreement.

Chapter 2: Would the *Salini* test benefit the Kyrgyz Republic's investment regime?

Having discussed the *Salini* test as interpreted in ICSID jurisprudence, it is now time to see if that test could help to improve the Kyrgyz Republic's investment regime and its odds of success in arbitral cases. This chapter divided into two-part, The first part concentrate on the current situation on jurisdiction issue *ratione materiae*, and the second part dedicated to hypothetical application the *Salini* test in the decision that was already rendered by tribunals against the Kyrgyz Republic.

2.1 Term 'investment' in the Kyrgyz Republic

The Kyrgyz Republic has given the concept of investment a vast meaning in order to create a favorable investment environment and to improve economic development. Nowadays, the Kyrgyz Republic is facing numerous investment claims. Currently, 15 investment arbitration cases against the Kyrgyz Republic are publicly accessible. When creating an investment regime, the state does not take into account the consequences that may occur, at the risk of potentially undermining the ability to develop the economy of the host state. For example, the GDP of the Kyrgyz Republic was 8 billion US dollars in 2018⁵³, and investment claims are about 1 billion US dollars⁵⁴, which means 13 percent of the GDP of the state itself. Moreover, the practice of the Kyrgyz Republic shows that in the international arbitration court, the state loses, so out of 15 cases, the Kyrgyz Republic has not won once, given that four cases are still pending⁵⁵. These statistics indicate that the country is simply not ready to face an investment dispute at the moment.

When signing and attaching importance to investment, the state does not take into account that it gives its sovereign rights to the international community, and by entering into more BITs and

⁵³ GDP (current US\$) - Kyrgyz Republic, The World Bank (March 30, 2020, 05:11 PM), <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=KG>

⁵⁴ Roeline Knotnerus & Ryskeldi Satke, *supra* note 7, at p.5

⁵⁵ *Kyrgyzstan: Cases as Respondent State*, Investment Policy Hub (Apr. 24, 2020, 10:12 AM), <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/113/kyrgyzstan>

IIAs, the Kyrgyz Republic is increasingly deprived of its sovereign right⁵⁶. The concept of investment for determining the jurisdiction of the tribunal is of key importance since if the actions of the investor do not fall under the concept of investment, and the tribunal loses jurisdiction to resolve a dispute between the investor and the state.

The Kyrgyz Republic has 36 BIT and is a party to 9 larger Investment-related agreements⁵⁷. In each of the agreements, the concept of investment is broad and does not indicate what benefit the investment should bring to the host state. Moreover, the Kyrgyz Republic does not have its own standard BIT, which indicates that States have not stated their expectations from BITs and IIAs, and agree to the terms of other countries.

Accordingly, the state should specify the criteria to be found when considering the concept of investment in order to protect the Kyrgyz Republic from malicious investment claims.

In the investment legislation of the Kyrgyz Republic, the term “investment” is defined as follows:

“Investments are tangible and intangible investments of all types of assets owned or controlled directly or indirectly by the investor in objects of economic activity for the purpose of making a profit and (or) achieving other useful effect in the form of:

- money;
- movable and immovable property;
- property rights (mortgage, right of retention of property, pledge, etc.);
- shares and other forms of participation in a legal entity;

⁵⁶ Roeline Knottnerus & Ryskeldi Satke, *supra* note 7, at 4

⁵⁷ *Kyrgyzstan: Bilateral Investment Treaties (BITs)*, Investment Policy Hub (Apr. 24, 2020, 11:47 AM), <https://investmentpolicy.unctad.org/international-investment-agreements/countries/113/kyrgyzstan?type=tips>

- bonds and other debt obligations; - non-property rights (including intellectual property rights, including business reputation, copyrights, patents, trademarks, industrial designs, technological processes, brand names, and know-how);
 - any right to carry out activities based on a license or other form granted by the state bodies of the Kyrgyz Republic;
 - concessions based on the legislation of the Kyrgyz Republic, including concessions for the search, development, extraction or exploitation of natural resources of the Kyrgyz Republic;
 - profit or income received from investments and reinvested in the territory of the Kyrgyz Republic;
 - other forms of investment that are not prohibited by the legislation of the Kyrgyz Republic.
- The form in which the property is invested, or a change in this form, does not affect its character as an investment.”⁵⁸

The above article gives a very broad definition of the concept of investment in the Kyrgyz Republic. Moreover, the Kyrgyz Republic has not defined the interests of the host state, nor what responsibilities the investor should have, nor what interests of the state in General. It is important to note that several countries have their own Model B.I.T.s. Other states either discontinued their BITs or introduced a new concept that included the interests of the state. For example, Ecuador terminated BITs with many countries, arguing that the country’s BITs in their current form were biased in favor of the interests of investors and posed a threat to the ability of the Ecuadorian government⁵⁹.

