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Microinvestment Disputes

Perry S. Bechky*

ABSTRACT

Salini v. Morocco sparked one of the liveliest controversies in the dynamic field of international investment disputes. Salini held that the word “investment” in the Convention establishing the International Centre for Settlement of Investment Disputes (ICSID), although undefined, has an objective meaning that limits the ability of member states to submit disputes to ICSID arbitration. The Salini debate is central to this field because it shapes the nature, purpose, and volume of ICSID arbitration—and also determines who gets to decide those matters. In particular, Salini’s decision to include “a contribution to development” as an element of its objective definition of investment transformed development promotion from a generalized goal of ICSID as an institution into a jurisdictional requirement for each case.

This Article introduces the concept of a microinvestment dispute, which focuses attention on small investments giving rise to ICSID cases. The microinvestment lens reveals the failings of Salini’s contribution-to-development prong. By conditioning ICSID jurisdiction on an individualized showing of such a contribution, this prong disproportionately burdens microinvestors, inhibiting their access to ICSID despite the fact that the drafters of the ICSID Convention specifically rejected a minimum size requirement. In so doing, the development prong also limits ICSID’s value to those who need it most. In the name of promoting development, Salini may well undercut it.

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In addition, this Article also offers a “third way” alternative to both Salini’s objectivity and pure subjectivity. This alternative—bounded deference—draws on the principles of autonomy, consent, and good faith to strike a better balance between states and arbitral tribunals.

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I. INTRODUCTION

“[A]fter all, [a] person’s a person, no matter how small.”
– Horton the Elephant.¹

Is an investment an investment, no matter how small? In the context of international investment disputes, this question matters because the jurisdiction of the International Centre for Settlement of

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

Investment Disputes (ICSID or the Centre) hinges on the meaning of *investment*.²

Nothing in the text of the ICSID Convention excludes small investments (or small claims) from the Centre's jurisdiction or otherwise discriminates against small investments.³ Indeed, the negotiating history reveals the conscious rejection of proposals excluding small disputes and small investments from the Centre's reach.⁴

Article 25(1) of the ICSID Convention gives ICSID jurisdiction over "*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.*"⁵ Yet the Convention omits any definition of *investment*.

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" has objective content limiting ICSID jurisdiction.⁷ The tribunal added:

The doctrine generally considers that investment infers: [i] contributions, [ii] a certain duration of performance of the 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.⁸

The tribunal in *Salini* went on to note, "In reality, these various elements may be interdependent" and they "should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here."⁹ The tribunal then determined that the claimant satisfied each of the four elements and "[c]onsequently . . . consider[ed]" that the claimant had made an investment within the

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, *opened for signature* Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

4. See *infra* Part II.B.

5. ICSID Convention, *supra* note 3, art. 25(1) (emphasis added).

6. *Salini Construttori S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001), *translated in* 42 I.L.M. 609 (2003). All arbitral decisions cited herein are available from <https://icsid.worldbank.org> or <http://italaw.com>.

7. *Id.*

8. *Id.*

9. *Id.*

meaning of Article 25.¹⁰ Notwithstanding *Salini*'s call for sensitivity in examining the elements "globally," later tribunals have generally attributed to *Salini* the creation of a four-part "test."¹¹ Some tribunals have followed "the *Salini* test,"¹² other tribunals have rejected it,¹³ while still others have suggested modifying it into three-,¹⁴ five-,¹⁵ and six-part tests.¹⁶ Some tribunals have changed 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.¹⁷ Some tribunals have returned to the idea of a global assessment—sometimes to expand access to ICSID, sometimes to restrict it.¹⁸ The *Salini* test thus remains at the center of a lively debate between

10. *Id.* ¶¶ 53–58.

11. *See, e.g., Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, ¶¶ 39 n.18, 81–83 (Apr. 15, 2009) (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*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 57 (concerning a highway construction project whose "contribution . . . to the economic development of the Moroccan State cannot seriously be questioned"), with *Fedax N.V. v. Republic of Venez.*, ICSID Case No. ARB/96/3, Decision on Jurisdiction, ¶ 43 (July 11, 1997) (concerning promissory notes). For more on *Fedax*, see *infra* notes 132–34 and accompanying text.

12. *See, e.g., Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pak.*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, ¶¶ 130–38 (Nov. 14, 2005) (applying a four-part "*Salini* test").

