

Rethinking the Salini Test: A Comprehensive Examination and Proposal for Improvement in Defining International Investment

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Abstract. This dissertation critically examines the Salini test, a foundational tool in international investment law (IIL), with a specific focus on its fourth criterion: "Contribution to the Host State's Economic Development." Through an in-depth analysis of various case studies, the research highlights the inherent challenges and controversies surrounding the Salini test, particularly its potential rigidity and the subjectivity embedded in the economic contribution criterion. The study underscores the need for the Salini test to evolve in response to contemporary investment trends, such as green investments, social impact ventures, and the increasing importance of intangible assets. Drawing from past arbitration decisions, academic research, and expert opinions, the dissertation offers suggestions for refining the Salini test to make it more adaptable and relevant in the modern investment landscape. These recommendations encompass defining clear parameters for economic contribution, balancing economic inputs with other considerations, and introducing mechanisms for periodic review. Furthermore, the research forecasts the future of IIL with an improved Salini test, outlining both the opportunities, such as enhanced consistency and predictability, and challenges, including implementation hurdles and potential over-complexity. In conclusion, as the international investment domain continues to transform, the Salini test must be rethought and refined to remain a robust and pertinent instrument in this ever-evolving field.

Keywords: Salini test, international investment law, economic contribution, arbitration, sustainable development.

1. Introduction

The Salini test serves as a bedrock in the domain of IIL. Crafted by the International Centre for Settlement of Investment Disputes (ICSID), this test plays a pivotal role in delineating the parameters of international investment. Comprising four key elements -- a contribution, a specified duration, risk, and a contribution to the economic development of the host State -- the Salini test is vital in establishing the jurisdictional purview of ICSID tribunals. Furthermore, it has left a profound mark on how the term "investment" is construed within bilateral investment treaties (BITs) and other global investment accords (IIAs).

Originating from the 2001 case *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, the Salini test was birthed when the tribunal faced the challenge of deciding if a construction agreement for a roadway qualified as an investment under the ICSID Convention [1]. This decision to introduce specific criteria to delineate an investment signified a notable transformation in IIL. As time progressed, the Salini test underwent adaptations, with various tribunals offering distinct interpretations and applications of the criteria. Some have introduced new benchmarks, such as the commitment of significant resources or the existence of an active project, while others have either adjusted or excluded the established criteria [2].

However, the Salini test, while pivotal, has not been without criticism. Critics argue that the test is too rigid and does not adequately account for the diverse forms of modern international investments. Furthermore, the test's stipulation for a contribution to the economic growth of the host State has sparked significant debate. Detractors believe it's overly subjective, potentially resulting in varied and inconsistent verdicts [3].

The implications of not updating the Salini test are manifold. Initially, there's an elevated risk of outcomes that are inconsistent and unpredictable, which could erode the trustworthiness and efficacy of IIL. Furthermore, the failure to adapt the Salini test to contemporary investment practices may

result in certain types of investments, such as intellectual property rights or portfolio investments, being excluded from protection. This could potentially discourage foreign investment and hinder economic development. Lastly, the lack of a universally accepted definition of investment may lead to forum shopping, where investors choose to bring claims in tribunals that are likely to interpret the term "investment" in their favor.

2. Examination of the Salini Test and Its Implications

2.1. Global Perspective

Globally, the Salini test has significantly influenced the management of international investments. Its four benchmarks have played a key role in defining the term "investment" in BITs and IIAs, which in turn affects ICSID's jurisdictional reach and the relevance of investment safeguards [4]. However, the Salini test, with its emphasis on traditional forms of investment, may not adequately account for new investment trends, such as digital investments, green investments, and social impact investments [5].

Digital investments, for instance, often involve intangible assets, such as data and algorithms, which may not fit neatly into the Salini test's criteria. Likewise, investments focused on environmental conservation and societal benefits, which emphasize ecological preservation and social outcomes above financial gains, might find it challenging to satisfy the test's criteria for contributing to the economic growth of the host nation [6]. Hence, in its present configuration, the Salini test might not entirely capture the nuances of modern international investment, possibly leaving some investment forms without adequate safeguards.

2.2. Development of International Investment

The Salini test is pivotal in guiding the evolution of industries and emerging investment forms. By defining what constitutes an investment, the test influences the types of projects that investors choose to undertake and the jurisdictions in which they choose to invest [7]. For example, the test's stipulation for a specific duration might deter brief investments. Meanwhile, its criteria for contributing to the host nation's economic growth could promote investments in areas seen to offer immediate economic benefits, like infrastructure and production.