⁵⁸ Zakon Kirgizskoi Respubliki “Ob Investiciyah Kirgizskoi Respubliki” [Zakon ob Investiciyah] [Law of the Kyrgyz Republic on investments in the Kyrgyz Republic], No.66 (2003), art. 1

⁵⁹ Roeline Knottnerus & Ryskeldi Satke, *supra* note 7, at 19

In turn, India, in 2015, adopted a new Model BIT that defines “investment” in light of the *Salini* test. In particular, the model treaty specifies that “investment” means an enterprise constituted, organized and operated in good faith by an investor in accordance with the law of the Party in whose territory the investment is made, taken together with the assets of the enterprise, has the characteristics of an investment such as the commitment of capital or other resources, certain duration, the expectation of gain or profit, the assumption of risk and a significance for the development of the Party in whose territory the investment is made.....”⁶⁰. Thus under the Indian Model BIT, at least these four *Salini* test criteria must be met to determine the existence of an investment.

In all 15 investment disputes against the Kyrgyz Republic, the tribunal recognized its jurisdiction and indicated that the investor’s contribution could be considered an “investment.” The tribunal recognized jurisdiction since the concept of investment was found in BITs, IIAs, and legislation of the Kyrgyz Republic.

The first case whose decisions are publicly available is *Petrobart v. Kyrgyz Republic*, which concerned a gas supply contract entered into by a state-owned gas company, this case was initiated using the Energy Charter Treaty, where it is stated that the investment is in accordance with article 1(6). the term “Investment” means: “every kind of asset, owned or controlled directly or indirectly by an Investor and includes:

- (a) movable and immovable, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
- (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business

⁶⁰ Model Text for the Indian Bilateral Investment Treaty, art. 1 ¶4, (2015)

enterprise; (c) claims to money and claims to performance pursuant to contract to have economic value and associated with an investment;

(d) Intellectual Property;

(e) Returns;

(f) any right conferred by law or contract or by virtue of any licenses and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.”⁶¹ which is also a very broad value that can cover almost any contribution of the foreigner on the territory of the Kyrgyz Republic as an investment.

In this case, the tribunal concluded that “It is thus not unusual that claims to money, even if not based on any long-term involvement in a business in another country, are included in treaties within the concept of “investment.” Such a broad definition of that concept has been accepted by the Kyrgyz Republic in its BITs”⁶² which proves the above argument.

In the case of *Sistem v. Kyrgyz Republic* concerning the expropriation of hotels in which the Kyrgyz-Turkey BIT was applied, article 1 (2), in turn, refers to the investment legislation of the host state. Accordingly, the above-mentioned investment legislation of the Kyrgyz Republic of 2003 was applied, which does not require any criteria in favor of the host state. Accordingly, the tribunal decided that the tribunal had jurisdiction because all the criteria were found in the case⁶³. Moreover, this tribunal also applied the *Salini* test to determine the investment and recognized that “.....the tribunal decides that Sistem had made an investment, in the form of its investment of know-how and services in the construction of the hotel, its operation of the hotel, its purchase of Ak-Keme’s share of participation in the project, its

⁶¹The Energy Charter Treaty, art. 1 ¶6, Dec.17, 1994, EECH /A1

⁶²Petrobart Limited v. The Kyrgyz Republic, SCC Case No. 126/2003, Arbitral Award, p.72 (Mar.29,2005)

⁶³ Sistem Mühendislik İn aat Sanayi ve Ticaret A. v. Kyrgyz Republic, ICSID Case No. ARB(AF)/06/1, Decision on Jurisdiction , ¶94 (Sep.13,2007)

payment of Ak-Keme's debts, and its reinvestment of(a share of) its profits from running of the hotel."⁶⁴ In this case, the tribunal applied the *Salini* test, although even the investment law, as well as the deal, does not require an application. However, this is the only case in which this test was applied by the tribunal in determining the issue of jurisdiction *ratione materiae* in a decision of the Kyrgyz Republic.

In *Belokon v. Kyrgyz Republic*, cases concerning the expropriation of Manas Bank, which used the Kyrgyz-Latvian BIT, namely article 1 (1) for the definition of jurisdiction *ratione materiae*, which specifies "The term" investment "shall reflect every kind of asset invested in connection with economic activities by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter"⁶⁵ in this case the tribunal did not provide analysis since the Kyrgyz Republic did not even challenge the jurisdiction of the tribunal⁶⁶.

In the case of *Stans Energy v. Kyrgyz Republic*, a case concerning indirect expropriation of "Kutisai mining" LLC the court's decision was based on the Convention on the Protection of the Rights of the Investor, which defines investments as "the investments shall mean financial and material resources invested by the investor into different objects of activities as well as transferred rights to property and intellectual property for the purpose of obtaining profit (income) or achieving a social effect if they are not withdrawn from circulation or are not limited in circulation in accordance with the national legislation of the parties; the country of origin of investment shall mean the state in whose territory is registered the investor who is a legal entity or whose citizen is the investor who is a physical person; the recipient country is the state in whose territory is located the object of investment; the proprietary right shall mean

⁶⁴ *Id.*, at ¶96

⁶⁵ Agreement for the Promotion and Reciprocal Protection of Investment, Republic of Latvia-Kyrgyz Republic, art. 1 ¶1, May 22, 2008,

⁶⁶ Valeri Belokon v. Kyrgyz Republic, UNCITRAL, Award, ¶186 (Oct.24, 2014)

the right of possession, use, and disposal of property.”⁶⁷ actions performed by Stans energy will be qualified as investments in accordance with the investment legislation of the Kyrgyz Republic⁶⁸⁶⁹.