13. *See, e.g., Abaclat v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 364 (Aug. 4, 2011) ("[T]he Tribunal does not see any merit in following and copying the *Salini* criteria."); *M.C.I. Power Grp. L.C. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, ¶ 165 (July 31, 2007) ("[T]he requirements that were taken into account in some arbitral precedents 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.")

14. *See, e.g., Fakes v. Republic of Turk.*, ICSID Case No. ARB/07/20, Award, ¶¶ 110–14 (July 14, 2010) (accepting the first three *Salini* criteria, while reviewing and rejecting other candidates).

15. *See, e.g., Joy Mining Mach., Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, ¶ 53 (Aug. 6, 2004) (adding to the *Salini* criteria a requirement of "regularity of profit and return").

16. *See, e.g., Phoenix Action*, ICSID Case No. ARB/06/5, Award, ¶ 114 (adding to the *Salini* criteria requirements that assets must be invested bona fide (i.e., in good faith) and in conformity with the domestic laws of the host state).

17. *See, e.g., Helnan Int'l Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Objection to Jurisdiction, ¶ 77 (Oct. 17, 2006) ("[T]o be characterized as an investment, a project must show . . . [inter alia] a substantial commitment and a significant contribution to the host State's development." (emphasis omitted) (internal quotation marks omitted)). The subsequent award for the respondent was partially annulled on other grounds. *Helnan Int'l Hotels A/S v. Arabic Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Annulment, ¶ 73 (June 14, 2010).

18. *See* discussion *infra* Part IV.A.

objectivists and subjectivists, and among the former.¹⁹ This debate is crucial to shaping ICSID's docket and, more, its character.²⁰

This Article problematizes *Salini* and especially its 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.²¹ It does this by focusing on *Salini*'s impact on microinvestment disputes, a concept introduced here.²² Criticism of the development prong is not new—indeed, Christoph Schreuer has called this “the most controversial” part of *Salini*.²³ Yet, the microinvestment lens reveals new problems with the development prong: it imposes a backdoor size requirement that inhibits access to ICSID by microinvestors who may have the greatest need for such access, thereby harming ICSID's ability to fulfill its objectives, including development promotion. This article thus critiques *Salini*'s fourth prong from the perspectives of text, negotiating history, teleology, and such fundamental policies as access to justice and contribution to development itself.

In keeping with Article 25, a *microinvestment dispute* is a legal dispute arising directly out of a microinvestment, between a state and a foreign investor. A *microinvestment*, in turn, is an investment worth less than \$5 million²⁴ made by an individual, a microenterprise, or a

19. Judge Shahabuddeen framed this debate more starkly: “The cleavage [between the “subjectivist” and “objectivist” views of *investment*] marks a titanic struggle between ideas, and correspondingly between capital exporting countries and capital importing ones.” *Malaysian Historical Salvors, Sdn., Bhd. v. Malaysia*, ICSID Case No. ARB/05/10, Dissenting Opinion of Judge Mohamed Shahabuddeen, ¶ 62 (Feb. 19, 2009).

20. See discussion *infra* Part II.B.

21. *Salini Construttori S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001), translated in 42 I.L.M. 609 (2003).

22. The word *microinvestment* and its corollary *microinvestor* owe a debt to the better-established *microfinance* and, especially, *microenterprise*.

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

24. According to Susan Franck's data set of awards in investment treaty arbitrations rendered (and made available publicly) before June 1, 2006, forty-four awards quantified the damages claimed, with the amounts sought varying from approximately \$155,314 to \$9.4 billion. Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 16–17, 57 (2007). The mode and median claims were \$50 million and approximately \$59 million, respectively, while the mean was significantly higher at approximately \$343 million. *Id.* at 58 & n.254. The \$5 million threshold for *microinvestment* is much smaller than the average claim, clearly low enough that investors with qualifying disputes can be expected to experience difficulties related to the small size of the investment in dispute. See *infra* text accompanying notes 238–45 (discussing these difficulties). At the same time, this threshold is also high enough to identify a meaningful number of qualifying cases. By way of comparison, a threshold of \$1 million would capture only one case actually filed at ICSID. See *infra* Part IV.B (discussing this one case).

