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Microinvestment Disputes

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MICROINVESTMENT DISPUTES

Perry S. Bechky[*]

"*After all, a person's a person, no matter how small.*" – Horton the Elephant.[1]

Is an investment an investment, no matter how small? It depends on the meaning of *investment*.[2]

The World Bank established the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") in 1966.[3] Unsurprisingly, the word *investment* figures prominently in the language establishing ICSID's jurisdiction. Article 25(1) of the ICSID Convention provides:

> The jurisdiction of the Centre shall extend to *any legal dispute arising directly out of an investment*, between a Contracting State … and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.[4]

Yet, the Convention omits any definition of *investment*, its central term. Nothing in the text of the Convention excludes small investments from the Centre's jurisdiction or otherwise discriminates against small investments.

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[1] DR. SEUSS, HORTON HEARS A WHO! (1954).

[2] In this article, I italicize a word when talking about the word instead of using the word in the ordinary way. For example: Smith made an investment; the tribunal construed *investment*. Here *investment* is shorthand for "the word 'investment.'"

[3] *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington, Mar. 18, 1965, entered into force Oct. 14, 1966, 575 UNTS 159 [hereafter, "ICSID Convention"].

[4] *Id.* art. 25(1) (emphasis added).

Indeed, the *travaux préparatoires* reveal the conscious rejection of proposals excluding small disputes and small investments from the Centre's reach.[5]

Through 2000, "there ha[d] been almost no cases where the notion of investment within the meaning of Article 25 of the Convention was raised."[6] In 2001, in *Salini v. Morocco*, an ICSID tribunal held that the "investment requirement" objectively limits ICSID jurisdiction, adding:

> The doctrine generally considers that investment infers: [i] contributions, [ii] a certain duration of performance contract and [iii] a participation in the risks of the transaction…. In reading the Convention's preamble, one may add [iv] the contribution to the economic development of the host State of the investment as an additional condition.
>
> In reality, these various elements may be interdependent…. As a result, these various criteria should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here.[7]

Salini went on to determine that the claimant satisfied each of the four criteria mentioned and "[c]onsequently … consider[ed]" that the claimant had made an investment within the meaning of Article 25.[8] Notwithstanding *Salini*'s cautionary language about the need for sensitivity in applying the criteria "globally," later tribunals have generally attributed to *Salini* the creation of a four-part "test."[9] Some tribunals have followed "the *Salini* test,"[10] other

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[5] *See* Part I.A *infra*.

[6] Salini Construttori S.P.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (Jul. 23, 2001), *transl. in* 42 Int'l Leg. Materials 609 (2003).

[7] *Id.*

[8] *Id.* at ¶¶ 53-58.

[9] *See*, *e.g.*, Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, Apr. 15, 2009, ¶¶ 39 n. 18, 81-83 (describing *Salini* as "seminal"). It might be noted that this attribution developed and persists notwithstanding the fact that another tribunal adopted a similar approach several years earlier and in circumstances where the investment question was much more present than in *Salini*. *Compare* Salini, *supra* note __, ¶ 57

tribunals have rejected it,[11] while still others have suggested modifying it into three-[12], five-[13], and six-part tests.[14] Some tribunals have modified one or more of the *Salini* criteria, insisting, for example, that the investor must contribute "substantial" assets or must make a "significant" contribution to the development of the host state.[15] Some tribunals have returned to the idea of a global assessment, sometimes to expand access to ICSID, sometimes to restrict it.[16] The *Salini* test thus remains at the center of a lively debate crucial to shaping ICSID's docket and, more, its character.[17]

This article problematizes *Salini*'s fourth prong, which requires an investment to "contribut[e] to the economic development of the host state" as a condition of access to ICSID arbitration.[18] It does this by focusing on

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(concerning a highway construction project whose "contribution … to the economic development of the Moroccan State cannot seriously be questioned") *with* Fedax N.V. v. Venezuela, ICSID Case No. ARB/96/3, Decision on Jurisdiction, Jul. 11, 1997, ¶ 43 (concerning promissory notes). For more on *Fedax*, *see infra* notes __ and accompanying text.

[10] *See*, *e.g.*, Bayinder Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction, Nov. 14, 2005, ¶¶ 130-38.

[11] *See, e.g.*, MCI Power Group LC v. Ecuador, ICSID Case No. ARB/03/6, Award, Jul. 31, 2007, ¶ 165 ("[T]he requirements that were taken into account in some arbitral proceedings for purposes of denoting the existence of an investment … must be considered as mere examples and not necessarily as elements that are required for its existence.").

[12] *See*, *e.g.*, Fakes v. Turkey, ICSID Case No. ARB/07/20, Award, Jul. 14, 2010, ¶¶ 110-14 (accepting the first three *Salini* criteria, while reviewing and rejecting other candidates).

[13] *See* Joy Mining v. Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, Aug. 6, 2004, ¶ 53 (adding a requirement of regular profits and returns to the *Salini* criteria).

[14] *See* Phoenix Action, *supra* note __, ¶ 114 (adding requirements that assets must be invested *bona fide* (i.e., in good faith) and in conformity with the domestic laws of the host state to the *Salini* criteria).

[15] *See*, *e.g.*, Helnan International Hotels A/S v. Egypt, ICSID Case No. ARB/05/19, Decision on Jurisdiction, Oct. 17, 2006, ¶77. The subsequent award for the respondent was partially annulled on other grounds. *See* Helnan International Hotels A/S v. Egypt, ICSID Case No. ARB/05/19, Decision on Annulment, June 14, 2010, ¶ 73.

[16] *See* discussion *infra* Part III.B.

[17] *See* discussion *infra* Part I.

[18] *See* Salini, *supra* note __, ¶ 52.

Salini's impact on "microinvestments," a concept introduced here to refer to investments worth less than US$1,000,000.[19] This definition is tied in principle to the value of the investment, and not to the size of the investor or the amount in controversy, although there is surely a correlation among them in this field of law as a large investor is unlikely to "make an international case" out of a claim it perceives as small relative to its revenues (or potential revenues) in the host country.

Criticism of the development prong is not new – indeed, Christoph Schreuer calls this "the most controversial" part of *Salini*.[20] Yet, the microinvestment lens introduced here reveals new problems with the development requirement: it imposes a backdoor size requirement and harms not only microinvestments but also ICSID's and *Salini's* own development objectives.

Part I of this article introduces ICSID jurisdiction, stressing the investment and consent requirements and the relationships between them. Part II describes ICSID's objectives, particularly the way in which ICSID is intended to promote development, and the debate about whether those objectives justify *Salini*'s development prong. Part III examines *Salini*'s impact on two notable microinvestment disputes: *Mitchell v. D.R. Congo* and *Malaysian*

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[19] The word *microinvestment* owes a debt to the better-established *microfinance* and, especially, *microenterprise*. The latter is defined in U.S. law as a business with "fewer than 5 employees" that "generally lacks access to conventional loans, equity, or other banking services," 15 U.S.C. § 6901(10), which corresponds with the definition used sometimes of *small enterprise* as a business with 5 to 50 (or 100) employees.

The definition chosen here for *microinvestment* focuses on a different criterion of measurement (value vs. employment) and it likely embraces some businesses with more employees and better access to financing. I believe these choices are justified in the circumstances, as they attend to data relevant in the investment context and often discussed in ICSID decisions while setting the threshold high enough to avoid reducing to zero the number of ICSID cases in the set. By way of rough comparison, had ICSID adopted in 1965 the US$100,000 amount-in-controversy requirement debated in the *travaux* (*see infra* nn. __ and accompanying text), that amount would have climbed to US$719,190 in 2011 dollars. *See* U.S. Department of Labor, Bureau of Labor Statistics, CPI Inflation Calculator, available at http://www.bls.gov/data/inflation_calculator.htm (last visited Sept. 30, 2011).

[20] CHRISTOPH H. SCHREUER, ET AL., THE ICSID CONVENTION: A COMMENTARY 131 (2d ed. 2009).

Historical Salvors v. Malaysia. Part IV critiques *Salini*'s development prong from the microinvestment perspective. The article then concludes in Part V.

I. AN INTRODUCTION TO ICSID JURISDICTION

As mentioned, the ICSID Convention does not define its core term *investment*. The *travaux préparatoires* reveal ample discussion of the issue, including the presence of a definition in the first draft[21] and the secretariat's preparation of a revised definition in response to criticisms of the first.[22]

Of particular relevance to microinvestments, the negotiators debated whether to exclude small investments or small disputes from ICSID jurisdiction. "In fact, [an early text] provided that … the Centre would not exercise jurisdiction in respect of disputes involving claims of less than US$100,000."[23] Other "delegates felt that the total value of the investment and not the claim under dispute should be determinative."[24] Still others favored procedural mechanisms, such as screening by the Secretary-General or the investor's home state, "to shield the Centre from insignificant claims."[25] None of these proposals prevailed, however. Unable to agree to a definition of *investment*, the negotiators agreed instead to omit one.[26]

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[21] *See id.* at 114-15 ("any contribution of money or other assets of economic value for an indefinite period or, if the period be defined, for not less than five years").

[22] *Id.* at 115 ("the acquisition of (i) property rights or contractual rights (including rights under a concession) for the establishment or in the conduct of an industrial, commercial, agricultural, financial or service enterprise; participations or shares in any such enterprise; or (iii) financial obligations of a public or private entity other than obligations arising out of short-term banking or credit facilities."). For a thorough discussion of the ICSID negotiating history as it pertains to *investment*, see Julian Mortenson, *The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law*, 51 HARV. INT'L L. J. 257 (2010).

[23] *Id.* at 115.

[24] SCHREUER, *supra* note __, at 116; *accord* Mortenson, *supra* note __, at 297-98 ("The first draft of the Convention imposed a minimum $100,000 amount in dispute as a jurisdictional prerequisite. The dollar minimum was withdrawn in the next draft, and despite occasional expressions of concern that it might leave ICSID open to 'small or frivolous' disputes, it was never reinstated…. *The same held true for all efforts to impose a substantiality requirement on the investment itself.*") (emphasis added).

[25] SCHREUER, supra note __, at 116.

[26] *See id.* at 115.