In the case of *OKKV V. the Kyrgyz Republic*, which concerned indirect expropriation of rights to use land and monetary deposits for the construction of a tourist complex, in accordance with article 1 of the Convention “On the protection of investors’ rights.” Thus, the funds invested by the plaintiff are foreign investments under the Convention “on the protection of investor’s rights” and under the legislation of the Kyrgyz Republic.⁷⁰

In the case of *Beck v. Kyrgyz Republic*, concerning the expropriation of rights defined by a lease agreement. The concept of investment was used in the CIS Convention for the Protection of Investor Rights (1997), which refers to the legislation of the host state of the investment⁷¹. In this case, the tribunal found that “the investments of Mr. Lee John Beck and Central Asia Free Economic Zones Development Corporation LLC, as well as their property lease rights, are foreign investments under the Convention on the protection of investor rights and under the legislation of the Kyrgyz Republic.”⁷².

These cases are publicly available, so I took all the cases that are publicly available to analyze the concept of investment and how they are interpreted when determining the question of jurisdiction *ratione materiae*. In all cases, a very broad meaning of the concept of investment was used, none of the above-mentioned agreement and investment law, when determining the issue of jurisdiction *ratione materiae*, revealed any interests of the host state. Taking into

⁶⁷ Convention on the Protection of the Rights of the Investor art. 1, Mar.23,1997

⁶⁸ Zakon ob Investiciyah, *supra* note 58, art.2

⁶⁹ Stans Energy Corp. and Kutisay Mining LLC v. Kyrgyz Republic (I), MCCI Case No. A-2013/29, Award, pp. 83-86 (Jun. 30, 2014)

⁷⁰ OKKV (OKKB) and others v. Kyrgyz Republic, MCCI No. A-2013/10, Award, p.22 (Nov.21, 2013)

⁷¹ Convention on the Protection of the Rights of the Investor, *supra* note 67, art. 4

⁷² Lee John Beck and Central Asian Development Corporation v. Kyrgyz Republic, MCCI No. A-2013/08, Award, p.34 (Nov.13, 2013)

account the fact that some IIAs refer to the domestic legislation of the host state when defining “investment,” the law of the Kyrgyz Republic on Investment, which was adopted in 2003⁷³, was used accordingly. Accordingly, the fact that the expectations from the investment in which was revealed at the signing of BITs and IIAs, the definition of an investment in a very broad sense, has not justified expectation of the countries since 2003, the Kyrgyz Republic needs to take specific steps to prevent investment claims and Lewisham topic examines whether the inclusion of the *Salini* test in the investment legislation of the Kyrgyz Republic for achieving the original goals from the BITs and IIAs, such as the development of the economy of the host state, and whether it will reduce investment claims in relation to the Kyrgyz Republic.

2.2 Investment disputes with hypothetical inclusion of *Salini* test

In order to determine how effective the *Salini* test will be in relation to the Kyrgyz Republic, I will try to compare the facts of the above cases with the analyses of the *Salini v. Morocco* tribunal. In the future, this will answer the question of how much the introduction of Salinization will help the Kyrgyz Republic for its economic development.

In *Petrobart v. the Kyrgyz Republic*, on February 23, 1998, Petrobart entered into a contract for the supply of gas condensate for 143.5 US dollars per 1 ton⁷⁴, having purchased the gas condensate from Uzneftgazodobicha for 95 US dollars⁷⁵, and this contract was concluded between the Gibraltar company Petrobart and state joint-stock company “Kyrgyzgazmunaizat” (Hereinafter “KGM”)⁷⁶. However, KGM could not fully pay Petrobart’s bills for the supply of gas condensate, citing a difficult financial situation⁷⁷. As a result, KGM had a debt to Petrobart for the supply of gas condensate in the amount of about one and a half million US dollars⁷⁸.

⁷³ Zakon ob investitsiyah, *supra* note 58

⁷⁴ Petrobart, *supra* note 62, at p.4

⁷⁵ *Id.*, at p. 6

⁷⁶ *Id.*, at p.4

⁷⁷ *Id.*, at p.5

⁷⁸ *Id.*, at p.6

In November 1998, as a result of unsuccessful negotiations with K.G.M., Petrobart applied to the judicial authorities of the Kyrgyz Republic in order to recover the amount owed from KGM. The court decision was in favor of Petrobart⁷⁹.

In the period from January 25 to February 3, 1999, the bailiff seized the property of KGM in the amount of the debt, which was to be put up for auction⁸⁰. However, on February 11, 1999, the court received an official letter from the Deputy Prime Minister of the Kyrgyz Republic requesting to suspend the execution of the court's decision to collect the amount owed from KGM for three months due to the difficult financial situation of KGM⁸¹. As a result, the process of execution of the court's decision was suspended for three months.

During the suspension of the enforcement proceedings to recover from KGM amounts owed to Petrobart (February-April 1999) by the decision of state bodies of the KR, under the management of gas, was made a withdrawal of assets (movable and immovable property) of KGM and their transmission in a newly created public company - Kyrgyzgaz and Munai⁸². At the same time, KGM's obligations (debts), including to Petrobart, were not transferred to Kyrgyzgaz or Munai⁸³.