small or medium enterprise (SME).²⁵ This definition focuses on claims arising from microinvestments, not on small claims per se, which may arise from investments of any size. The point is to identify cases that are, despite their small size, genuinely important to the business concerned. The importance of a dispute about an investment—and hence the investor’s need for access to ICSID—is a function of the size of the claim relative to the value of the investment. Simply put, a large company is better able than a small company to bear a loss of the same amount.²⁶ While a loss of \$5 million would give rise to “bet the company” litigation for many companies, the same loss only gives rise to an “ordinary business dispute” for larger companies. Where a smaller company may have urgent need in a \$5 million case for the effectiveness and neutrality promised by international arbitration, a larger company may be willing to litigate it in domestic court or even write off the loss altogether in the pursuit of other, larger business dealings with the

25. In this regard, it should be noted that claims by individuals (e.g., Alex Genin, Antoine Goetz) and relatively small companies (e.g., Asian Agricultural Products Ltd., Vacuum Salt Products Ltd.) join those of business giants (e.g., ADM, Shell) in populating the ICSID universe. See *List of Concluded Cases*, ICSID, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded> (last updated Oct. 10, 2012).

As to the definitions of *microenterprise* and *SME*, according to the Organisation for Economic Co-operation and Development (OECD),

SMEs are generally considered to be non-subsidary, independent firms which employ fewer than a given number of employees. This number varies across countries. The most frequent upper limit designating an SME is 250 employees, as in the European Union. However, some countries set the limit at 200, while the United States considers SMEs to include firms with fewer than 500 employees. Small firms are mostly considered to be firms with fewer than 50 employees while micro-enterprises have at most ten, or in some cases, five employees.

OECD, *SME AND ENTREPRENEURSHIP OUTLOOK 2005*, at 17 (2005) [hereinafter *OECD OUTLOOK*]; see also TOM GIBSON & H.J. VAN DER VAART, *DEFINING SMES: A LESS IMPERFECT WAY OF DEFINING SMALL AND MEDIUM ENTERPRISES IN DEVELOPING COUNTRIES* 4–8 (2008) (surveying definitions of *SME*). The traditional emphasis on employment may need updating. See *id.* at 12–15 (arguing for revenues as a better criterion than employment or assets). The European Union and World Bank use both employment and financial criteria. *Id.* at 5; *OECD OUTLOOK*, *supra*; cf. 15 U.S.C. § 6901(10) (2006) (specifying that microenterprises employ “fewer than 5 employees” and “generally lack access to conventional loans, equity, or other banking services”).

26. The materiality concept from U.S. securities law makes a helpful analogy, as a loss of \$5 million might be material to a small company but not to a larger company. See 4 LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, *SECURITIES REGULATION* 613–60 & n.436 (4th ed. 2009) (discussing the concept of materiality and noting a case in which “\$6.8 million was immaterial [because] this amount represented only 2% of [the company’s] total assets” (quoting *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 546–47 (8th Cir. 1997))).

country concerned.²⁷ This is why the definition of *microinvestment dispute* excludes claims by large businesses.²⁸ In principle, then, the definition is tied to the size of both the investment and the investor, not to the amount in controversy. In practice, however, data about the size of the investment and the investor is often unavailable, and the amount in controversy serves as a proxy for the (claimed) value of the investment, because most cases allege the taking or (nearly) complete destruction of the investment.²⁹ Ultimately, the aim of this Article is more to introduce the concept of a *microinvestment dispute* than to fix its exact definition—that is, to establish that a real class of these disputes exists, and regardless of its precise parameters, it matters how ICSID treats them.

It matters, of course, to injured microinvestors whether they have access to an effective mechanism for dispute settlement. It matters systemically as well, for microinvestors' collective economic power is awesome, they may have the greatest need for access to ICSID, and their investment may be chilled the most by lack of that access.³⁰

Part II of this Article introduces ICSID and its jurisdiction, stressing the investment and consent requirements and the relationships between them. It argues for replacing *Salini's* objective approach with an approach of bounded deference, which permits member states, through the power of consent, to determine the scope of *investment* for a given case within the bounds of good faith. Part III describes ICSID's purposes, particularly the aim to promote development, and argues that those purposes do not justify *Salini's* development prong. Part IV surveys the landscape of microinvestment disputes and examines *Salini's* impact on two recent microinvestment disputes: *Mitchell v. Democratic Republic of the Congo* and *Malaysian Historical Salvors Sdn., Bhd. v. Malaysia*. Part V critiques *Salini's* development prong from the microinvestment perspective. The Article then concludes in Part VI.

27. In this regard, an in-house counsel at a Fortune 500 company that deals extensively with states once said to me, "We would rather eat dirt than bring one of these [ICSID] cases."