Throughout the negotiations, Aron Broches[27] opposed the efforts to define *investment*. In part, like Justice Potter Stewart's famous description of pornography,[28] Broches regarded *investment* as difficult to define but easy to recognize.[29] More fundamentally, Broches argued that a definition was "danger[ous]," because

> recourse to the services of the Center might in a given situation be precluded because the dispute in question did not precisely qualify under the definition…. There was the further danger that a definition might provide a reluctant party with an opportunity to frustrate or delay the proceedings by questioning whether the dispute was encompassed by the definition.[30]

Broches thus objected to the jurisdictional issues that would follow from defining *investment*, when jurisdictional details were best left to each Member State to decide which cases to submit to ICSID.[31] Broches made this point

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[27] Broches was the general counsel of the World Bank at the time, in which position he was one of the main architects of the ICSID Convention. When ICSID came into existence, Broches also served as its first Secretary-General. *See* ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 539 (2d ed. 2008).

[28] *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (The Court "was faced with the task of trying to define what may be indefinable…. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [i.e., hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it….").

[29] SCHREUER, *supra* note __, at 114, 116.

[30] Malaysian Historical Salvors, Sdn., Bhd. v. Malaysia, ICSID Case No. ARB/05/10, Decision on Annulment, Apr. 16, 2009, ¶67 (quoting II HISTORY OF THE ICSID CONVENTION 54) [hereafter, *Salvors Annulment*]. In a similar vein, the staff comment to the October 1963 draft convention expressed concern that defining *investment* would "open the door to frequent disagreements" about jurisdiction. *See* Mortenson, *supra* note __, at 282-83.

[31] SCHREUER, *supra* note __, at 114-16.

repeatedly, and specifically in opposition to a minimum-dollar-value requirement.[32]

One possible reading of the ICSID Convention, then, is that the undefined word in Article 25 places no independent restraint on a Member State's freedom to refer disputes to ICSID. Some support for this view is found in the report on the Convention prepared by the Executive Directors of the World Bank, as it states: "No attempt was made to define the term 'investment'[33] given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre."[34] But the Executive Directors also undercut any construction that deprives the word *investment* of all jurisdictional significance,[35] as do both the rule of effectiveness[36] and state practice under the Convention.[37]

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[32] *Id.* at 115-16; *see also* Mortenson, *supra* note __, at 297-98 ("As the Bank drafters explained in their elimination of 'lower limit[s]' from the draft circulated to the Consultative Meetings of Legal Experts, 'the parties would in practice be best qualified to decide whether, having regard to pertinent facts and circumstances including the value of the subject-matter, a dispute is one which ought to be submitted to the Center.'").

[33] As Schreuer notes, "Historically, this is, of course, incorrect. There were a number of attempts but they all failed." SCHREUER, supra note __, at 116. Mortenson explains that the "bland description" in the Executive Directors' Report resulted from Broches' efforts to "appease" a Director who opposed the Convention and especially its approach to *investment*. Mortenson, *supra* note __, at 292-93.

[34] Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention of the Settlement of Investment Disputes between States and Nationals of Other States, ¶ 27, Mar. 18, 1965, available at http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partB-section05.htm#03, last visited ___ [hereafter, "Executive Directors' Rep."].

[35] *See*, *e.g.*, *id.* at ¶ 25 ("While consent of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto."). The key phrase here is "the nature of the dispute," which must refer to the language in Article 25 about jurisdiction over "any legal dispute arising directly out of an investment." *See* Aron Broches, *The Convention on the Settlement of Investment Disputes: Some*

State consent is plainly necessary for ICSID jurisdiction: it is the "essential prerequisite" for jurisdiction, "the cornerstone of the jurisdiction of the Centre."[38] So central to ICSID's fabric is the consent requirement that it is manifest three times in the preamble alone.[39] This consent-centeredness was crucial to overcoming resistance, especially among Latin states, to ICSID's

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Observations on Jurisdiction, 5 COLUM. J. TRANSNAT'L L. 263, 266-68 (1966) (explaining the phrase "the nature of the dispute").

[36] The International Law Commission regarded the principle that the language of a treaty should be given appropriate effect (*ut res magis valeat quam pereat*) to be "embodied" in the general rule of treaty interpretation now codified in Article 31.1 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969) [hereafter, "Vienna Convention"], laying stress on the obligation to construe a treaty "in good faith" and "in the light of its object and purpose." Draft Articles on the Law of Treaties with Commentaries, [1966] 2 YBK. INT'L L. COMM'N 187, 219. For a modern expression of this maxim in the context of international economic law, see *United States — Standards for Reformulated Gasoline*, Report of the Appellate Body, WT/DS2/AB/R, adopted on May 20, 1996, at 22 ("An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.").

[37] *See* Vienna Convention, *supra* note __, art. 31.3(b) ("There shall be taken into account … any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation"), although it should be noted that only those customary rules codified in the Vienna Convention, and not the Convention itself, apply to the ICSID Convention. *See id.* art. 4 ("Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States"). The ICSID Convention creates the Administrative Council of ICSID, "composed of one representative of each Contracting State," and empowers it to "adopt the rules of procedure for the institution of conciliation and arbitration proceedings." ICSID Convention, *supra* note __, arts. 4(1), 6(1)(b). ICSID rules governing requests for the institution of arbitral proceedings oblige complainants to specify separately how both the consent and investment requirements have been satisfied. *See* ICSID, Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, Rules 2(1)(c), 2(1)(e); SCHREUER, *supra* note __, at 117.

[38] Executive Directors' Rep., *supra* note __, at ¶¶ 23-24.

[39] *See* ICSID Convention, *supra* note __, pmbl.

creation.[40] It also anchored ICSID in traditional international legal norms,[41] even as ICSID otherwise represented a radical step towards transnational law with meaningful participation by nonstate actors.[42] The consent requirement allows each ICSID Member to decide for itself how far to go into the brave new world of investor claims, i.e., to decide how many and what kinds of cases it is willing to allow investors to bring against it.

With the rise over the past twenty (and, especially, ten) years of cases based on state pre-consent in investment treaties to arbitration of any dispute that may arise alleging a violation of investor rights set forth in the treaty,[43]

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[40] *See generally* ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 537-40 (2d ed. 2008).

[41] State consent is sometimes regarded as the *sine qua non* of international legal obligation. In the words of the *Lotus* Court, "The rules of law binding upon States … emanate from their own free will…." *The S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (Ser. A) No. 10, at 18. Even if the Lotus formulation is overstated, it remains clear that state consent plays a vital role in the creation of international legal obligation – most obviously in the case of treaties, but also custom and general practices. *See generally* Jutta Brunée, *Consent*, MAX PLANCK ENCYCL. PUB. INT'L L., www.mpepil.com (last visited Sept. 29, 2011).

[42] *See* PHILIP JESSUP, A MODERN LAW OF NATIONS: AN INTRODUCTION 2 (1948) (arguing that "international law, like national law, must be directly applicable to the individual"; this is one of the two "keystones of a revised international legal order"); PHILIP JESSUP, TRANSNATIONAL LAW 3 & n.6 (1956) ("Having argued in 1948 that [recognizing individuals as subjects of international law] was a desirable position …, I am prepared to say it is now established."). *Cf.* Broches, *supra* note __, at ("This capacity of individuals to appear with States on a footing of equality before international … tribunals is a further recognition of the status of the individual as a subject of international law.").

[43] Although the possibility of nonsynchronous consent was contemplated at ICSID's creation, *see* Executive Directors' Rep., *supra* note __, at ¶ 24, it was only in 1990 that an ICSID tribunal first exercised jurisdiction based upon state consent expressed in an investment treaty. *See* Asian Agricultural Prods. Ltd. v. Sri Lanka, ICSID Case No. Arb/87/3, Final Award, ¶ 2 (June 27, 1990); *see generally* Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. 232 (1995). Treaty-based cases have since grown to dominate ICSID's docket, now vastly larger than in the recent past. *See* ICSID, 2011-2 THE ICSID CASELOAD – STATISTICS 7 (year-by-year data showing that of ICSID's total of 351 cases through June 30, 2011, 282 cases have been registered since 2000), 10 (73% of ICSID cases are treaty-based). Indeed, it may be said that "investment treaties are to ICSID what Prince Charming was to Sleeping

ICSID jurisdictional disputes now often turn on the scope of the state's consent – that is, on the definition of protected *investment* in the relevant investment treaty.[44] Deploying the image of Article 25 as a "jurisdictional keyhole,"[45] investments covered by the consent clause of an investment treaty have a key unlocking at least one of two locks on the door barring access to ICSID arbitration. They may need a second key to open the investment requirement lock. Or, it may be that the one key opens both locks. Both the investment treaty and ICSID revolve around the same core word, and they may (or may not) use the word in the same way.

In these circumstances, ICSID tribunals should presume that the consent key normally opens both locks.[46] In other words, they should take a broad, flexible, and party-centric approach to the definition of *investment*.[47] They should approach with a spirit of modesty and deference the question whether to construe the undefined word to impose "outer limits"[48] on a Member State's ability to submit a dispute to ICSID. They should assess

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Beauty, having stirred the activities of the Centre." Forji Amin George, *By Their Provisions, You Can Know Them: Are BITs the Magic Wand for Investments in LDCs?*, Oct. 16, 2006, available at http://www.bilaterals.org/IMG/doc/By_Their_Provisions_BITS.doc, last visited Sept. 28, 2011 (quoting Eloïse Obaida).

[44] *See*, *e.g.*, U.S. Model Bilateral Investment Treaty (2004), arts. 24-26, available at http://www.state.gov/e/eeb/ifd/bit/index.htm (consenting to arbitration of investment disputes arising under the treaty). The definition of investment in investment treaties is typically broad and detailed. *See*, *e.g.*, *id.* art. 1.

[45] *See* Aguas del Tunari, S.A. v. Bolivia, ICSID Case No. ARB/02/3, Decision on Jurisdiction, Oct. 21, 2005, ¶¶ 278-80.

[46] *Cf.* Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision on Jurisdiction, May 24, 1999, ¶ 66 [hereafter, CSOB] (consent is an "important element in determining whether a dispute qualifies as an investment" and it "creates a strong presumption" that a transaction so qualifies).

[47] *Accord* R. DOAK BISHOP, ET AL., FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS, AND COMMENTARY 344 (2005) (describing *investment* under the Convention as a "relatively malleable and party-sensitive term"); Biwater Gauff (Tanzania) Ltd. v. Tanzania, ICSID Case No. ARB/05/22, Award, Jul. 24, 2008, ¶¶ 316-17 (advocating a "flexible and pragmatic approach" that construes *investment* "by reference to the parties' agreement").