In April 1999, KGM was declared bankrupt by a court decision, and the fact of non-repayment of KGM's debt to Petrobart became quite obvious⁸⁴.

Petrobart, considering that the Kyrgyz Republic violated its obligations to protect investments, initiated arbitration proceedings against the Kyrgyz Republic⁸⁵. As a result of consideration of the Investment Dispute, a decision was made to recover from the KR 1,130,859 us dollars and the corresponding interest in favor of Petrobart⁸⁶.

⁷⁹ *Id.*

⁸⁰ *Id.*, at p.6-7

⁸¹ *Id.*, at p.7

⁸² *Id.*, at p.20

⁸³ *Id.*, at p.20-21

⁸⁴ *Id.*, at p.22

⁸⁵ *Id.*, at p.15

⁸⁶ *Id.*, at p.88

If we apply the *Salini* test criteria, then the decision on jurisdiction *ratione materiae* would be as follows:

1. First element contribution was found in this dispute since the contribution meant money⁸⁷. Since Petrobart itself bought and delivered gas condensate, respectively, in this case, there is a contribution from Petrobart.
2. Second element is about the duration of the investment. According to the case of *Salini v. Morocco*, the minimum investment period should have been two years⁸⁸. In the case *Petrobat v. Kyrgyz Republic*, a supply contract was concluded, which means that the contract will end after the delivery and therefore there will be no activity by Petrobart⁸⁹, which means that this contract would not fall within the concept jurisdiction *ratione materiae*, and therefore this case would not be a dispute in investment arbitration. If, in this case, a tribunal would have applied the Salini test, then Petrobart would have failed with this criteria.
3. Third element of risk is met since, in *Salini v. Morocco*, the risk was understood to be an unforeseen incident that does not entitle to compensation⁹⁰. In this case, this criterion was also found, since Petrobart could not have foreseen that the company could simply be liquidated without paying the amount for the service provided, and there was a risk. However, if you can also interpret the opposite, that Petrobart had no risk, since, between the purchase price of Petrobart itself, and the amount for which Petrobart sold to KGM, you can see the markup of Petrobart, and this action could be considered as a contract of sale. As noted, the contract of sale was not the purpose of the investment agreement⁹¹.

⁸⁷ Salini, *supra* note 19, at ¶53

⁸⁸ *Id.*, at ¶54

⁸⁹ Petrobart, *supra* note 62, at p.4

⁹⁰ Salini, *supra* note 19, at ¶55

⁹¹ History of ICSID Convention, *supra* note 15, at p. 117

4. The fourth element, the contribution of the host states economy, if we compare the *Salini v. Morocco* decision in which the provision of services for which the state would pay, the tribunal ruled that the provision of the service and construction of the highway is the contribution to the economy of the host state⁹². In the case of *Petrobart v. Kyrgyz Republic*, too, would be found as KGM was a state company, accordingly this good supply was in the interests of the state⁹³. However, this factor is very controversial, as it raises the question of how services for which the state would pay a certain amount of money can be considered as a contribution to the economy of the state. If we analyze *Petrobart v. the Kyrgyz Republic*, we can conclude that Petrobart does not make any contribution to the economy of the Kyrgyz Republic. So it really depends on the tribunal how they will analyze the situation.

Thus, in this case, the question arises on how the analysis of the tribunal will be formed on account of the 4th criterion since this rule can be interpreted in different ways. Moreover, any business activity is taxed or has procedural payments, which in the future can be qualified as a contribution to the economy of the host state.

In the case of *Belokon v. Kyrgyz Republic*, Manas Bank was founded in 2008 by a Latvian banker, Valeri Belokon, who in 2007 acquired the then insolvent Kyrgyz commercial Bank Insan Bank and renamed it Manas Bank⁹⁴. Manas Bank started its operations on January 1, 2008, offering a wide range of corporate and retail banking services⁹⁵. However, within 28 months, on April 8, 2010, after the regime change in the Kyrgyz Republic, the Kyrgyz national Bank placed Manas Bank under its management to investigate money laundering cases⁹⁶.

⁹² Salini, *supra* note 19, at ¶56

⁹³ Petrobart, *supra* note 62, at p.4

⁹⁴ Belokon, *supra* note 66, at ¶¶ 4, 57

⁹⁵ *Id.*, at ¶51

⁹⁶ *Id.*, at ¶68

In August 2011, Belokon filed a lawsuit against the Kyrgyz Republic in international arbitration, claiming that government interference in the activities of Manas Bank amounted to the “expropriation” of the Bank⁹⁷. On October 24, 2014, the tribunal awarded Belokon compensation in the amount of 15,020,000 US dollars, plus 1,220,000 US Dollars for legal costs for the “expropriation” of Manas⁹⁸.