28. I acknowledge that the argument for excluding large businesses could be extended to claims by wealthy individuals as well.

29. I acknowledge that this proxy is imperfect. To determine whether a particular case genuinely qualifies as a microinvestment dispute as defined here, it may be necessary to drill into data beyond what is included in an award. For example, in *Petrobart Ltd. v. Krygz Republic*, the claimant sought about \$4 million, but it is a natural gas distribution company and so may well be too large to qualify as an SME. *Petrobart Ltd. v. Kyrgyz Rep.*, Arb. No. 126/2003, Award, 4, 78 (Arb. Inst. of the Stockholm Chamber of Comm. 2005).

30. See discussion *infra* Part V.

In offering this microinvestment critique of *Salini's* development prong, this Article does not contend that this jurisdictional hurdle is the chief impediment to the successful prosecution of microinvestment claims. The economics of these claims are inherently challenging—they invoke expensive procedures in pursuit of (by definition) small recoveries—and are worsened by the risk that a tribunal may subject an unsuccessful microinvestor to the “loser pays” rule.³¹ A full treatment of the economics of microinvestment disputes is beyond the scope of this Article. The contention here is that *Salini's* development prong unnecessarily and inappropriately adds to the inherent burdens on microinvestors' access to ICSID.

II. ICSID AND ITS JURISDICTION

A. A Brief Introduction to ICSID

ICSID was created by multilateral treaty in 1966.³² It has 147 member states today.³³ ICSID is an “autonomous international institution,”³⁴ but it is closely related to the World Bank: the Bank conceived of ICSID and sponsored the talks leading to its creation, the Bank houses ICSID at its headquarters, and the Bank's president serves *ex officio* as chairman of ICSID's Administrative Council and is responsible for nominating ICSID's secretary-general (a position occupied until 2009 by the Bank's general counsel).³⁵

ICSID's primary purpose is to facilitate the resolution of disputes between international investors and member states. It resolves disputes through either arbitration or conciliation, but the former dominates its docket.³⁶ ICSID has no standing decisional bodies.

31. See *infra* notes 237–39 and accompanying text.

32. *About ICSID*, ICSID, <http://icsid.worldbank.org> (“The ICSID Convention is a multilateral treaty It was opened for signature on March 18, 1965 and entered into force on October 14, 1966.”) (last visited Oct. 9, 2012).

33. *Member States*, ICSID, <http://icsid.worldbank.org> (last visited Oct. 9, 2012).

34. Int'l Bank for Reconstruction and Dev. [IBRD], *Report of the Executive Directors on the Convention of the Settlement of Investment Disputes Between States and Nationals of Other States*, ¶ 15 (Mar. 18, 1965) [hereinafter *Executive Directors' Report*], available at <http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partB.htm>.

35. See ICSID Convention, *supra* note 3, arts. 2, 5, 10(1) (establishing ICSID with numerous connections to the World Bank); *Executive Directors' Report*, *supra* note 34, ¶¶ 1–8, 15–18 (describing the role the World Bank had in the creation of ICSID).

36. Through 2011, ICSID has heard only seven conciliations, accounting for only 2 percent of ICSID cases. ICSID, THE ICSID CASELOAD—STATISTICS 8 (2012-1), <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics> [hereinafter ICSID CASELOAD].

Independent ad hoc tribunals are constituted to decide a single case.³⁷ The ICSID Secretariat performs vital work to support the tribunals, but it has no decisional responsibility (apart from the secretary-general's "limited power to 'screen'" cases that are "obviously outside the jurisdiction of the Centre").³⁸

ICSID awards are binding on the parties.³⁹ ICSID has a unique provision for the enforcement of its arbitral awards, which obliges each member state to enforce ICSID awards as if they were final judgments of its own domestic courts.⁴⁰ To avoid giving tribunals absolutely unreviewable authority, the ICSID Convention created the annulment process, which allows quasi-appellate review on five specified grounds by an "ad hoc Committee" appointed by the President of the World Bank.⁴¹

Access to international adjudication traditionally had been reserved to states, as remains the case today at the International Court of Justice.⁴² A private business injured by a foreign state in violation of international standards had to persuade its home state to "espouse" the claim, which international law then regarded as the home state's to control and dispose.⁴³ ICSID represented a profound

37. See ICSID Convention, *supra* note 3, arts. 37–49 (addressing the constitution, powers, and functions of the tribunals).