[48] *See Salvors Annulment*, *supra* note __, ¶ 68 (quoting Broches in II HISTORY OF THE ICSID CONVENTION 566).

whether a Member State's submission is *bona fide*, not whether it is correct.[49] They should give "great weight" to the Member State's understanding of investment, but without deeming it "controlling."[50] They should recognize that the act of consent to ICSID jurisdiction suggests that the dispute "aris[es] directly out of an investment," because only in rare circumstances will an ICSID Member State submit to ICSID, whether in error or in bad faith, a dispute that cannot reasonably be regarded as arising directly out of an investment.[51]

Thus, subject to other requirements not here relevant, an ICSID tribunal should normally have jurisdiction to decide any legal dispute voluntarily submitted to it by the parties, so long as the dispute arises out of a transaction that may be characterized *in good faith* as an investment. This approach remains true to the text of Article 25 and the fundamental obligation to construe it in good faith.[52] It also comports with the principle of estoppel[53] and, to borrow an oft-quoted phrase from the European Court of Human

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[49] *Cf.* Mortenson, *supra* note __, at 273 (criticizing "the *Salini* line" for deciding correctness rather than reasonableness).

[50] Broches, *supra* note __, at 268.

[51] [To push the key metaphor further, consider the keys to a car. Ordinarily, any one key for a car will suffice to open all locks and turn the ignition. Some cars, however, also have a special key for valets, which will open the doors and turn the ignition, but will not open the trunk or glove compartment.]

[52] *See* Vienna Convention, *supra* note __, art. 31.1. In this regard, while Mortenson similarly advocates deference to state approaches to *investment*, he goes too far in embracing ordinary sales or any other activity that is "plausibly economic," a construction that extends in principle beyond a good faith construction of *investment*, although I agree with Mortenson that states are unlikely to consent very often to ICSID jurisdiction premised on such an overbroad conception of *investment*. *See* Mortenson, *supra* note __, at 302-10, 315-16. Likewise, Yulia Andreeva errs by characterizing bilateral definitions of *investment* as *lex specialis*, Yulia Andreeva, *Salvaging or Sinking the Investment?* MHS v. Malaysia *Revisited*, 7 INT'L CTS. & TRIBS. 161, 169 (2008), as this characterization, by operation of the implicit Latin maxim, would permit Member States to derogate from the ICSID Convention.

[53] *See* Temple of Preah Vihear (Cambodia v. Thailand), 1962 I.C.J. 6. Even under the narrower view of estoppel recognized by Judge Spender's dissent, a state may not contest a prior representation on which another state reasonably relied to its detriment. *Id.* at 143-44. States have been estopped as well from contesting prior representations in disputes with private persons. *See* Thomas Cottier & Jörg Paul Müller, *Estoppel*, MAX PLANCK ENCYCL., *supra* note __.

Rights,[54] appropriately gives each Member State "a margin of appreciation" when defining *investment* for the purpose of determining when the submission of disputes to ICSID best suits its own interests.[55]

This party-driven approach represents, to be sure, a radically different vision of subject-matter jurisdiction than that embodied in the U.S. federal courts. Litigants in the United States may not manufacture federal court jurisdiction by consent.[56] They cannot waive jurisdictional defects.[57] Indeed, jurisdictional defects may be raised on appeal for the first time, even by the party that originally invoked federal jurisdiction[58] or *sua sponte* by the appellate courts.[59] But this restrictive view of jurisdiction – which closes the door to the federal courts even when causing inefficiency[60] or injustice[61] – is driven by the

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[54] *See generally* STEVEN GREER, THE MARGIN OF APPRECIATION: INTERPRETATION AND DISCRETION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2000); Yutaka Arai, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR (2002); Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?,* 16 Eur. J. Int'l L. 907 (2005).

[55] *Accord* SCHREUER, *supra* note __, at 117 (advocating an approach in which Member States have "much freedom," but not "unlimited freedom," in deciding what transactions qualify as investments).

[56] *See* WRIGHT & MILLER, 13 FED. PRAC. & PROC. JURIS. § 3522 nn. 15-17 (3d ed.) (collecting cases).

[57] *See* Fed. R. Civ. P. 12(h)(3).

[58] *See*, *e.g.*, Capron v. Van Noorden, 6 U.S. 126 (1804).

[59] *See*, *e.g.*, Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908) ("Neither party has questioned that jurisdiction, but it is the duty of this court to see to it that the jurisdiction of the [federal trial court] … is not exceeded.").

[60] The result of *Mottley*, *id.*, for example, was to force the parties to relitigate in state court what had already been decided in federal court, adding three years of expense and delay. *See* Louisville & Nashville R.R. Co. v. Mottley, 219 U.S. 467 (1911) (reaching the merits of the federal questions not decided in 1908).

[61] *Capron*, *supra* note __, allowed a plaintiff who originally claimed jurisdiction but then lost at trial to later challenge the judgment against him for lack of jurisdiction. In *Finley v. United States*, 490 U.S. 545 (1989), the Court held that the wife and mother of passengers killed in an airplane accident had to pursue her claims against the two defendants in two separate courts despite the risk that the defendants would blame each other and secure inconsistent verdicts that would leave her without any remedy. Congress later reversed

particular needs of the U.S. constitutional system. Litigants may not waive or change the jurisdictional limits of the federal courts because the Founders and Congress have created those limits to preserve the constitutional balance between the national government and the U.S. states.[62] No such considerations exist at ICSID. The international community has no interest in preventing a national government from voluntarily submitting a dispute to international arbitration.[63] Rather, quite opposite to domestic considerations in the United States, party consent is the *sine qua non* of ICSID jurisdiction.[64]

II. ICSID, DEVELOPMENT, AND *SALINI'S* DEVELOPMENT PRONG

A. Development as ICSID's Object and Purpose

Andreas Lowenfeld briefly captures the "wave of expropriations" that swept much of the globe in the first decades after World War II:

> [E]xpropriations and nationalizations of all kinds took place, in Eastern Europe, in former colonies, and in newly invigorated countries of Latin America. All the countries that had come

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Finley's result. *See* 28 U.S.C. § 1367 (1990) (authorizing pendent parties jurisdiction).

[62] *See* WRIGHT & MILLER, 13 FED. PRAC. & PROC. JURIS. § 3522 (3d ed.) ("A federal court's entertaining a case that is not within its subject matter jurisdiction … is nothing less than an unconstitutional usurpation of state judicial power…. The subject matter jurisdiction of the federal courts is too fundamental a concern to be left to the whims and tactical concerns of the litigants.").

[63] *Cf.* Mortenson, supra note __, at 306 (arguing that "close scrutiny" is not needed where "[t]he only entity hurt by deference … is the entity to which deference is actually directed: the [respondent] state itself").

[64] *See* notes ___ *supra*. A potential exception to the otherwise firm U.S. rule against consenting to federal jurisdiction is telling, because it allows party consent in a particular circumstance where that consent cures the constitutional problem driving the rule – namely, where a state itself is a party and consents to be sued in federal court. *Id.* ("There may be an exception to this rule when a state has consented to be sued in a federal court and has waived the protection afforded by the Eleventh Amendment. Whether this situation actually involves an exception to the general rule depends upon whether the Eleventh Amendment defense is one going to the subject matter jurisdiction of the federal courts, an issue on which there is substantial debate.").

> under Communist rule following World War II … nationalized land and private industrial property, including the property of aliens. Utilities, mines, and other major enterprises were subject to state takings in Bolivia, Brazil, Argentina, Peru, and Guatemala, among other states of Latin America…. The most widely known instances of state take-overs were the expropriation of Dutch properties in Indonesia (1958-59), the nationalization of the Anglo-Iranian Oil Company's properties in Iran (1951), and Egypt's nationalization of the Suez Canal Company (1956).[65]

In a series of debates through the 1960s into the 1970s, the UN General Assembly strove to declare the state of customary international law on the property rights of aliens.[66] In 1964, in a case emerging out of Cuba's nationalization of American-owned properties, the U.S. Supreme Court observed:

> There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens…. It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations.[67]

These events and controversies would have been known to the World Bank, of course. Indeed, in 1956-58, a World Bank team helped to negotiate compensation for Egypt's expropriation of the Suez Canal Company and a member of that team became president of the World Bank in 1963.[68]

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[65] LOWENFELD, *supra* note __, at 483-84.

[66] *See, e.g., id.* at 486-94.

[67] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428-30 (1964).

[68] *See* LOWENFELD, *supra* note __, at 484, 537 n.2; Suez Canal Compensation Discussed, available at http://go.worldbank.org/K48G1PWPA0 (last visited Oct. 1, 2011); George

The purposes of the World Bank – i.e., the International Bank for Reconstruction and *Development* – include "assist[ing] in the … development of territories of members by facilitating the investment of capital for productive purposes, including … the encouragement of the development of productive facilities and resources in less developed countries" and "promot[ing] private foreign investment…."[69] The Bank initiated negotiations to create ICSID "to further [the Bank's own] overall purpose of promoting economic development in the world's poor countries."[70] Ibrahim Shihata, a General Counsel of the World Bank and Secretary-General of ICSID, would thus write that ICSID's "paramount objective is to promote a climate of mutual confidence between investors and states favorable to increasing the flow of resources to developing countries under reasonable conditions.… ICSID must be regarded as an instrument of international policy for the promotion of investments and of economic development."[71]

Support for this view of ICSID as an instrument of investment promotion towards economic development can be found in the preamble to the ICSID Convention: "Considering the need for international cooperation

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David Woods, available at http://go.worldbank.org/SY4JPEAC50 (last visited Oct. 1, 2011).

[69] Articles of Agreement of the International Bank for Reconstruction and Development, Jul. 22, 1944, entered into force Dec. 27, 1945, 2 UNTS 134, art. 1. The clause about "promot[ing] private foreign investment" continues "by means of guarantees or participations in loans and other investments made by private investors," although ICSID is an example of the Bank not limiting itself to these means unless the arbitral process is seen as a form of "guarantee."

[70] LOWENFELD, *supra* note __, at 537. The Bank sought to make this contribution through a procedural innovation without involving itself in the debates about the state and desirability of the substantive international law of investment protection. See Elihu Lauterpacht, *Foreword*, *in* SCHREUER, *supra* note __, at ix, ix. Even the reference to international law in the Convention's choice of law clause is caveated with the words "as may be applicable," ICSID Convention, *supra* note __, art. 42, and this reference "gives no clue as to the content of [international] law; evidently in 1964 no useful clue could have achieved" widespread support. LOWENFELD, *supra* note __, at 540 (drawing on Lowenfeld's own experience as a U.S. negotiator for the ICSID Convention).