Yet, the Salini test's impact on international investment evolution isn't devoid of hurdles. Its stringent benchmarks might lack the flexibility needed for various contemporary investment types, like venture capital investments. These often carry significant risks and might not guarantee a set duration or a definitive economic benefit to the host nation. Therefore, there is a need to rethink the Salini test to ensure that it can accommodate the evolving dynamics of international investment.

2.3. Protection of Investors

The Salini test also holds considerable consequences for investor safeguards. By dictating the relevance of investment protections, the test can sway the equilibrium of authority between nations and investors [8]. For example, should an investment fall short of the Salini test's standards, the investor might be barred from presenting a case to an ICSID panel, possibly restricting the investor's avenue to legal recourse.

3. Case Studies and Analysis of the Salini Test

As a foundational element of IIL, the Salini test has been invoked in a multitude of arbitration instances since its introduction. Its interpretation and application have varied, leading to both praise and criticism. This section will delve into specific case studies to understand the nuances of the Salini test's application, its limitations, and potential areas for improvement.

3.1. Delving into the Application and Interpretation of the Salini Test Across Various Arbitration Instances

3.1.1. Case Study 1: Bayindir v. Pakistan (2005)

3.1.1.1. Background

Bayindir v. Pakistan stands as a landmark case within international investment arbitration. The contention stemmed from a building agreement for the M-1 Motorway Project in Pakistan. Bayindir, a construction firm from Turkey, claimed that Pakistan had unjustly ended the contract and pursued restitution for the damages incurred.

The central question for the tribunal was determining if the construction agreement for the motorway initiative qualified as an "investment" according to the ICSID Convention. The Salini test, with its four-pronged criteria, became the focal point of the tribunal's analysis (table 1).

Table 1. Application of the Salini Test in Bayindir v. Pakistan (2005)

Contribution	Bayindir had made significant financial contributions towards the motorway project. These contributions were not just in terms of capital but also in the form of expertise, machinery, and manpower.
Duration	The motorway project was long-term in nature, spanning several years. This clearly satisfied the duration criterion of the Salini test.
Risk	Bayindir had undertaken substantial risks in the project. These risks were not just financial but also pertained to the project's execution, including potential delays, cost overruns, and other unforeseen challenges.
Contribution to the Host State's Economic Development	The M-1 Motorway's construction held substantial economic value for Pakistan. Anticipated to enhance trade, streamline transportation, and further the nation's infrastructural growth, it was a pivotal project for the country.

Given the factors previously mentioned, the tribunal concluded that the construction contract genuinely qualified as an "investment" in line with the ICSID Convention.

3.1.1.2. Implications of the Tribunal's Decision

The verdict in Bayindir v. Pakistan by the tribunal highlighted the flexibility of the Salini test. By emphasizing the significance of the project's duration and the associated risks, the tribunal showcased a flexible approach to the Salini criteria. This case also highlighted the importance of the economic contribution criterion. The M-1 Motorway was not just a commercial venture but also a project of national importance for Pakistan. The tribunal recognized this and gave due weightage to Bayindir's contribution to Pakistan's economic development.

Bayindir v. Pakistan acts as a benchmark for the expansive interpretation of "investment". The tribunal's ruling emphasizes that while the Salini test offers guidelines, it doesn't impose inflexible criteria. Instead, it should be applied in a manner that reflects the realities of international investments and the unique circumstances of each case.

3.1.2. Case Study 2: Romak v. Uzbekistan (2009)

3.1.2.1. Background

Romak S.A., a company based in Switzerland, forged a wheat sale and acquisition deal with two entities from Uzbekistan. The agreement involved the supply of wheat to Uzbekistan and the subsequent purchase of wheat by Romak from Uzbekistan. Disputes arose between the parties, leading Romak to initiate arbitration proceedings against Uzbekistan under the BIT and the UNCITRAL.

The central question for the tribunal was if the wheat sale and acquisition agreement qualified as an "investment" as per the Switzerland-Uzbekistan BIT and the ICSID Convention. To ascertain the agreement's character, the tribunal referred to the Salini test.

3.1.2.2. Application of the Salini Test

Table 2. Application of the Salini Test in Romak v. Uzbekistan (2009)

Contribution	Romak's activities did not involve any significant capital or other resources being committed over an extended period. The transaction was a simple sale of goods, lacking the attributes of an investment.
Duration	The agreement was a one-off transaction without any long-term commitment or involvement in the host state.
Risk	The tribunal noted that while there was commercial risk involved, it was not the kind of operational or sovereign risk typically associated with investments.
Contribution to the Host State's Economic Development	The transaction did not significantly contribute to Uzbekistan's economic development. It was a mere commercial transaction without any lasting economic impact.