38. *Executive Directors' Report*, *supra* note 34, ¶ 20 (paraphrasing ICSID Convention, *supra* note 3, art. 36(3)).

39. ICSID Convention, *supra* note 3, art. 53.

40. Compare Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V, *opened for signature* June 10, 1958, 330 U.N.T.S. 3 [hereinafter New York Convention] (listing grounds for refusing enforcement of an award in international commercial arbitration), with ICSID Convention, *supra* note 3, 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 generally 22 U.S.C. § 1650a (2006) ("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."); 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).

41. See ICSID Convention, *supra* note 3, arts. 5, 52 (establishing the annulment process); SCHREUER ET AL., *supra* note 23, at 890–1095 (explaining and analyzing the annulment process).

42. See Statute of the International Court of Justice, art. 34(1), June 26, 1945, 3 Bevans 1179, 59 Stat. 1055 ("Only states may be parties in cases before the Court.").

43. See, for example, *Mavrommatis Palestine Concessions (Greece v. Gr. Brit.)*, 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30):

It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State . . . By taking up the case of one of its subjects . . . , a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law. . . . Once

step from this traditional conception of *international law* toward *transnational law* with meaningful participation by nonstate actors.⁴⁴ 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.⁴⁵ Host states received “radical” restrictions on diplomatic protection,⁴⁶ which often involved diplomatic pressure and was “sometimes followed by the use of force,”⁴⁷ for matters submitted to ICSID arbitration.⁴⁸ In other words, to borrow from John Jackson, host states, especially developing countries, benefitted from a move away from “power-oriented” toward “rules-oriented” dispute settlement.⁴⁹ Home states were freed from the diplomatic costs of involvement in investor disputes with other states. Thus, one of ICSID’s major objectives is to “depoliticize” investment disputes by treating them more like ordinary legal disputes.⁵⁰

a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant.

Id.; see also L. OPPENHEIM, 1 INTERNATIONAL LAW: A TREATISE § 291 (2d ed. 1912) (“[I]f individuals who possess nationality are wronged abroad, it is their home State only and exclusively which has a right to ask for redress, and these individuals themselves have no such right.”); *id.* §§ 13, 63, 288–92 (stressing that private persons are not subjects, but objects, of international law, with no rights thereunder).

44. See PHILIP C. JESSUP, A MODERN LAW OF NATIONS: AN INTRODUCTION 2 (1948) (arguing that “international law, like national law, must be directly applicable to the individual” and that this is one of the two “keystones of a revised international legal order”); PHILIP C. JESSUP, TRANSNATIONAL LAW 2–3 & 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. Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 RECUEIL DES COURS 331 (1972), reprinted in SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW 188, 198 (1995) (“[T]he most striking feature of the Convention is that it firmly establishes the capacity of a private individual or a corporation to proceed directly against a State in an international forum, thus contributing to the growing recognition of the individual as a subject of international law.”).

45. See sources cited *supra* note 40.

46. IBRAHIM SHIHATA, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, in THE WORLD BANK IN A CHANGING WORLD 313, 323–24 (Franziska Tschofen & Antonio R. Parra eds., 1st ed. 1991).

47. *Id.* at 309.

48. See ICSID Convention, *supra* note 3, art. 27 (barring diplomatic protection for matters submitted to ICSID arbitration unless the respondent lost the arbitration and refused to comply with the award).

49. See JOHN H. JACKSON, THE WORLD TRADING SYSTEM 109–11 (2d ed. 1997) (analyzing the roles of power and rules in international dispute settlement).

50. SHIHATA, *supra* note 46, at 313 (“[ICSID] . . . attempts in particular to ‘depoliticize’ the settlement of investment disputes.”).