Considering the criteria of the *Salini* test:

1. First element is the contribution is met, Valeri Belokon, in this case, repaid the existing debts and continued the Bank’s activities⁹⁹.
2. Second element of duration is also found in this case since the Bank “Manas” started its activity on January 1, 2008¹⁰⁰, and only in April 2010 actions were committed against the Bank “Manas,” respectively, the minimum period was found.
3. Third element of risk, in this case, there is no doubt that the risk of banking activity exists in profit since there can be a failure in bank activities and etc. But it should be taken into account that Valeri Belokon invested his money on a project that was supported by the deposed government¹⁰¹, and which operated and acquired this Bank, for the purpose of money laundering¹⁰², respectively, we can conclude that the risk for Valeri Belokon did not exist since this Bank was created for money laundering¹⁰³.
Therefore this case would fail to comply with the third element of the *Salini* test.
4. Fourth element is the contribution to the economy of the host state, which was also found since the banking activity existed for more than two years. Moreover, the Bank

⁹⁷ *Id.*, at ¶10

⁹⁸ *Id.*, at ¶335

⁹⁹ *Id.*, at ¶57

¹⁰⁰ *Id.*, at ¶51

¹⁰¹ *Id.*, at ¶120

¹⁰² *Id.*, at ¶50

¹⁰³ *Kyrgyz Republic v. Valeriy Belokon*, Cour D’appel De Paris Pôle 1 - Chambre 1 15/01650, Setting Aside Award, pp. 14-15 (Feb.21, 2017)

operated without debt obligations from a loss-making Bank¹⁰⁴. It should also be taken into account that the Bank must pay taxes to the state¹⁰⁵, which is a contribution to the state's economy. Based on the fact that the contribution to the economy of the state does not have a certain standard; therefore, any payments will be considered as a contribution to the economy of the state.

Thus, in Belokon's case their an absence of the third element of the Salini test, therefore tribunal would not have jurisdiction to hear this case.

In the case of *Stans Energy v. Kyrgyz Republic*, the dispute was on account of indirect expropriation. In this case, since 2010, the company "Stans Energy Corp." invests in the research of potential and development of reserves of rare and rare earth metals in the Kemin district of the Chui region of the Kyrgyz Republic. Investments are made through two of its subsidiaries registered as legal entities of the Kyrgyz Republic: LLC. "Stans energy KG" and LLC. "Kutisai mining" (formerly JSC "Kutisai mining")¹⁰⁶.

It should be noted that JSC. Kutisai mining was established on December 9, 2009, as a joint-stock company, the sole founder of which was the company "Vestal United Limited" (New Zealand)¹⁰⁷.

On December 21, 2009, the State Agency for Geology and mineral resources under the government of the Kyrgyz Republic and JSC. "Kutisai mining" held negotiations under Protocol No. 1736-N-09, and it was decided to issue JSC. "Kutisai mining" license No. 2488 ME for The Kutisai II Deposit¹⁰⁸. On December 29, 2009, LLC. "Stans Energy KG" is a subsidiary of which the company is the sole participant "Stans energy Corporation"-acquired 100% of the shares of JSC. "Kutisai mining" from an open auction conducted on behalf of the

¹⁰⁴ Belokon, *supra* note 66, at ¶57

¹⁰⁵ Sydygaliev U.S., Temirlaiev A.S., *Nalogoblazheniye Kommercheskix bankov Kirgizskoy Respubliki* [Taxation Of Commercial Banks In The Kyrgyz Republic], Journal Manas, (2002)

¹⁰⁶ Stans Energy Corp., *supra* note 69, at p. 2

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*, at p. 3

Kyrgyz Republic development Fund CJSC by the Central Asian stock exchange, thus becoming its sole shareholder¹⁰⁹. On January 25, 2010, the said sole shareholder of JSC. “Kutisai mining” decided to reorganize by converting It into a Limited Liability Company (LLC “Kutisai mining”) ¹¹⁰. There was a reorganization, and the certificate was issued. LLC. “Kutisai mining” became a legal successor of JSC. “Kutisai mining.” On June 26, 2012, the Committee for the development of economic sectors of the Parliament of the Kyrgyz Republic (Jogorku Kenesh) adopted a resolution obliging the State Agency for Geology and mineral resources under the Government of the Kyrgyz Republic to terminate the license agreement with LLC. “Kutisai mining” in respect of the Kutisai II Deposit¹¹¹.

The decision was in favor of the investor, to recover from the Kyrgyz Republic 117.738.940, 30 US dollars in satisfaction of the main claim, 158.975, 24 US dollars as compensation for the investors’ expenses related to the payment of the arbitration fee, and 308.142, 50 US dollars as compensation for the investors’ expenses for conducting the case¹¹².