[71] Ibrahim Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, *in* IBRAHIM SHIHATA, THE WORLD BANK IN A CHANGING WORLD 314 (1991).

for economic development, and the role of private international investment therein...."[72] The Bank's Executive Directors likewise asserted that "the primary purpose of the [ICSID] Convention" was to "stimulate a larger flow of private international investment."[73]

Bilateral investment treaties ("BITs") have been described as embracing a "grand bargain" between investors and developing countries, in which the developing countries give "a promise of protection of capital in return for the prospect of more capital in the future."[74] ICSID can be seen as part of that bargain, as it provides a procedural mechanism to enforce the substantive rights BITs promise. But ICSID embodies its own bargain as well. Investors received a direct right of arbitral action against host states – a remarkable legal right to act on the international plane independent of their home state with the opportunity to secure an award uniquely powerful in domestic courts.[75] Host states received "radical"[76] restrictions on diplomatic

[72] ICSID Convention, *supra* note __, pmbl.

[73] Executive Directors' Rep., *supra* note __, ¶ 12; *see also id.* ¶ 3 ("In submitting the attached Convention to governments, the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development. The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it."); *accord* Convention on the Settlement of Investment Disputes, Hearing on H.R. 15785, Subctte on Int'l Organizations and Movements, Ctte on Foreign Affairs, U.S. House of Reps., 89th Cong., 2d Sess., June 28, 1966, at 2 (testimony of Fred Smith, General Counsel of U.S. Dept. of the Treasury) (ICSID's "primary purpose is to improve the climate for private investment in countries which seek to attract foreign capital, particularly the economically developing countries, and thus to stimulate a larger flow of private investment into those countries.").

[74] *See* Jeswald Salacuse & Nicholas Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. J. INT'L L. 67, 77 (2005); *see also* UNCTAD, *International Investment Rule-Making: Stocktaking, Challenges and the Way Forward* 46 (2008), available at http://www.unctad.org/templates/webflyer.asp?docid=10129&intItemID=2068&lang=1&mode=downloads (last visited Oct. 2, 2011) (investment treaties "mainly pursue the development goal in an indirect manner, namely through the protection of foreign investment in the host country").

[75] *Compare* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958, entered into force June 7,

protection – which often involved diplomatic pressure and was "sometimes followed by the use of force"[77] – for matters submitted to ICSID arbitration.[78] In other words, host states, especially developing countries, benefitted from a move away from "power-oriented" toward "rules-oriented" dispute settlement.[79] Home states were freed from the political costs of involvement in investor disputes with other states. Thus, one of ICSID's major objectives is to "depoliticize" investment disputes.[80] Depoliticization in turn gives investors more confidence in the investment climate and contributes to the ultimate aim of stimulating investment flows to further development.

Alan Sykes justified granting investors a direct right of action on the ground that doing so generates economic benefits for developing countries. In short, Sykes argued that investors concerned about the risk of uncompensated expropriation may charge a risk premium for investment in developing countries, but a credible mechanism for assuring compensation ameliorates the risk, thereby reducing the risk premium and the cost of capital for a developing country.[81] Diplomatic protection is too uncertain to reduce

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1959, 330 UNTS 3 [New York Convention], art. V (listing grounds for refusing enforcement of an award in international commercial arbitration) *with* ICSID Convention, *supra* note __, art. 54(1) ("Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."). *See also* 22 U.S.C. § 1650a ("The pecuniary obligations imposed by [an ICSID] award … shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States."); *see generally* Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675, 687-99 (2003) (arguing that ICSID awards enjoy higher status in domestic law than do the judgments of any other international tribunal).

[76] *See* Shihata, *supra* note __, at 313, 323-24.

[77] *Id.* at 309.

[78] *See* ICSID Convention, *supra* note __, art. 27 (barring diplomatic protection for matters submitted to ICSID arbitration unless the respondent lost the arbitration and refused to comply with the award).

[79] *See* JOHN H. JACKSON, THE WORLD TRADING SYSTEM 109-111 (2d ed. 1997).

[80] *See* Shihata, *supra* note __, at __.

[81] Alan O. Sykes, *Public vs. Private Enforcement of International Economic Law: Of Standing and Remedy* 14-15 (2005), *unpublished draft available at* http://ssrn.com/abstract_id=671801 (last visited Oct. 1, 2011).

adequately this premium.[82] Sykes concluded that a state with "benign" intentions toward investors can reap the benefits of cheaper capital at minimal cost to itself by granting investors the right to initiate investment arbitration and thus "signaling" to foreign investors that it is a state of this "benign type."[83]

B. Salini's Development Prong

Schreuer has identified five "typical characteristics" of investments."[84] He included "significance for the host State's development" in this list, for purposes of the ICSID Convention, while acknowledging that "[t]his is not necessarily characteristic of investments in general."[85]

Fedax v. Venezuela, the first ICSID case centered on the meaning of *investment*, relied on Schreuer's characteristics, calling them the "basic features" of an investment.[86] Faced with the question whether promissory notes qualify as investment under Article 25, the tribunal briefly ticked off how the notes possessed each of the five features.[87] This recitation ended, "And *most importantly*, there is clearly a significant relationship between the transaction and the development of the host state, as specifically required under the [Venezuelan law] for issuing the pertinent financial instrument."[88]

Two years later, in *CSOB v. Slovakia*, the tribunal considered whether a loan constituted an Article 25 investment.[89] The tribunal laid primary emphasis on two factors: Slovakia's consent, which "creates a strong

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[82] *See* CHRISTOPHER F. DUGAN, ET AL., INVESTOR-STATE ARBITRATION 43 (2008) (quoting Aron Broches, "The necessity of espousal … introduces a political element. An investor may well find that his national Government refuses to espouse a meritorious case because it fears that to do so would be regarded as an unfriendly act by the host Government. And this consideration is even more likely to cause the national government to refrain from acting if the merits of the investor's case are not wholly clear in its view, thus withholding from the investor an opportunity to have his case judged by an impartial tribunal.").

[83] *See* Sykes, *supra* note __, at 15-16.

[84] *See* SCHREUER, *supra* note __, at 128.

[85] *Id.*

[86] *See* Fedax, *supra* note __, ¶ 43.

[87] *Id.*

[88] *Id.* (emphasis added).

[89] CSOB, *supra* note __.

presumption that [the parties] considered their transaction to be an investment within the meaning of the ICSID Convention";[90] and CSOB's contribution to the development of Slovakia's banking sector. On the latter, the tribunal argued that the reference to promoting development in the ICSID Convention's preamble supported a "liberal interpretation" of *investment*, stating: "This language permits an inference that an international transaction which contributes to cooperation designed to promote the economic development of a Contracting State may be deemed to be an investment as that term is understood in the Convention."[91] The tribunal then held that a loan may qualify as an investment "*if only* because … [it] may contribute substantially to a State's economic development."[92] Although the respondent had argued for an approach to *investment* broadly similar to that advocated by Schreuer and *Fedax*,[93] the tribunal seems to have regarded CSOB's contribution to Slovakia's development as sufficient alone for investment status under Article 25.[94]

Accordingly, the first two cases to apply ICSID's development objective to the construction of *investment* both approached the question in a liberal spirit, treating contribution to development as a factor easing access to ICSID arbitration. This began to change with *Salini*, particularly in the more rigid manifestations of its test as a "fixed and inflexible"[95] checklist of mandatory criteria. With this, the development language of the preamble transformed from a door-opening aid to borderline claimants into a door-closing obstacle for otherwise eligible claimants.

The liberal approach is preferable. It maximizes freedom for Member States to use ICSID as they deem best and thus maximize its benefits to them. A fixed *Salini* test with a mandatory development prong not only acknowledges that Article 25 establishes the "outer limits" of party consent to ICSID jurisdiction, but sets those limits more restrictively than does the "ordinary meaning" of *investment*.

In this regard, the mandatory development prong calls to mind Alice's conversation with Humpty Dumpty in *Through the Looking Glass*:

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[90] *Id.* ¶ 66.
[91] *Id.* ¶ 64.
[92] *Id.* ¶ 76 (emphasis added).
[93] *Id.* ¶ 78.
[94] *See id.* ¶¶ 90-91.
[95] Biwater Gauff, *supra* note __, ¶ 314.

> Humpty: When *I* use a word, it means just what I choose it to mean – neither more nor less.
>
> Alice: The question is whether you *can* make words mean so many different things.
>
> Humpty: The question is which is to be the master – that's all.
>
> ….
>
> Alice: That's a great deal to make one word mean.
>
> Humpty: When I make a word do a lot of work like that, I always pay it extra….[96]

Some tribunals must be paying *investment* extra. They make it do a lot of work, making it mean just what they choose it to mean – not *investment* in its ordinary sense but something less, something like "investment that demonstrably contributes to development." The drafters of the ICSID Convention were free to define *investment* as they wished, whether more or less expansively than, or otherwise akilter from, its ordinary meaning. They did not do so. Tribunals do not enjoy the drafters' freedom. Drafters are the masters of language, tribunals are not. They are bound to construe undefined terms in accordance with their ordinary meaning and the customary rules of treaty interpretation.[97] In the context of ICSID jurisdiction, absent clear limitations in Article 25, tribunals should acknowledge that states are the masters of jurisdiction – that the Convention empowers them with broad discretion to determine which matters to submit to ICSID arbitration.

Other critiques of the mandatory development prong abound. For example, although some proponents of the *Salini* test attribute credit to

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[96] *See* LEWIS CARROLL, THROUGH THE LOOKING GLASS 268-70 (MARTIN GARDNER, ED., THE ANNOTATED ALICE (1960)). For brevity, I have edited Carroll's text into dialogue form.

[97] *Cf.* Fakes, *supra* note __, ¶ 110 (accepting only those "three criteria [that] derive from the ordinary meaning of the word 'investment,' be it in the context of a complex international transaction or that of the education of one's child").

Schreuer's "typical characteristics" of investment, he denies paternity.[98] He calls "unfortunate" the trend towards calcification of his "typical characteristics" into a "rigid list of criteria," arguing that it will neither "facilitate the task of tribunals" nor "make decisions more predictable."[99] He warns that a test insisting on a showing of contribution to development needs "particular care."[100] He favors a liberal spirit in which an investor who contributes to development "enjoys the presumption of being an investment," but without automatically "exclud[ing] from the Convention's protection" "an activity that does not obviously contribute to economic development."[101] Lastly, he favors an expansive view of development, which embraces "development of human potential, political and social development and the protection of the local and the global environment."[102]

Some tribunals have rejected *Salini*'s development prong. One held that contribution to development is "implicitly covered" by any investment, rendering unnecessary a separate prong.[103] Another rejected the contention that the ICSID Convention's preamble requires a development prong:

> [I]t would be excessive to attribute to this reference a meaning and function that is not obviously apparent from its wording…. [W]hile the economic development of a host State is one of the proclaimed objectives of the ICSID Convention, this objective is not in and of itself an independent criterion for the definition of an investment. The promotion and protection of investments in host States is expected to contribute to their economic development. Such development is an expected consequence, not a separate requirement, of the investment

[98] SCHREUER, *supra* note __, at 133 ("The First Edition of this Commentary cannot serve as authority for this development….").