ICSID arbitration, like other forms of arbitration, is a creature of consent.⁵¹ The state's consent may be expressed in several ways, but over the past twenty—and, especially, ten—years, ICSID's docket has come to be dominated by cases where the state unilaterally preconsented in a treaty, mainly in a bilateral investment treaty (BIT). In a BIT, each party grants substantive rights to investors from the other party, typically including fair and equitable treatment, national treatment, and a promise to pay compensation for any expropriation.⁵² The parties also typically consent to international arbitration at ICSID or other fora (or both) over any dispute submitted by an investor from the other party alleging a violation of the BIT.⁵³ The state's preconsent by treaty empowers qualifying investors to initiate arbitration at one of the specified fora by consenting themselves just before filing a claim.⁵⁴ Treaty-based cases transformed ICSID's docket, now vastly larger than in the recent past.⁵⁵ They "are to ICSID what Prince Charming was to Sleeping Beauty, having stirred the activities of the Centre."⁵⁶

B. ICSID Jurisdiction and the Case for Bounded Deference

As mentioned, ICSID has jurisdiction over legal disputes "arising directly from an investment," but the ICSID Convention does not

51. See *infra* text accompanying notes 74–79 (discussing the role of consent in ICSID jurisdiction).

52. See generally RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* 58–65, 108–14 (1995) (describing provisions often found in BITs).

53. *Id.* at 129–30. Absent state consent to investor–state arbitration, the traditional norms of espousal, discussed *supra* note 43, survive into the ICSID era. See, e.g., *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, ¶ 79 (Feb. 5) ("The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. . . . [T]he State enjoys complete freedom of action.").

54. The possibility of such "nonsynchronous consent" was contemplated at ICSID's creation, see *Executive Directors' Report*, *supra* note 34, at ¶ 24 (giving examples of permissible means of consent), and there have been a handful of cases premised upon consent expressed in domestic statutes. See ICSID CASELOAD, *supra* note 36, at 10 (showing that 6 percent of ICSID cases are based on statutory consent). It was only in 1990 that an ICSID tribunal first exercised jurisdiction based upon state consent expressed in a treaty. See *Asian Agric. Prods. Ltd. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, ¶ 2 (June 27, 1990), 6 ICSID Rev. 526, 527 (1991) (relying on Sri Lanka's consent in a BIT). See generally Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV.—FOREIGN INV. L.J. 232 (1995).

55. See ICSID CASELOAD, *supra* note 36, at 7, 10 (showing that 81 percent of ICSID cases have been registered since 2000 and 74 percent are treaty-based).

56. Forji Amin George, *By Their Provisions, You Can Know Them*, BILATERALS.ORG (Oct. 16, 2006), <http://www.bilaterals.org/spip.php?article6366> (quoting Eloïse Obadia).

define the crucial term *investment*. The negotiating history reveals ample discussion of the issue.⁵⁷ 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.”⁵⁸ Other “delegates felt that the total value of the investment and not the claim under dispute should be determinative.”⁵⁹ 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.”⁶⁰ None of these proposals prevailed, however. Unable to agree to a definition of *investment*, the negotiators agreed instead to omit one.⁶¹

Throughout the negotiations, Aron Broches⁶² opposed the efforts to define *investment*. In part, like Justice Potter Stewart’s famous

57. The first draft of the Convention included a definition of *investment* as “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.” SCHREUER, *supra* note 23, at 115. The secretariat later revised the definition to read:

[T]he 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; (ii) 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.

Id. at 115. 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, 280–96 (2010).

58. SCHREUER, *supra* note 23, at 115. In constant dollars, \$100,000 in 1965 is worth about \$731,000 in 2012. See *CPI Inflation Calculator*, BUREAU OF LABOR STATISTICS, http://www.bls.gov/data/inflation_calculator.htm (last visited Oct. 9, 2012).

59. SCHREUER, *supra* note 23, at 116. Mortenson added:

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.*

Mortenson, *supra* note 57, at 297–98 (emphasis added).

60. SCHREUER, *supra* note 23, at 116.

61. *Id.* at 115.

62. 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. ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 539 (2d ed. 2008).

description of pornography,⁶³ Broches regarded *investment* as difficult to define but easy to recognize.⁶⁴ 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.⁶⁵

Broches thus objected to the wrangling that would follow from defining *investment*, deeming jurisdictional details best left to each member state to decide which cases to submit to ICSID.⁶⁶ Broches made this point repeatedly—and specifically in opposition to a minimum-dollar-value requirement.⁶⁷

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—that *investment’s* definition is wholly subjective and member states enjoy complete discretion to manufacture jurisdiction through consent.⁶⁸ The report

63. Justice Stewart wrote:

[F]aced 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

Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

64. SCHREUER, *supra* note 23, at 114, 116.

65. *Malaysian Historical Salvors Sdn., Bhd. v. Malaysia*, ICSID Case No. ARB/05/10, Decision on Annulment, ¶ 67 (Apr. 16, 2009) (quoting INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, 2 HISTORY OF THE ICSID CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES 54 (1968)). 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. Mortenson, *supra* note 57, at 282–83.