Given that the agreement didn't meet the Salini criteria, the tribunal concluded that it wasn't recognized as an investment under the BIT or the ICSID Convention (table 2).

3.1.2.3. Implications and Controversies

The verdict in the Romak case ignited substantial discussions among IIL enthusiasts. Many perceived the tribunal's staunch adherence to the Salini test as a narrow interpretation of what constitutes an investment.

Initially, the tribunal's ruling was perceived as a shift away from the more expansive and adaptable definitions of "investment" observed in other instances. Such a stance ignited apprehensions regarding the reliability and uniformity of investment treaty adjudication. Besides, the case highlighted the distinction between commercial transactions and investments. While all investments involve commercial transactions, not all commercial transactions can be classified as investments. Moreover, the Romak decision reignited debates about the relevance and applicability of the Salini test. Critics argued that the test's rigidity could exclude many modern forms of investment from protection under investment treaties.

The Romak v. Uzbekistan decision underscores the complexities and challenges in defining "investment" in IIL. The case underscores the importance of adopting a more flexible and nuanced method for categorizing transactions, considering the ever-changing landscape of international trade and investment.

3.1.3. Case Study 3: Philip Morris v. Uruguay (2016)

3.1.3.1. Background

In a pivotal case centered on intellectual property, Philip Morris contested Uruguay's rigorous tobacco rules. Although the Salini test was mentioned, the tribunal didn't rigidly follow its standards. They acknowledged the dynamic character of investments and the importance of safeguarding non-tangible assets.

Philip Morris, an international tobacco behemoth, launched arbitration actions against Uruguay, claiming the nation's rigorous tobacco rules breached the Switzerland-Uruguay Bilateral Investment Treaty (BIT). The contested regulations mandated that graphic health alerts occupy 80% of cigarette packaging and restricted tobacco firms to one product display, essentially banning descriptors such as "light" or "mild."

3.1.3.2. Application of the Salini Test

Given the framework of the Salini test, the central issue was determining if Philip Morris's trademarks and branding endeavors in Uruguay qualified as an "investment" according to the ICSID Convention (table 3).

Table 3. Application of the Salini Test in Philip Morris v. Uruguay (2016)

Contribution	Philip Morris had made significant financial investments in Uruguay, including the acquisition of local companies, the establishment of distribution networks, and marketing campaigns.
Duration	Philip Morris had been operating in Uruguay for several decades, indicating a long-term commitment and expectation of continuity.
Risk	The company faced various risks, including regulatory risks, market competition, and economic fluctuations.
Contribution to the Host State's Economic Development	Philip Morris contributed to Uruguay's economy through job creation, tax revenues, and local partnerships.

Given these factors, the tribunal recognized Philip Morris's operations in Uruguay as an investment. However, it did not strictly adhere to the Salini criteria, especially given the intangible nature of some of the assets, like trademarks.

The tribunal recognized Philip Morris's investments in Uruguay but ultimately sided with Uruguay regarding the case's core arguments. They determined that Uruguay's tobacco rules were a valid exertion of the nation's sovereign authority to safeguard public health and weren't in breach of the BIT. This ruling emphasized the notion that nations retain the prerogative to legislate in the public's interest, even if it affects overseas investments.

3.1.3.3. Implications for the Salini Test

The tribunal's willingness to recognize intangible assets like trademarks as investments indicate a departure from a traditional understanding of investments, emphasizing the need for the Salini test to adapt to contemporary forms of investments.

The Philip Morris v. Uruguay case marks a pivotal milestone in the realm of IIL, shedding light on the complex intricacies of applying the Salini test in contemporary scenarios. Although the test offered a blueprint to discern the essence of Philip Morris's ventures in Uruguay, the tribunal's ruling accentuated the overarching tenets of international law, especially the equilibrium between the investors' rights and the sovereignty of states. As the landscape of international investments undergoes transformation, the instruments and criteria for interpreting and ruling on them must also adapt.

3.2. Examination of the Limitations and Controversies Surrounding the Salini Test as Revealed in These Case Studies

3.2.1. Rigidity vs. Flexibility

The Salini test's four-pronged criteria, while providing a structured framework, have often been criticized for their rigidity. As seen in Romak v. Uzbekistan, the tribunal's strict adherence to the Salini criteria led to the exclusion of a commercial transaction from the ambit of "investment." This has prompted concerns regarding the test's capacity to accommodate the diverse and evolving nature of modern international investments.