[99] *Id.*

[100] *Id.* at 134.

[101] *Id.*

[102] *Id.*; *accord* Casado v. Chile, ICSID Case No. ARB/98/2, Award, May 8, 2008, ¶ 234 ("The acquisition and expansion of the daily 'El Clarín', whose reputation was, according to current opinion, the country's most important, undoubtedly contributed to economic, social and cultural development.").

[103] Fakes, *supra* note __, ¶ 102 n. 65 (quoting an English translation of LESI-Dipenta v. Algeria, ICSID Case No. ARB/03/08, Award, Jan. 10, 2005, ¶ II.13(iv)).

> projects carried out by a number of investors in the aggregate.[104]

A third found it "impossible to ascertain" whether an investment contributes to development, "the more so as there are highly diverging views on what constitutes 'development.'"[105] It proposed a superior alternative: focusing on contribution to the economy, rather than to development, and adopting the rebuttable presumption that investments so contribute.[106] This alternative is consistent with the rule of good faith, and it helpfully moves from the vague and value-laden question whether an investment aimed to "contribute to development" to the more readily ascertainable question whether it aimed to "contribute to the economy,"[107] although it might be

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[104] Fakes, *supra* note __, ¶ 111; *see also* Phoenix Action, Ltd. v. Czech Republic, ICSID Case No. ARB/06/5, Award, Apr. 15, 2009, ¶ 232 ("[T]his reference [to development in the preamble] is presented as a consequence, not as a requirement of investment: by protecting the investment, the Convention encourages the development of the host State. This does not mean that the development of the host State is constitutive of the notion of investment.").

[105] Phoenix Action, *supra* note __, ¶ 85; *see also* LESI-Dipenta, *supra* note __, ¶ II.13(iv) ("difficult to establish").

[106] Phoenix Action, *supra* note __, ¶ 85, 86, 114.

[107] *Cf.* Devashish Krishan, *A Notion of ICSID Investment*, *in* INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW 61 (T.J. Grierson Weiler ed., 2008), available at http://www.transnational-dispute-management.com/article.asp?key=1348, at *15-16 ("It is a stretch of human knowledge and reason to say that there must be an individual showing of contribution to economic development for transactions to be considered investments. Rather, [it should be assumed] that an economic transaction constituting an investment, by definition, contributes to economic development…. In order to reverse this assumption, one would need to adopt a fantastical theory that investment is not a driver and causative instrument of economic growth…. [I]t calls into question the competence of ICSID arbitrators – most of whom are lawyers, not economists – to make this critical determination.").

Krishan's last point finds support in the often quite thin reasoning of tribunals applying the development prong. For example, a tribunal examining whether improvements to a hotel constituted an Article 25 investment had only this to say: "As for the contribution to the development of the EGYPT's development [sic], the importance of the tourism industry in the Egyptian economy makes it obvious." *Helnan*, *supra* note __, ¶ 77. Apparently the tribunal deemed worthy any contribution to the tourism sector, because of

better still to exclude this inquiry from the definition of *investment* altogether and rely on such equitable notions as *abuse du droit* to exclude even technically qualifying investments from accessing ICSID in bad faith.

III. APPLICATION OF *SALINI*'S DEVELOPMENT PRONG TO MICROINVESTMENT DISPUTES

A. Mitchell v. Congo

Patrick Mitchell owned a small law firm in the Democratic Republic of Congo ("Congo") called Mitchell & Associates. On March 5, 1999, Congolese authorities sealed the premises of Mitchell & Associates, seized documents and other items, and detained two attorneys. The premises remained sealed and the attorneys remained imprisoned for more than eight months, until November 12, 1999.[108] With these actions, the Congolese authorities effectively put Mitchell & Associates out of business.[109]

Egypt's existing success in that sector. Does this imply that contributions to less successful or even nonexistent sectors are unworthy? Surely not, for development often entails starting or radically improving industries to meet unmet needs. Thus, the reason given amounts to no reason at all.

[108] Mitchell v. Dem. Rep. of Congo, ICSID Case No. ARB/99/7, Decision on Annulment, Nov. 1, 2006, ¶ 1 (quoting Award, Feb. 9, 2004, ¶ 23). The *Mitchell* Award has not been made public, so all references to it here rely on quotations found in the annulment decision. Apparently, the jurisdictional analysis of the Award drew a dissent from one arbitrator. *See* Mitchell v. Dem. Rep. of Congo, ICSID Case No. ARB/99/7, Decision on the Stay of Enforcement of the Award, Nov. 30, 2004, ¶¶ 12, 26 (discussing the relevance of the dissent to Congo's request for a stay of enforcement pending the decision on annulment).

Luke Peterson has reported some further details about Mitchell's dispute with Congo. Apparently, Mitchell & Associates represented a Canadian mining company, Banro, in its own expropriation dispute with Congo. The Congolese authorities claimed that Mitchell's firm was cooperating with rebels and charged the two detained attorneys with treason. Among the items seized was "a large sum of cash." *See* Luke Eric Peterson, *Research Note: Emerging Bilateral Investment Treaty Arbitration and Sustainable Development* (2003), available at www.iisd.org/pdf/2003/investment_investsd_note_2003.pdf (last visited Oct. 31, 2011); Luke Eric Peterson, *ICSID Award against Democratic Republic of Congo Annulled*, INVESTMENT TREATY NEWS, Nov. 24, 2006, available at www.iisd.org/pdf/2006/itn_nov24_2006.pdf.

[109] *See* Mitchell, *supra* note __, ¶ 24 (quoting Award ¶ 55).

Mitchell, a U.S. citizen, brought an ICSID claim pursuant to the bilateral investment treaty ("BIT") between the United States and Congo. The ICSID tribunal ruled that "Mitchell has been the victim of an expropriation" in violation of the BIT and awarded him US$750,000 plus interest. The tribunal also ordered Congo to pay US$95,000 as a contribution to Mitchell's share of the tribunal's fees and costs.[110]

Congo had objected to the tribunal's jurisdiction, arguing that Mitchell had not made an investment within the meaning of Article 25. The Tribunal "received ample information" to determine whether Mitchell's activities in Congo qualified as an investment.[111] The tribunal concluded that Mitchell

> transferred into Congo money and other assets which constituted the foundations for his professional activities…. Together with the returns on the initial investments, which also qualify as investments …, these activities and the economic value associated therewith qualify as an investment within the meaning of the BIT and the ICSID Convention.[112]

The tribunal further considered that Mitchell's "movable property," his "right to 'know-how' and 'goodwill," and his "right to exercise [his] activities" in Congo all qualified as investment.[113]

Congo also had argued that Mitchell's activities were not "a long-term operation," did not involve a "significant contribution of resources," and were "not of such importance for the State's economy that it distinguishes itself from an ordinary commercial transaction." The tribunal rejected these contentions, finding that, while many investments possess these attributes, they are not necessary to qualify as an investment. The tribunal declared that the ICSID Convention "equally include[s] … 'smaller investments' of shorter duration and with more limited benefit to the host State's economy.…"[114]

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[110] *Id.* ¶ 3.
[111] *Id.* ¶ 24 (quoting Award ¶ 47).
[112] *Id.* ¶ 24 (quoting Award ¶ 55).
[113] *Id.* ¶ 24 (quoting Award ¶ 48).
[114] *Id.* ¶ 24 (quoting Award ¶ 56).

Congo requested that an *ad hoc* committee annul the tribunal award, on the grounds that the tribunal manifestly exceeded its powers and failed to provide reasons for its decision.[115] Of particular relevance here, Congo argued that the tribunal lacked jurisdiction over the matter because Mitchell had not made an investment within the meaning of Article 25. Congo won. The *ad hoc* committee negated Mitchell's award and ordered him to pay US$100,000 as a contribution to Congo's share of the committee's fees and costs.[116]

The committee relied on the *Salini* test for its analysis. To avoid the possibility that Member States might sign an investment treaty that "arbitrarily" defined business activities as investments, the committee stressed that "the [ICSID] Convention has supremacy over … a BIT."[117] The committee staked out this position even though it conceded that the relevant language in the US-Congo BIT was "altogether usual and in no way exorbitant."[118] It held that Article 25 identifies four interdependent characteristics of investment, including "contribution to the economic development of the host country."[119] It regarded the development prong as "fundamental," "essential," and "unquestionable" – deeming it "doubtless covered" implicitly by ICSID decisions where it "had not been mentioned expressly."[120]

The committee stated that the mandatory contribution to economic development need not be "sizable or successful…. It suffices for the operation to contribute in one way or another to the economic development of the host State, and this concept of economic development is, in any event, extremely broad but also variable depending on the case."[121] Nevertheless, the committee was unable to accept that Mitchell's small law firm made the kind of contribution to development needed to satisfy Article 25. It declared that the firm was not "readily recognizable" as an investment and was instead "a somewhat uncommon operation from the standpoint of the concept of investment."[122] It considered irrelevant the "minimal" funds contributed by Mitchell to start and operate his firm.[123] Thus, while the committee disclaimed

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[115] *See* ICSID Convention, art. 52(1)(b), (e). On the annulment procedure, see generally SCHREUER, *supra* note __, at 890-1095.

[116] Mitchell, *supra* note __, ¶ 67.

[117] *Id.* ¶ 31.

[118] *Id.* ¶ 32.

[119] *Id.* ¶ 27.

[120] *Id.* ¶¶ 30, 33.

[121] *Id.* ¶ 33.

[122] *Id.* ¶¶ 34 (quoting Broches), 39.

[123] *Id.* ¶ 38.

any desire to discriminate against "smaller" investments, its whole analysis begins from the premise that the law firm was not "readily recognizable" as an investment and that Mitchell's financial contribution was "minimal."