66. See SCHREUER, *supra* note 23, at 114–16 (discussing Broches’s views).

67. *Id.* at 115–16. Mortenson added:

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.

Mortenson, *supra* note 57, at 298.

68. One recent case may subscribe to this view. See *Abaclat v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 364 (Aug. 4, 2011). The tribunal in *Abaclat* explained:

on the Convention prepared by the executive directors of the World Bank provides some support for the subjective view, as it states: "No attempt was made to define the term 'investment'⁶⁹ 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. . . ."⁷⁰ But the same report also undercuts any construction that deprives the word "investment" of all jurisdictional significance,⁷¹ as do both the rule of effectiveness⁷² and state practice under the Convention.⁷³

If Claimants' contributions were to fail the *Salini* test, those contributions . . . would not be given the procedural protection afforded by the ICSID Convention. The Tribunal finds that such a result would be contradictory to the ICSID Convention's aim, which is to encourage private investment while giving the Parties the tools to further define what kind of investment they want to promote. It would further make no sense in view of Argentina's and Italy's express agreement [in the BIT at issue] to protect the value generated by these kinds of contributions.

Id.

69. As Schreuer noted, "Historically, this is, of course, incorrect. There were a number of attempts but they all failed." SCHREUER, *supra* note 23, at 116. Mortenson explained that the "bland description" in the Executive Directors' Report resulted from Broches's efforts to "appease" a director who opposed the Convention and especially its approach to *investment*. Mortenson, *supra* note 57, at 292-93.

70. *Executive Directors' Report*, *supra* note 34, ¶ 27 (footnote added).

71. For example, the report stated:

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.

Id. at ¶ 25. 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 Observations on Jurisdiction*, 5 COLUM. J. TRANSNAT'L L. 263, 267-68 (1966) (explaining the phrase "the nature of the dispute").

72. 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 [hereinafter 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 Y.B. INT'L L. COMMISSION 187, 219.

73. See Vienna Convention, *supra* note 72, 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."). It should be noted that only those customary rules codified in the Vienna Convention, and not the Convention itself, apply to the ICSID Convention:

State consent is plainly necessary for ICSID jurisdiction: it is the “essential prerequisite” for jurisdiction, “the cornerstone of the jurisdiction of the Centre.”⁷⁴ So central to ICSID’s fabric is the consent requirement that it is manifest three times in the preamble alone.⁷⁵ This consent-centeredness was crucial to overcoming resistance, especially among Latin American states, to ICSID’s creation.⁷⁶ It also anchored ICSID in traditional international legal norms,⁷⁷ even as ICSID otherwise broke radically from those norms by empowering private persons to act in their own interests on the

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.

Id. art. 4. 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 3, arts. 4(1), 6(1)(b). The 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* INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, RULES OF PROCEDURE FOR THE INSTITUTION OF CONCILIATION AND ARBITRATION PROCEEDINGS, r. 2(1)(c), 2(1)(e); SCHREUER, *supra* note 23, at 117 (discussing the two requirements).

74. *Executive Directors’ Report*, *supra* note 34, at ¶¶ 23, 25; *accord* Broches, *supra* note 44, at 352 (“I want to stress the overriding significance of consent not merely as a formal requirement for the jurisdiction of the Centre, but as an essential characteristic of the entire system of the Convention.”).

75. *See* ICSID Convention, *supra* note 3, pmb. (making facilities available for submission by parties “if they so desire” without obliging any state to submit any case “without its consent,” while also recognizing that “mutual consent” once given “constitutes a binding agreement”).

76. *See* LOWENFELD, *supra* note 62, at 540–41 (describing the gradual acceptance of the convention over time).