3.2.2. Subjectivity in Economic Contribution

The stipulation within the Salini test that mandates a contribution to the economic growth of the host State is among its most contentious aspects. As showcased in the Philip Morris v. Uruguay dispute, the tribunal, while acknowledging the firm's economic inputs, concurrently upheld the

nation's sovereign prerogative to legislate for public welfare. The intrinsic ambiguity of this criterion can pave the way for diverse interpretations, possibly culminating in divergent verdicts.

3.2.3. Inadequacy in Addressing Intangible Assets

The increasing importance of intangible assets in the global economy poses a challenge to the Salini test. The Philip Morris v. Uruguay case highlighted the test's potential limitations in addressing intangible assets like trademarks. With the rise of digital investments and intellectual property rights, there's a pressing need for the Salini test to evolve and recognize such assets explicitly [9].

3.2.4. Overemphasis on Traditional Investments

The Salini test, with its emphasis on traditional forms of investment, may not adequately account for contemporary investment trends. For instance, the test's criteria might not fully capture the essence of green investments, social impact investments, or venture capital investments, which might not always align with traditional notions of duration, risk, or economic contribution.

3.2.5. Potential for Forum Shopping

Given the varied interpretations and applications of the Salini test across different tribunals, there's a potential risk of forum shopping. Investors might opt for tribunals they believe are more likely to interpret the term "investment" in their favor, leading to unpredictability.

From the aforementioned case studies, it's evident that while the Salini test serves as a cornerstone, it also comes with its set of complexities. The diverse interpretations and applications of the test across different cases underscore the need for a more adaptable and comprehensive framework. As the landscape of international investments continues to evolve, so too must the tools and tests that govern them.

3.3. Suggestions for Improving the Salini Test Based on the Analysis of Case Studies

As the above analysis of various case studies has shown, there are inherent challenges, particularly with the fourth criterion: "Contribution to the Host State's Economic Development." This section delves into suggestions for refining this criterion to make the Salini test more adaptable and relevant in the contemporary investment landscape.

3.3.1. Defining Clear Parameters for Economic Contribution

The fourth criterion of the Salini test has been a subject of contention due to its subjective nature. While the economic contribution is undeniably crucial, its interpretation has varied across tribunals, leading to inconsistent outcomes.

For clarity's sake, it's crucial to define explicit criteria determining what signifies a contribution to the economic growth of the host state. This could include:

Direct Financial Investments: This encompasses capital injections, infrastructure development, and other tangible financial contributions.

Indirect Benefits: This could include technology transfers, skill development, enhancement of local industries, and other intangible benefits that have a lasting positive influence on the economic wellbeing of the host state [10].

3.3.2. Balancing Economic Contribution with Other Considerations

While quantitative metrics are essential, the qualitative aspects of an investment's contribution should also be considered. For instance, investments that prioritize environmental sustainability, social impact, or cultural preservation can have significant long-term benefits for the host state, even if their immediate financial contribution is limited [11].

Besides, even though economic contribution is vital, it should not overshadow other essential aspects of investments, such as social, environmental, and cultural considerations. Instead of focusing solely on economic development, the Salini test could incorporate a "Balanced Contribution" criterion. This would evaluate an investment's overall contribution, such a holistic approach would ensure that investments align with the broader goals of sustainable development and societal well-being [12].

3.3.3. Adapting to the Evolving Nature of Investments

The global investment landscape is rapidly evolving, with new forms of investments emerging, such as digital assets, green technologies, and social impact ventures.

Given the dynamic nature of global investments, it would be prudent to introduce a mechanism for the periodic review and update of the Salini test's criteria, especially the economic contribution aspect. This would ensure that the test remains relevant and adaptable to changing investment scenarios [13].

3.3.4. Enhancing the Credibility and Predictability of the Salini Test

To ensure the Salini test retains its reliability in IIL, bolstering its credibility and consistency is paramount.

To ensure consistent application, comprehensive guidelines could be developed, elucidating the interpretation and application of the "Contribution to the Host State's Economic Development" criterion. These guidelines could draw from past arbitration decisions, academic research, and expert opinions to provide a clear roadmap for tribunals.

4. Forecasting the Future of IIL with an Improved Salini Test

As this paper envisions a more polished and enhanced Salini test, it's crucial to anticipate its ramifications on the future trajectory of IIL. This segment will delve into the potential prospects and hurdles that might emerge in this dynamic arena.