The committee also excluded the firm's movable property, know-how, and goodwill from its *investment* analysis, deciding these only mattered if "the services of the 'Mitchell & Associates' firm" constituted an investment.[124] The committee thus considered that the firm's services had to make a contribution to development.[125] The committee added that this requirement could only be satisfied if the firm "had concretely assisted the DRC, for example by providing it with legal services in a regular manner or by specifically bringing investors."[126]

The committee concluded that the tribunal had made a "particularly grave" error in failing to establish a link between the firm's services and Congo's development, because the absence of such a link "boils down to granting the qualification as investor to any … law firm established in a foreign country."[127] But the committee failed to explain why every law firm should not qualify as an investment. Contrary to the committee's view, law firms do indeed share the characteristics typical of investment: they contribute assets, for a duration of time, and bear risk in the expectation of profit. What they lack is size, especially in the case of a smaller firm like Mitchell & Associates. The capital contribution is small, the physical footprint is small, and the equipment needed is small. Bricks and mortar are largely absent. Most of the value lies in the firm's know-how and goodwill. An investment in a small law firm does not look like an investment in a factory or power plant, but it is still an investment. That fact does not change depending whether the firm counsels the government or private clients, domestic or foreign clients, few or many clients, investors or other clients. The committee embarked down this path only because it deemed that the law firm was not "readily recognizable" as an investment and that Mitchell's financial contribution was "minimal." It is difficult to conceive that a larger investment would be subjected to the same misguided analysis about the nature of its clients and services. The committee's analysis, moreover, discounts the value of legal know-how and

[124] *Id.*

[125] *Id.* ¶ 39.

[126] *Id.* The committee conceded here that both parties had presented evidence showing that "some U.S. investors had indeed consulted the 'Mitchell & Associates' firm," but it disregarded this evidence because the tribunal had not mentioned it (at least not with sufficient specificity). *Id.*

[127] *Id.* ¶ 40.

ignores the possibility that law firms contribute to the development of the rule of law, which ought to count inherently as a contribution to development properly understood.[128] This failure is particularly notable here, as it has been reported that Congo moved against Mitchell & Associates in retaliation for the firm's representation of a foreign investor in a separate dispute with the government; if true, this charge evidences the progress needed in Congo to develop the rule of law for the benefit of investors, the Congolese economy, and indeed Congolese society as a whole.[129]

As poor as the *ad hoc* committee's reasoning is, it should be recognized, by way of partial mitigation, that some of the fault lies with the tribunal award and with the BIT itself. The tribunal laid undue emphasis on the bits and pieces of Mitchell & Associates without adequate attention to the whole as a going concern. The BIT definition of *investment* omits an express reference to any "enterprise." Although the broad, exemplary language of the definition could have been construed to include an enterprise,[130] the United States has achieved greater clarity in later treaties.[131]

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[128] Contributing to the rule of law fits comfortably within Schreuer's conception of *development*, which embraces "development of human potential" and "political and social development." *See* SCHREUER, *supra* note __, at 134.

[129] *See* Peterson, *ICSID Award*, *supra* note __.

[130] Treaty concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Dem. Rep. Congo [formerly Zaire], signed Aug. 3, 1984, entered into force Jul. 28, 1989, art. I(c) [hearafter U.S.-D.R. Congo BIT], available at http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp.

[131] *See* Free Trade Agreement, U.S.-Rep. Korea, signed June 30, 2007, entered into force [tbd], art. 11.28 (defining *investment* to include "an enterprise" and "shares, stock, or other forms of participation in an enterprise"), available at http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text. The agreement in turn defines an *enterprise* as "any entity constituted or organized under applicable law, … including any corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization." *Id.* art. 1.4. Similar language appears in Free Trade Agreement, U.S.-Austral., entered into force Jan. 1, 2005, art. 11.17(4), available at http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text, while somewhat older wording appears in North American Free Trade Agreement, U.S.-Can.-Mex., signed Dec. 17, 1992, entered into force Jan. 1, 1994, art. 1139, available at http://www.nafta-sec-alena.org/en/view.aspx?x=343.

B. Malaysian Historical Salvors v. Malaysia

[Insert]

C. Other Microinvestment Disputes

[Insert]

IV. A MICROINVESTMENT CRITIQUE

As illustrated by *Mitchell* and *Salvors*, one risk posed by *Salini*'s contribution-to-development test – especially in its "substantial contribution" variant – is that it may devolve into a backdoor mechanism for screening out microinvestments. The Convention does not impose a minimum size requirement and tribunals ought not invent one. As the *Fakes* tribunal stated, "[S]mall investments are covered by the ICSID Convention in the same way as large investments. An investment can be large or small…."[132]

In a worst-case scenario, a ruling that a microinvestment is not an Article 25 investment can deprive the claimant of any international forum to hear the claim. For example, had the *Salvors* Award not been annulled, the claimant would have been left without another forum because the Malaysia-UK BIT makes ICSID the sole forum for dispute settlement.[133] Even with the

[132] Fakes, *supra* note __, ¶112 n.73.

[133] *See* Agreement for the Promotion and Protection of Investments, Malay.-UK, entered into force Oct. 21, 1988, UKTS No. 16 (1989), art. 7, available at Investment Instruments Online, *supra* note __.

By contrast, the BIT at issue in *Mitchell* afforded an alternative known as the ICSID Additional Facility. U.S.-D.R. Congo BIT, *supra* note __, art. VII(2)(b). Cases may be submitted to Additional Facility arbitration where they concern "legal disputes which are not within the jurisdiction of the Centre because they do not arise directly out of an investment." ICSID, RULES GOVERNING THE ADDITIONAL FACILITY FOR THE ADMINISTRATION OF PROCEEDINGS BY THE SECRETARIAT OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, art. 2(b). However, access to the Additional Facility is conditioned on receiving the Secretary-General's approval, which she can give "only if [s]he is satisfied … that the underlying transaction has features which distinguish it from an ordinary commercial transaction." *Id.* art. 4(3)(b). Moreover, Additional Facility arbitration is "outside the jurisdiction of the Centre," so "none of the provisions of the

annulment, it should be seen that the development prong imposed costs, risks, and delay on the claimant. Such burdens may dissuade microinvestors from filing claims, as they are inherently challenged to afford investment arbitration, so each incremental cost further tilts the field against them.[134] These burdens

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Convention" apply, including the Convention's special provisions on enforceability of awards. *Id.* art. 3; on enforcement, see *infra* note __.

Where no international forum is available, domestic court litigation may be an option, but courts in dualist states may not enforce treaty rights, courts may be bound by domestic rules (such as the later-in-time rule in the United States) that restrict treaty-based challenges to domestic legislation, courts may otherwise defer to domestic actions, and courts may even themselves deny justice to foreign litigants. *See generally* Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 VA. J. INT'L L. 809 (2005). In any of these scenarios, a foreign investor may find itself forced to exhaust remedies in the national courts and then attempt to persuade its home state to espouse its claim – exactly the antiquated process ICSID is meant to replace.

[134] Susan Franck has mined her original data set about investment treaty arbitration for information about the costs of arbitral tribunals and attorney fees in investment treaty arbitration. Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 69 (2008). She found eleven awards where tribunals quantified cost-shifting of attorney fees, with an average of US$655,407 shifted. *Id.* She also found seventeen awards quantifying tribunal costs, with an average of US$581,332. *Id.* These prices are obviously problematic for microinvestment disputes. Franck noted that the smallest tribunal costs quantified in any award was US$31,088, in the case of *Bogdanov v. Moldova*, *supra* note __. *Id. Bogdanov* is interesting on the matter of costs because the investment value was small (about US$2 million), but the case was brought before the Swedish Chamber of Commerce where ICSID jurisdictional requirements do not apply and the tribunal costs nevertheless exceeded the value of the award won by claimant (approximately US$24,603, per Franck's calculations, *id.* at 58).

Franck also surveyed the literature expressing concerns about the costs of investment arbitration. *See* Susan D. Franck, *Rationalizing Costs in Investment Treaty Arbitration*, 88 WASH. U. L. REV. 769, 811-13 (2011). She concluded that the costs are "not necessarily exorbitant," but "may prove troubling" nonetheless:

> [W]here attorney's fees and tribunal costs exceed the possible damages (i.e., for smaller investments), those fiscal costs may deter investors with legitimate claims of international

also pressure microinvestors to settle on unfavorable terms.[135] The development prong presses a finger on the scale against access to the ICSID system and it weighs particularly heavily against claims by microinvestors – indeed, it may not carry any force at all in cases regarding larger investments, given the conclusory assertions and weak analyses often found in such cases.[136]

The development prong may hinder access to ICSID arbitration in another way as well. While trends in investor-state arbitration appear to favor contingency fee arrangements or third-party funding,[137] such arrangements

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> law violations from arbitrating their claims….
> [C]ost decisions can be critical to assessing the
> utility of arbitration and its efficacy in
> promoting access to justice and the rule of law.

Id. at 812-13; *accord* Lee M. Caplan, *Making Investor-State Arbitration More Accessible to Small and Medium-Sized Enterprises*, *in* THE FUTURE OF INVESTMENT ARBITRATION 297, 298-99, 304 (Catherine A. Rogers & Roger P. Alford eds., 2009) ("There is growing—albeit anecdotal—evidence that …. the high cost of arbitration and the exclusivity of legal expertise in the field prevent SMEs from accessing investor-state arbitration as readily as do larger enterprises…. With less of a financial cushion, SMEs confronted with an investment dispute are arguably less able to bear the costs of investor-state arbitration….").

[135] Susan Franck reveals that settlement rates are quite low (7%) in her data set. *Id.* at 74. Based on my own experiences in and observations of disputes, I would join Franck's hypothesis that the rates are so low because the novelty of the field introduces many uncertainties that inhibit claimants and respondents from coming to a shared understanding about the appropriate value, and thus would predict that – if the jurisprudence of investor-state arbitration stabilizes as it grows – settlements should become more prevalent. This prediction is consistent with Franck's observation that all three cases in her data set that resulted in an award confirming a settlement first had "a critical decision by the arbitral tribunal" that removed important elements of uncertainty from these disputes. *Id.* at 72.

[136] *See*, *e.g.*, *supra* note __ (discussing *Helnan*).