Considering this case according to the criteria of the *Salini* test,

1. First element of the *Salini* test was found, the company bought out JSC. “Kutisai mining” ¹¹³, respectively, Stan energy Corp made a contribution by buying out the company.
2. Second duration element was met too, since the buyout of JSC. “Kutisai mining” on December 29, 2009, and the mineral prospecting activities that began in 2010, and at the time when the government of the Kyrgyz Republic took the license from the company on June 26, 2012¹¹⁴, more than two years have passed, respectively, this element was also found in the case of *Stans v. the Kyrgyz Republic*.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*, at p. 98

¹¹³ *Id.*, at p. 2

¹¹⁴ *Id.*, at p. 3

3. Third element of risk would also be found, since the company took a license to search and extract metals¹¹⁵, however, this license is issued only for a certain territory¹¹⁶, which means that, in this territory, the investor may not find metals and minerals¹¹⁷, which leads to a huge risk if the territory does not have metals.
4. Fourth element is the contribution to the economy of the host state was also found because this sector is subject to a certain type of tax¹¹⁸, which accordingly gives the state revenues to the state budget, as well as considering that for the Kyrgyz Republic this sector is important for the country's economy, a good example would be Kumtor, which is one of the important sources of the country's budget¹¹⁹.

Thus, all four elements of the *Salini* test were found in this case.

In the case of OKKV v. Kyrgyz Republic, the LLC OKKV was registered in the Kyrgyz Republic on June 5, 2007¹²⁰. 23 Jul 2008 the Office of the President of the Kyrgyz Republic issued Order No. 329 on holding the investment tender for the construction of recreational and tourist complex on the territory of sanatorium "Issyk Kul Aurora," and the winner became LLC OKKV by presenting the business plan for the construction of health tourism complex (gated complex, combined with cultural entertainment center)¹²¹. The Director of the sanatorium "Issyk-Kul Aurora" was instructed to conclude an agreement with the LLC. "OKKV" on the temporary use of a land plot of 4 hectares on the territory of the Sanatorium for 49 years, and on September 25, 2008, this agreement was signed¹²².

¹¹⁵ *Id.*, at p. 2

¹¹⁶ Zakon Kirgizskoy Respubliki "O nedrah" [Law of the Kyrgyz Republic on Mineral Resources], No 160 (2012) art. 4

¹¹⁷ Andrew Beattie, *The Biggest Risks Mining Stocks Face*, Investopedia (May 16, 2018), <https://www.investopedia.com/articles/investing/031813/biggest-risks-mining-stocks-face.asp>

¹¹⁸ Nalogoviyyi Codex Kirgizskoy Respubliki [Tax Code of the Kyrgyz Republic], No 230 (2008) art.299

¹¹⁹ Roeline Krottnerus & Ryskeldi Satke, *supra* note 7, at p.13

¹²⁰ OKKV, *supra* note 70, at p.2

¹²¹ *Id.*

¹²² *Id.*

In accordance with this agreement, LLC. “OKKV”: 1) had to pay a guarantee fee of 2.000.000, 00 soms within ten days, as well as make an investment amount of 10.000.000, 00 soms for the construction of a restaurant on the territory of the Sanatorium. These amounts were paid by LLC. “OKKV” in four tranches in the period from December 11, 2008, to February 9, 2009; 2) received a land plot of 4 hectares for temporary use for 49 years with a preferential right to extend the contract at the end of this period. In paragraph 1.2 of the agreement, the purpose of the site was specified - it was transferred for the construction of a health and tourism complex¹²³.

On March 18, 2009, The Director of the Issyk-Aurora sanatorium notified The managing Director of the President of the Kyrgyz Republic, K. T. Temirbayev, That the L.L.C. “OKKV” fulfilled its obligations under the agreement and made an investment of 10.000.000, 00 soms, as well as a guarantee fee of 2.000.000, 00 soms¹²⁴. The letter further stated that the guarantee fee in the amount of 2.000.000, 00 soms was subject to return to LLC. “OKKV” in the period from 22 to 27 April 2009, the specified guarantee fee was returned to LLC. “OKKV” in two tranches¹²⁵.

On September 26, 2008, the land plot was transferred to the temporary use of LLC. “OKKV”¹²⁶ after receiving the land plot, the shareholders concluded equity participation agreements with LLC. “OKKV”. The total amount of contributions from participants in shared construction was 2.343.862, 00 US dollars. The specified amount of money was invested by LLC. “OKKV” in the construction of the health and tourism complex “Aurora Green.”¹²⁷

An equity participation agreement was concluded, the parties to which are, on the one hand, a participant in shared construction, and on the other hand, a developer organization¹²⁸.

¹²³ *Id.*

¹²⁴ *Id.* at p.3

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at p.4-5

¹²⁸ *Id.* at p. 5

Participants in shared-equity construction contribute funds that are used for construction to pay for the services of the developer organization and include the profit due to it. After putting the object into operation, participants in shared construction acquire ownership of the cottage they paid for¹²⁹.

Participants in shared-equity construction do not have common ownership of the construction object as a whole: after signing the act of acceptance and transfer of the object, each participant receives ownership of a cottage or apartment¹³⁰.

On July 19, 2010, on the basis of Decree of the Provisional Government of the Kyrgyz Republic No. 99 “On Nationalization Of The Facilities of the “Aurora Green” was nationalized¹³¹. Since the right of ownership from the participants of shared construction contract in equity financing occurs only after passing the entire object into operation and common ownership of the object prior to its commissioning from co-investors does not occur, the legitimate expectations of participants of shared construction could be realized only in the case of delivery of object in operation, and transfer of ownership of houses or apartments¹³².