4.1. Opportunities

4.1.1. Enhanced Consistency and Predictability

A refined Salini test, equipped with lucid directives and boundaries, has the potential to yield more uniform and foreseeable results in arbitration verdicts. Such consistency can bolster the trustworthiness of IIL, positioning it as a favored route for settling disputes. Take, for example, the *AES Corporation v. Argentina (2005)* case, where the tribunal wrestled with the concept of investment [14]. A more delineated Salini test might have offered more direct insight, simplifying the adjudication procedure.

4.1.2. Inclusion of Modern Investment Forms

By adapting the Salini test to contemporary investment scenarios, such as digital assets and green technologies, the scope of IIL can be broadened. This inclusivity can ensure that modern forms of investments receive adequate protection and recognition.

4.1.3. Balanced Investor-State Interests

An enhanced Salini test, encompassing economic, social, environmental, and cultural facets, can more adeptly balance investor entitlements with state autonomy. The *Occidental Petroleum Corporation v. Ecuador (2012)* case underscored the friction between investor privileges and the regulatory authority of states [15]. A refined Salini test could offer a structure that duly acknowledges both these aspects. Such a well-rounded perspective can cultivate a more congenial rapport between foreign investors and host nations, championing investments that are sustainable and advantageous for both parties.

4.2. Challenges

4.2.1. Implementation Hurdles

While refining the Salini test is a commendable goal, its practical implementation across various tribunals and jurisdictions may pose challenges. Achieving a global consensus on the modifications and ensuring their consistent application can be a daunting task.

4.2.2. Potential for Over-Complexity

Introducing multiple new criteria or guidelines can make the Salini test more complex. This increased complexity can lead to prolonged arbitration proceedings and higher costs for the parties involved.

4.2.3. Reconciling Diverse Stakeholder Interests

Different stakeholders, including investors, states, and civil society, may have varied opinions on the direction of the Salini test's refinement. Reconciling these diverse interests to achieve a universally accepted framework can be challenging.

5. Conclusion

With a refined Salini test in place, the future landscape of IIL is poised for significant potential and growth. While there are significant opportunities to make the field more inclusive, consistent, and aligned with global development goals, the challenges cannot be overlooked. As the global community sets forth on this path of enhancement, a united, well-informed, and equilibrium-driven strategy is imperative. This will guarantee that the Salini test remains to stand as a sturdy and pertinent instrument amidst the constantly shifting terrain of IIL.

References

- [1] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 2001.
- [2] Dolzer, Rudolf, and Christoph Schreuer. Principles of International Investment Law. Oxford University Press, 2nd Edition, 2012, 63-80.
- [3] Bjorklund, Andrea K. The Emerging Civilization of Investment Arbitration. Pennsylvania State Law Review 113, no. 4, 2009, 1269-1331.
- [4] Yackee, Jason Webb. Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence. Virginia Journal of International Law 51, no. 2, 2010, 397-442.
- [5] Poulsen, Lauge N. Skovgaard. Bounded Rationality and the Diffusion of Modern Investment Treaties. International Studies Quarterly 58, no. 1, 2014, 1-14.
- [6] Gordon, Kathryn, Joachim Pohl, and Marie Bouchard. Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey. OECD Working Papers on International Investment 2014/01, OECD Publishing, 2014.
- [7] Alschner, Wolfgang, and Dmitriy Skougarevskiy. Mapping the Universe of International Investment Agreements. Journal of International Economic Law 19, no. 3, 2016, 561-588.
- [8] Van Harten, Gus. Investment Treaty Arbitration and Public Law. Oxford University Press, 2007, 121-151.
- [9] Newcombe, Andrew, and Lluís Paradell. Law and Practice of Investment Treaties: Standards of Treatment. Kluwer Law International, 2009, 65-74.
- [10] Dolzer, Rudolf, and Margrete Stevens. Bilateral Investment Treaties. Martinus Nijhoff Publishers, 1995, 31-66.
- [11] Schreuer, Christoph. The ICSID Convention: A Commentary. Cambridge University Press, 2001, 59-66.
- [12] Sornarajah, M. The International Law on Foreign Investment. Cambridge University Press, 2010, 453-473.
- [13] Vandevelde, Kenneth J. Bilateral Investment Treaties: History, Policy, and Interpretation. Oxford University Press, 2010, 395-396.
- [14] AES Corporation v. Argentine Republic, ICSID Case No. ARB/02/17, 1991.
- [15] Occidental Petroleum Corp. and Occidental Exploration and Production Co. v. Republic of Ecuador, ICSID Case No. ARB/06/11, 2012.