[137] For claims by knowledgeable insiders about this trend, see, e.g., Mark Kantor, *Third-Party Funding in International Arbitration: An Essay About New Developments*, 24 ICSID REV.--FILJ 65, 76 (2009) ("Notwithstanding the legal uncertainties created by the differing cultural and legal reactions to third-party funding among countries, the practice is flourishing."). For anecdotal evidence of this trend, see www.icsidlawyers.com ("Contact ICSID Lawyers today for a FREE & strictly confidential assessment of your potential investment

may be inhibited by the increased risk of jurisdictional defeat[138] and the greater costs that must be incurred to minimize that risk.[139] This concern ought not be overstated, however, as microinvestments already inherently face significant obstacles to obtain such arrangements because the expected recovery is limited.[140]

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arbitration claim. If we determine your claim is viable, various legal fee payment types are possible, including contingency fee agreement…."); RSM Production Corp. v. Grenada, ICSID Case No. ARB/05/14, Order Discontinuing the Proceeding and Decision on Costs, Apr. 28, 2011, ¶¶ 68-69 (ordering RSM to pay Grenada's legal fees when RSM abandoned its claim, notwithstanding RSM's allegations that Grenada's legal fees were paid by a third-party funder); S&T Oil Equipment & Machinery, Ltd. v. Juridica Investments Ltd., Civ. H-11-0542, S.D.Tex., Order 3/10/2011, Judge Nancy Atlas, available at http://docs.justia.com/cases/federal/district-courts/texas/txsdce/4:2011cv00542/865197/29/ (declining to stop a contractual arbitration in Guernsey between a U.S. company that had abandoned an ICSID claim against Romania and its third-party funder).

[138] By way of comparison, no less an observer of U.S. civil litigation than Arthur Miller has predicted that recent decisions heightening the standards to commence litigation in the federal courts will cause lawyers to take fewer cases on a contingency fee basis, making it harder for plaintiffs to find representation and thus leaving more meritorious claims uncompensated. *See* Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 67-68 (2010).

[139] Continuing with the analogy to U.S. pleadings standards, one survey asked approximately 300 employment lawyers about the effects that recent changes in pleading standards had on their practice: 94% included more facts in their complaints and 75% had to respond to motions to dismiss more often. *See* Emery G. Lee III & Thomas E. Willging, *Attorney Satisfaction with the Federal Rules of Civil Procedure: Report to the Judicial Conference Advisory Committee on Civil Rules*, Federal Judicial Center, 5, 12 (2010), available at www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/$file/costciv2.pdf.

[140] One third-party funder, which is known to have funded at least one ICSID case, *see supra* note __, announced that it "focuses exclusively on [cases] where the amount in dispute exceeds US$25,000,000." *See* www.juridicainvestments.com. The cost of due diligence in deciding which cases to fund may make investments in small cases cost-prohibitive. *See* Anthony Charlton, Kicking all the Tyres (Dec. 2, 2010) at http://kluwerarbitrationblog.com/blog/2010/12/02/kicking-all-the-tyres/ ("From anecdotal evidence, funders will, on average, depending on the size of the claim, invest anywhere between US$100,000 to US$1 million on due diligence, covering both legal and quantum issues."). Likewise, a survey of

Salini's development prong may push some microinvestment claims outside ICSID into other arbitral fora, depriving microinvestors of a choice available to larger claimants. From a claimant's perspective, alternative tribunals may be inferior to ICSID, especially when it comes to the enforceability of awards.[141] Moreover, from a public perspective, proceedings before alternative tribunals are generally less transparent than ICSID and less open to public participation as amici.[142]

Inhibiting microinvestors' access to ICSID is unfortunate because they have particular need for treaty-based legal protections.[143] Large businesses sometimes enjoy sufficient leverage to secure contractual commitments to international arbitration.[144] Small businesses are typically less able to protect themselves politically in the host state or to secure diplomatic protection from their home state.[145] And small businesses are more affected by weaknesses in

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U.S. civil litigators found that "[a]lmost 90% of plaintiffs' lawyers," 74% of whom rely on contingency fees as their "usual arrangement" with clients, "agree that their firm, in general, will turn down a case if it is not cost-effective to handle it"; this figure was significantly higher than the comparable number for defense counsel (76%), who almost never use contingency fees as their usual arrangement (0.1%). *See* ABA Section of Litigation, MEMBER SURVEY ON CIVIL PRACTICE: FULL REPORT 172, 176 (Dec. 11, 2009), available at http://www.abanet.org/litigation/survey/1209-report.html.

[141] *See* note __ *supra* (comparing enforceability provisions of New York and ICSID Conventions). *See generally* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1548-57 (2005).

[142] *See* ICSID, Rules of Procedure for Arbitration Proceedings, Rules 32(2), 37(2), 48(4) (addressing public access to hearings, amicus briefs, and publication of summaries of awards).

[143] *See* UNCTAD, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries*, UNCTAD Series on International Investment Policies for Development 34 (2009), available at www.unctad.org/en/docs/diaeia20095_en.pdf ("BITs may matter as a special protection for small and medium-sized enterprises").

[144] *See* WALLACE, *supra* note __, at 43 (quoting Broches).

[145] *See* Caplan, *supra* note __, at __ n.20 (quoting Nigel Blackaby, *Public Interest and Investment Treaty Arbitration*, TRANSNAT'L DISP. MGMT. (2004)) ("The small or medium investor would rarely carry the weight to cause the scales to tip in its favor."); *id.* at 302 ("While larger enterprises sometimes pursue arbitration, they may feel, as a general matter, that it is less necessary or even

legal systems,[146] particularly in countries with relatively weak legal systems.[147] ICSID ought not adopt a jurisdictional requirement that impedes access by the very claimants most in need of effective, neutral dispute settlement.

Depriving microinvestments of adequate access is also inconsistent with ICSID's foundational syllogism: availability of effective, neutral tribunals promotes investment flows, which in turn promote development. While the costs of losing any one microinvestment are small, by definition, what is vital from the developmental perspective is the cumulative impact of many microinvestments.[148] Collectively, the economic potential of small enterprises is awesome: "Across income groups, establishments that employ less than 100 people have the largest employment shares, ranging from 40% in upper-middle income countries to 57.6% in low income countries."[149] It has also been shown

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desirous to do so. Their stronger economic and political influence may bring host state governments to the negotiating table more readily and with better settlement terms…. Because larger enterprises are typically more financially resilient than SMEs, they are likely to be in a better position to pursue a broader dispute settlement strategy that is less reliant on investor-state arbitration.").

[146] *See* Thorsten Beck, et al., *Financial and Legal Constraints to Growth: Does Firm Size Matter?*, World Bank Policy Research Paper No. 2784, at 22 (2002), available at http://econ.worldbank.org. ("The economic effect is .028 for large firms, whereas it is .057 for medium firms, and .085 for small firms. These results indicate that large firms are able to better adjust to the inefficiencies of the legal system. This does not seem to be the case for small and medium enterprises which end up paying for the legal shortcomings in terms of slower growth.").

[147] *See id.* at 23-24 ("The results indicate that firms in financially and legally developed countries with lower levels of corruption are less affected by firm-level constraints in these areas…. Taking into account firm size makes these results even stronger…. [M]arginal improvements in legal efficiency are translated into relaxing of legal constraints for small and medium firms (albeit significant at ten percent).").

[148] *See* Caplan, *supra* note __, at 298 ("Though SMEs typically make small investments on an individual basis, their collective efforts can be sizeable, with substantial benefits for international development and cross-border prosperity.").

[149] Meghana Ayyagari, et al., *Small vs. Young Firms across the World Contribution to Employment, Job Creation, and Growth*, World Bank Policy Research Working Paper No. 5631, at 12 (2011), available at http://econ.worldbank.org. Also striking is the percentage of new jobs created by small businesses: "in the 81 countries that had a net positive job creation … the job creation share for

that smaller businesses transfer more technology to developing countries than do larger businesses.[150] Thus, in the name of promoting development, the *Salini* test may actually hamper that goal.

To be sure, the word "may" in the previous sentence (and elsewhere in this section) indicates an important limitation on the claim made in this critique. The argument is essentially theoretical, relying on the theories underpinning ICSID's foundational syllogism and the idea that raising costs and risks for microinvestors will affect their actions on the margins. Lee Caplan has called for "a comprehensive survey of SME attitudes toward the settlement of investment disputes," including "their perceptions about the importance of investor-state arbitration in resolving investment disputes, and whether they can effectively afford and utilize investor-state arbitration."[151] Without a better empirical understanding, we cannot know how many microinvestors are dissuaded from bringing claims to ICSID – and why – and, even worse, how many are dissuaded from investing in developing countries. The ICSID decisions only reveal those few microinvestment disputes that have been brought to date, obscuring those not brought. Anecdotal evidence (and common sense) suggest there are indeed other microinvestment disputes never submitted to ICSID.[152] We can only presume, for now, that Salini's burdens contribute to the dissuasion.

V. CONCLUSION

Like Horton the Elephant, ICSID tribunals should conclude that investments are investments no matter how small. They should discard *Salini*'s development prong, which burdens access to ICSID by microinvestors. The ICSID Convention sets no minimum size requirement and none is warranted by ICSID's *travaux* or development-promotion objectives. To the contrary, assuring that the doors to ICSID remain open to microinvestment disputes serves ICSID's values of depoliticization and development-promotion.

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firms with less than 100 employees ranges from 67.5% in upper-middle income countries (median) to 95.4% in low income countries" and even in "17 countries that had a net job loss…. the smallest firms with less than 100 employees are creating jobs." *Id.* at 14.

[150] *See* Caplan, *supra* note __, at 298.

[151] *Id.* at 311.

[152] Id. at at 303 ("The author's own experiences in the field – which include investment disputes involving SMEs that ICSID would not necessarily know about – confirm the existence of these two kinds of barriers [expense of arbitration and access to expert counsel] for at least some SMEs.").

More fundamentally, ICSID exists to help move the reality of the international community towards community values.[153] Rejecting *Salini*'s development prong serves such core community values as the rule of law, peaceful settlement of disputes, equal access to justice, and *pacta sunt servanda*. It helps to move international society towards transnational society with a meaningful ability by private persons to protect their rights and interests.

But Horton went further. He vowed, "I'm going to protect them. No matter how small-ish!"[154] This raises difficult questions about whether ICSID should go further to affirmatively facilitate access by microinvestors. In this regard, small reforms are unlikely to achieve much while larger reforms pose significant risks and costs. Caplan has suggested that ICSID establish a differentiated rate schedule charging lower administrative costs for cases brought by smaller businesses,[155] which would ease access, but only at the margins.[156] Caplan did not address whether the shortfall should be recovered from Member State contributions[157] or by charging above-cost rates to larger claimants, and did not consider whether the latter is economically feasible given that other fora are often available. Roberto Dañino, while serving as Secretary-General of ICSID, mentioned training and information to help smaller claimants as well as the possibility of creating "a *pro bono* advisory

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[153] *Cf.* Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1089 (1984) ("Civil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals.").