The tribunal’s decision was to recover from the Kyrgyz Republic in favor of LLC. “OKKV” 2.343.862, 00 US dollars to satisfy the main claim, 32.107, 00 US dollars to reimburse the plaintiff’s expenses for the payment of the arbitration fee and 29.250, 00 US dollars to reimburse the plaintiff’s expenses for the services of a representative¹³³.

Considering the criteria of the *Salini* test,

1. First element of the contribution from the LLC. “OKKV” was found, as the company’s participants invested 2.343.862 US dollars for the construction of the health and tourism complex “Aurora Green.”¹³⁴

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at p.6

¹³² *Id.*

¹³³ *Id.* at p.27

¹³⁴ *Id.* at p.2

2. Second element of duration is also present in this case, since the company itself has been operating since June 5, 2007¹³⁵, and the actions of the interim government against the company were issued on July 19, 2010¹³⁶, respectively, this company has been operating for three years.
3. Third element of risk is also present since the investor could not have predicted that the project would be successful, and in case of failure, the investors could not get the benefit they expected. For this, the investors did not receive compensation, and respectively, this risk was present.
4. The fourth element of contribution to the economy of the host state, in this case, this fact is similar to *Helnan v. Egypt*, when the tribunal ruled that the hotel industry is one of the factors for improvement of tourism in Egypt¹³⁷. Therefore, this complex was calculated as the recreational and tourist complex “Aurora Green,” which is also one of the elements of tourism development in the Kyrgyz Republic. Accordingly, these investments would fall into the concept of contribution to the economy of the host state.

Thus, all four elements of the *Salini* test were found in this case.

In the case of *Beck v. the Kyrgyz Republic*, the case concerned an indirect expropriation. In 1997, at the invitation of the President of the Kyrgyz Republic, Lee John Beck started his activities in the Free Economic Zone “Bishkek,”¹³⁸ and starting from December 1, 1997, the investor was registered as a subject of the FEZ “Bishkek,” and at the same time, contracts were signed between Lee John Beck and the General Directorate of the FEZ¹³⁹. According to these contracts, the investor was granted land plots on the territory of the FEZ “Bishkek” for a lease period of 97 years for construction¹⁴⁰.

¹³⁵ *Id.*

¹³⁶ *Id.* at p.6

¹³⁷ *Helnan*, *supra* note 30

¹³⁸ *Beck*, *supra* note 72, at p.2

¹³⁹ *Id.*

¹⁴⁰ *Id.*

On November 14, 2002, the investor and the General Directorate of the Bishkek FEZ signed Agreement No. 101-A, in paragraph 1.1, of which the parties agreed to transfer land plots with a total area of 232.500 square meters to the plaintiff for long-term use on lease terms¹⁴¹.

At the time of the conclusion of the agreement. 101-A, the FEZ General Directorate had a debt to the investor in the amount of 1,774,968 US dollars, of which 947,117 US dollars was written off by the investor. The lagging part of the parties agreed that the investor lease payments under Agreement No. 101-A would be made by reducing the remaining debt of the FEZ General Directorate “Bishkek” to the plaintiff in the amount of 827,851 US dollars.

The contract also specified paragraph according to which, the investor to lease a land area of over 23 hectares, and this land plot was granted for the following purposes: Park development, construction, and operation of a brick factory, which after ten years had to be transferred to the “Bishkek” FEZ, construction and operation of the solution node, which after ten years was also to be transferred to the FEZ “Bishkek” and for doing other activities (without identifying them, that is at the discretion of the investor) ¹⁴². Besides, the investor has committed to reconstructing the building of the ExpoCenter within 26 years¹⁴³.

The investor acted in full compliance with the Agreement the Flamingo Park, built by the investor, is a children’s entertainment Park. The constructed brick factory and mortar unit were transferred to the FEZ “Bishkek.” A partial reconstruction of the ExpoCenter was carried out¹⁴⁴.

In the course of investment activities, the investor faced the inability to implement many of the initially planned activities due to significant negative changes in the Kyrgyz legislation, which destroyed the legitimate expectations of the investor; constant political instability; unjustified

¹⁴¹ *Id.*

¹⁴² *Id.* at p.11

¹⁴³ *Id.*

¹⁴⁴ *Id.*

interference of the tax and customs authorities of the Kyrgyz Republic in the investor's activities; lack of support from the state bodies of the Kyrgyz Republic, which have an international legal obligation to ensure investment security, including the creation of a favorable investment climate¹⁴⁵.

One example is when an Investor developed and submitted a Business Center project to the Bishkek city mayor's office and the management of the Bishkek FEZ. The project was fully ready, including the availability of the necessary funding. The Directorate of FEZ "Bishkek" refused to permit the implementation of this project¹⁴⁶. In a letter to the Directorate dated October 19, 2012, it was stated that "... the projects proposed by the investor are of a commercial nature ..., which does not coincide with the goals and objectives of the Bishkek FEZ"¹⁴⁷. This refusal was surprising for the investor since, in accordance with paragraph 1.3.1 of the Agreement No. 101-A of November 14, 2002, the land was leased for 93 years for "the development of the park and other activities." At the same time, the management of the Bishkek FEZ was well aware that the investor was not a charitable organization, and his investment activities were for commercial purposes¹⁴⁸.