[154] DR. SEUSS, *supra* note 1.

[155] *See* Caplan, *supra* note __, at 309. ICSID charges an initial fee of US$25,000 to launch a case, US$20,000 when the tribunal is established, US$20,000 annually, and reimbursement of out-of-pocket expenses like fees for interpreters. *See* ICSID Schedule of Fees ¶¶ 1, 4 (Jan. 1, 2008), available at http://icsid.worldbank.org/ICSID/ICSID/DocumentsMain.jsp (last visited Nov. 11, 2011). In comparison, the U.S. federal courts charge only a US$350 filing fee for most civil suits. *See* 28 U.S.C. § 1914(a).

[156] Much more expensive than ICSID's administrative fees are the attorney fees and tribunal fees. Franck's data set shows that total fees and costs average about US$1.2 million per investment treaty arbitration (including both ICSID and non-ICSID cases). *See* Franck, Rationalizing Costs, supra note __, at 812. While this data includes administrative fees, *id.* at 784 & n.68, even at ICSID's present rates, the administrative fees in a case lasting five years would only amount to 10% of the average total.

[157] *See* ICSID Administrative and Financial Regulations, reg. 18(1) ("Any excess of expected expenditures over expected revenues shall be assessed on the Contracting States.").

service, most likely to be provided by private lawyers."[158] Training and information are valuable, of course, and yet no substitute for qualified counsel; nor do they speak to the issue of tribunal costs. As to the latter, more ambitious, proposal, one suspects the bar's appetite for providing *pro bono* representation to small investors will be limited; in any event, such representation (even if provided free) should be more properly understood as a marketing or training activities than a service genuinely *pro bono publico*.[159]

One might imagine a fast-track, small-claims procedure to facilitate microinvestment disputes.[160] Yet, extreme care is needed to ensure that any such reforms neither overwhelm nor undercut the ICSID system. Facilitating microinvestment disputes would present at least four challenges to ICSID.

First, care must be taken to avoid a system that may overwhelm respondent states and push them to exit. Kal Raustiala has characterized investment arbitration as a "fire alarm" – indeed, as the "major" fire alarm in international practice.[161] Anyone can pull a fire alarm in a public building, propelling the fire department into action. This symbolizes a decentralized regime with empowered private actors, to be distinguished from "police patrols," a centralized state-managed process, as with the traditional practice of diplomatic protection. The strengths and weaknesses of fire alarms are closely related: they promote enforcement of treaty obligations, but may lead to "overenforcement." The empowered private actors may "unleash[] processes that are difficult for governments to control" and they may "promote goals

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[158] Roberto Dañino, *Making the Most of International Investment Agreements: A Common Agenda*, Opening Remarks, Dec. 12, 2005, Paris, at 3, available at www.oecd.org/dataoecd/5/8/36053800.pdf; *accord* Caplan, *supra* note __, at 310 (suggesting that NGOs, law school clinical programs, trade associations, and others donate services to SMEs with investment disputes).

[159] *See* ABA Model Rule 6.1(a) & cmt. 3 (urging lawyers to prioritize individuals who cannot afford counsel and organizations that serve them, such as homeless shelters, for *pro bono* representation).

[160] For example, WIPO has promulgated Expedited Arbitration Rules, available at http://www.wipo.int/amc/en/arbitration/expedited-rules/ (last visited Nov. 11, 2011), and the ICC has published nonbinding guidelines for expediting small disputes. *See* ICC GUIDELINES FOR ARBITRATING SMALL CLAIMS UNDER THE ICC RULES OF ARBITRATION (2003), available at http://www.iccwbo.org/court/arbitration/id4095/index.html (last visited Nov. 11, 2011) [hereinafter, ICC SMALL CLAIM GUIDELINES].

[161] Kal Raustiala, *Police Patrols and Fire Alarms in the NAAEC*, 26 LOY. L.A. INT'L & COMP. L. REV. 389, 390 & n.7 (2004).

that are not in the collective interest of the broader cooperative community."[162] Thus, while the goal of reforming ICSID practices to accommodate the needs of microinvestors is to avoid underenforcement of investor rights (as happens when they are unable to afford to pursue valid claims), the challenge is to minimize overenforcement. The costs of ICSID participation should not be allowed to overwhelm the benefits.

Second, on a related note, the ICSID system must not become so backlogged with small claims as to fail to resolve disputes efficiently. It must remain an attractive place to submit disputes, including large disputes of obvious public significance. In managing its docket, ICSID should heed the words of Yogi Berra: "Nobody goes there anymore; it's too crowded."[163]

Third, a streamlined procedure for small claims would likely involve less process and fewer arbitrators.[164] Caplan suggested, for example, that cases brought by SMEs should have "a sole arbitrator (rather than three arbitrators) preside over the proceedings, submit simultaneous pleadings, and dispense with oral hearings, if possible."[165] The procedure could not be so streamlined,

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[162] *Id.* at 394, 410-11.

[163] *Cf. Hearns v. San Bernardino Police Dept.*, 530 F. 3d 1124, 1139 (9th Cir. 2008) (Kleinfeld, J., dissenting in part) ("No doubt judges feel that they are doing a fine and charitable thing when they devote a great deal of time to an incompetently pleaded complaint, trying to turn a sow's ear into a silk purse.... [but this] is like a clerk in a grocery store displaying warmth and friendliness by chatting with the customer at the register, while a half dozen others stand seething in the slow line.").

[164] ICSID has a default rule of three arbitrators unless the parties agree to another odd number. *See* ICSID Convention, *supra* note __, art. 37(2). By contrast, the ICC has a default preference for one arbitrator, "save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators," and it urges parties in small claims to agree to one arbitrator to save time and money. ICC ARBITRATION RULES, art. 12(2); ICC SMALL CLAIM GUIDELINES, *supra* note __, at 5.

[165] Caplan, *supra* note __, 308-09. Caplan cited to the work of Jack Coe, who had advocated a variety of cost-saving reforms for international commercial arbitration, involving email, videoconferencing, language, situs, sole arbitrator, abolishing oral hearings, bifurcating jurisdiction and merits, and simultaneous exchange of memorials. *See generally* Jack J. Coe, Jr., *Pre-Hearing Techniques to Promote Speed and Cost-Effectiveness: Some thoughts concerning Arbitral Process Design*, 2 PEPP. DISP. RESOL. L. J. 53 (2002).

of course, as to compromise basic principles of due process.[166] Even so, it must be acknowledged that reducing the process and the number of arbitrators entails greater risk of error.

Last, a small claims procedure would probably allow less transparency and less opportunity for public participation (at the least *de facto*, if not *de jure*).[167] This would in turn raise legitimacy concerns, especially when paired with the increased risk of error.

Accordingly, any streamlined procedure would have to ground its legitimacy elsewhere. For example, an ICSID small-claims procedure might be open only to those states that expressly opt in; it might provide staff counsel to efficiently represent respondent states or other means of ensuring defenses adequate to the circumstances; it might hold hearings online or in or near the respondent state; it might empower the Secretary-General to require sensitive cases to proceed through the standard processes; and it might establish a "public counsel" charged with arguing the public interest to tribunals and the Secretary-General. Still, acknowledging the greater risk of errors from the expedited process, steps would have to be taken to minimize and isolate the effects of such errors. There might be limits to the *res judicata* effect to be

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[166] *See* Fabien Gélinas, *Arbitration and the Challenge of Globalization*, 17 J. INT'L ARB. 4, 119 (2000) ("[S]tates consider themselves responsible for ensuring a minimum quality of justice and have allowed arbitration only in so far as this could be guaranteed. Procedures can be streamlined, therefore, only to a certain extent, and so long as minimum standards of due process and quality are guaranteed, costs will remain a problem in the context of small claims.").

[167] Amicus briefs are often criticized for increasing costs. *See*, *e.g.*, Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN. ST. L. REV. 1269, 1293 (2009) ("Permitting the filing of amicus briefs adds to the burdens of the parties, both in terms of attorney time and cost. Deadlines in investment treaty cases already test the limits of attorney resources, particularly for government parties who are obliged to obtain acceptance of arguments within different spheres of the government. Requiring that attorneys read and respond to amicus arguments will add to the costs of the proceeding. Arbitrators, too, will need to be paid for the time they spend reading the briefs and the parties' responses."); Caplan, *supra* note __, at 305 ("While certainly reflecting the positive trend toward opening up investor-state arbitration to relevant outside players, such participation [i.e., amicus submissions] may increase the workload for arbitrators and parties, possibly compounding the already steep costs of investor-state arbitration.").

given to factual findings.[168] To protect ICSID's developing jurisprudence from poorly reasoned decisions arising from the streamlined procedure, it might be prudent (as well as cost-efficient) to have written awards without reasons, although such awards carry their own costs, including loss of the discipline that written analysis imposes on arbitrators and loss of the opportunity a persuasive opinion presents to assure even the losing party (as well as the public) that its arguments were duly considered.

In the end, it may not be possible to establish a streamlined procedure for microinvestment disputes that adequately addresses the range of competing concerns. At the least, absent empirical evidence showing demand for such a procedure among microinvestors,[169] one cannot make the case that its benefits would outweigh its clear costs. It might be preferable to muddle through with arbitral reforms of marginal significance while bolstering efforts to address microinvestors' concerns through other channels.[170] While more might be impracticable, ICSID tribunals should discard *Salini*'s development prong to honor the Hippocratic injunction to "do no harm" to microinvestors.

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[168] *Cf.* NY C.C.A. Law § 1808 ("A judgment obtained [in small claims court] shall not be deemed an adjudication of any fact at issue or found therein in any other action or court; except that a subsequent judgment obtained in another action or court involving the same facts, issues and parties shall be reduced by the amount of a judgment awarded under this article.").

[169] *See supra* text accompanying nn. __.

[170] For example, Susan Franck advocates the benefits of establishing ombuds offices to address emerging investment disputes, including "lowering the cost of raising issues" and hence "permitting smaller investors to be heard or smaller conflicts to be addressed." Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute System Design*, 92 MINN. L. REV. 161, 212-14 (2007). Political risk insurance may offer a workable alternative, provided that it can be offered at a reasonable price and on terms suitable for microinvestors. *See* MIGA, Small Investment Program, http://www.miga.org/investmentguarantees/index.cfm?stid=1801 (last visited Nov. 11, 2011) (describing MIGA coverage available to certain SMEs).