In 2006, the "creeping expropriation" of the investor's investments began, which ended in 2012. The expropriation took place in 3 stages: the withdrawal of 5,328 sq. m. of land in favor of Jipara Enterprises LLC; the withdrawal of the land plot belonging to the investor in the amount of 11,718 sq. m.m in favor of the state enterprise "Kyrgyzstroysservice" of the office of the president of the Kyrgyz Republic; termination of the lease agreement No. 101-a unilaterally¹⁴⁹.

¹⁴⁵ *Id.* at p.3

¹⁴⁶ *Id.* at p.12

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at p.3

The tribunal's decision was to recover from the Kyrgyz Republic in favor of Mr. Lee John Beck and Central Asia FEZ Development Corporation, Kyrgyz Republic, 22,481,437. 00 US dollars in satisfaction of the main claim, 73,293. 00 US dollars in reimbursement of the plaintiff's arbitration fee and 103,600. 00 US dollars in reimbursement of the investor's representative fees¹⁵⁰.

Considering the criteria of the *Salini* test:

1. First element of the contribution was found in this case since the investor invested money, it can also be noted that the General Directorate of the FEZ was in debt to the investor¹⁵¹.
2. Second element of duration is found because the investor has leased the territory for 97 years, which means that the investor has a goal to develop its activities for 97 years¹⁵².
3. Third element of risk was also found in this case, since the investor could not have expected that the legislation of the Kyrgyz Republic would change, that accordingly the plans and expectations of the investor changed, and the investor could not receive compensation for losses, and moreover, the investor could not foresee the income of his project, which consequently causes a great risk for the investor.
4. The fourth element was also found as the investor has acted in full accordance with the contract, the contract some businesses that would be built by an investor would become public enterprises after a certain time, according to the agreement, approximately ten years¹⁵³, respectively, it will be considered as a contribution to the economy of the host state, the investor began the Fairgrounds which is owned by the state¹⁵⁴. The investor

¹⁵⁰ *Id.* at p.41

¹⁵¹ *Id.* at p.2

¹⁵² *Id.* at p.4

¹⁵³ *Id.* at p.25

¹⁵⁴ *Id.* at p.12

also repaid the loans that the FEZ Directorate had and then wrote off, which, accordingly, indicates a contribution to the economy of the host state¹⁵⁵.

Thus, all four elements of the *Salini* test were found in this case.

Based on the fact that, out of six cases, two cases did not fall under the criteria of the *Salini* test, which would later lead to the fact that the tribunal would not have jurisdiction over the issue of jurisdiction *raione materia*. Therefore, we can conclude that even the *Salini* test criteria's are very abstract, and case law has shown in practice that the interpretation of the last element, the criteria for contribution to the economy of the host state, is analyzed by the court in different aspects, and any business activity can fall under the interpretation since it must at least pay for the registration of a legal entity, which already contributes to the economy of the host state.

¹⁵⁵ *Id.* at p.2

Conclusion

The term investment has a significant influence in determining the jurisdiction of the ISID and still plays an important role. The *Salini* test approach it is the way by which the Convention can evaluate the investment, but not the state. Every state should determine what will be considered an investment within their own legislation. The current study was to analyze the inclusion of the *Salini* test to protect the Kyrgyz Republic from the investment claims in ISID in order to have a real dispute with the investor, which has a real contribution to the economy of the host state.

In conclusion, the *Salini* test is also a broad concept, and each element must also be defined in detail. This work tried to answer to the question that was originally posed: How effective will the *Salini* test be for the Kyrgyz Republic? To this question, the answer was given that the Kyrgyz Republic needs to finalize the fourth element in order to get real economic development from investment.

After studying the issue of the Kyrgyz Republic's practice, it can be concluded that even the *Salini* test criteria are very abstract, and case law has shown in practice that the interpretation of the last element, the criterion of contribution to the economy of the host state, is analyzed by the court in different aspects, and any business activity may fall under the interpretation since it must at least pay for the registration of a legal entity that already contributes to the economy of the host state. For a developing state, a narrower definition of investment needs to be adopted in order for an investment to actually be invested in the host state's economy. At the moment, by creating an investment climate and giving a very broad concept of investment, the Kyrgyz Republic has 15 investment disputes in the International Tribunal, which also spoils the investment climate. Accordingly, it can be concluded that the Kyrgyz Republic is not ready to provide and adequately implement the regulatory framework, which is why the main priority of the Kyrgyz Republic is to narrow the concept of investment in order to implement the

promised and adequate protection of investors, which in practice will create a more favorable investment climate in the country.

Even if we assume that the Kyrgyz Republic does not consider it necessary to narrow the concept of investment, it is at least better to include the *Salini* test, since it would be reasonable for a developing country to apply this test. Also, when you include the *Salini* test, it is better to specify what will be considered a contribution to the economy of the host state, in order for the investment to bring a real contribution, and also add that the profit from the investment, the investor must reinvest part of their profits back into the economy of the host state, which immediately weeds out investors who do not expect to continue operating in the territory of the host state. Also add that investors should hire local workers, which will give the state a positive effect on unemployment.

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