77. *See, e.g.*, *The S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7) (“The rules of law binding upon States . . . emanate from their own free will . . .”). Eighty-five years later, 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 for custom and general principles. *See* Statute of the International Court of Justice, *supra* note 42, art. 38(1) (listing the sources of international law); LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 26–40 (1995) (describing the role of consent in making international law). Yet, the modern rise of *jus cogens*, most notably in the context of human rights law, has diminished markedly *Lotus*’s suggestion that consent is the only possible constraint on a state’s otherwise absolute freedom to do as it will. *See id.* at 38–39 & n.*, 176–81. Thus, while consent is discussed here as an important principle of international law—and one that is especially relevant to ICSID jurisdiction—nothing in this Article valorizes consent above basic human values. *Cf.* Perry S. Bechky, *Lemkin’s Situation: Toward a Rhetorical Understanding of Genocide*, 77 *BROOK. L. REV.* 551, 621 (2012) (“Sovereignty, like other governmental constructs, must yield to ‘elementary considerations of humanity.’” (quoting *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 22 (Apr. 9))).

international plane.⁷⁸ The consent requirement allows each ICSID member to decide for itself how far to go into the brave new world of investor claims—to decide how many and what kinds of cases it is willing to allow investors to bring against it.⁷⁹

With the BIT revolution in ICSID's docket, 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.⁸⁰ Deploying the image of Article 25 as a “jurisdictional keyhole,”⁸¹ 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, one key may open both locks. Both the investment treaty and ICSID revolve around the same core word. They may use the word in the same way or they may use it differently—but it is difficult to reach a conclusion without a definition in Article 25.⁸²

In these circumstances, ICSID tribunals should presume that the consent key normally opens both locks.⁸³ In other words, they should take a broad, flexible, and party-centric approach to the

78. See *supra* note 44.

79. Broches wrote:

The Bank has always stressed the doubly voluntary character of the entire ICSID scheme: not only are [Bank] members free to join the Centre or not, but even after they have done so, they are free to decide whether or not to utilize the Centre's facilities by consenting to its jurisdiction in respect of particular arrangements or disputes.

Broches, *supra* note 44, at 348.

80. See, e.g., Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. VII(1), Nov. 14, 1991, 1991 U.S.T. Lexis 176, available at http://unctad.org/sections/dite/ia/docs/bits/argentina_us.pdf (consenting to arbitration of investment disputes arising under the treaty). The definition of *investment* in investment treaties is typically expansive and open-ended. See, e.g., *id.* art. 1 (“[I]nvestment’ means every kind of investment . . . owned or controlled directly or indirectly . . . , such as equity, debt, and service and investment contracts; and includes without limitation [five types of investment].”).

81. *Aguas del Tunari, S.A. v. Republic of Bol.*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, ¶¶ 278–80 (Oct. 21, 2005), 20 ICSID Rev. 450, 535–36.

82. For the mathematically inclined, the keyhole imagery may be replaced with that of a Venn diagram. The question is the degree of overlap between two circles, each defining *investment*—a question made much harder to answer by the fact that one of the circles is, in effect, invisible.

83. Cf. *Československa Obchodní Banka, A.S. v. Slovak Republic (CSOB)*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, ¶ 66 (May 24, 1999), 14 ICSID Rev. 250, 274 (describing consent as an “important element in determining whether a dispute qualifies as an investment,” the presence of which “creates a strong presumption” that a transaction so qualifies).

definition of *investment*.⁸⁴ They should approach with a spirit of modesty and deference the question whether to construe the undefined word to impose “outer limits”⁸⁵ on a member state’s ability to submit a dispute to ICSID. They should assess whether a member state’s submission is bona fide, not whether it is correct.⁸⁶ They should give “great weight” to the member state’s understanding of *investment*—but they should not deem it “controlling.”⁸⁷

Thus, subject to other requirements not here relevant, an ICSID tribunal should ordinarily exercise 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 comports with the principles of estoppel⁸⁸ and *pacta sunt servanda*.⁸⁹ And, to borrow an oft-quoted

84. See 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 (Tanz.) Ltd. v. United Republic of Tanz.*, ICSID Case No. ARB/05/22, Award, ¶¶ 316–17 (Jul. 24, 2008) (advocating a “flexible and pragmatic approach” that construes *investment* “by reference to the parties’ agreement”).

85. Broches, *supra* note 44, at 351.

86. Cf. Mortenson, *supra* note 57, at 273 (criticizing “the *Salini* line” for deciding correctness rather than reasonableness).

87. Broches, *supra* note 71, at 268; see Broches, *supra* note 44, at 362 (declaring that the “wise decision” to omit a definition of *investment* “leaves a large measure of discretion to the parties,” but “this discretion is not unlimited and cannot be exercised to the point of being clearly inconsistent with the purposes of the Convention”); *Special Clauses Relating to the Subject-Matter of the Dispute*, INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, <http://icsid.worldbank.org/ICSID/StaticFiles/model-clauses-en/8.htm> (last visited Sep. 27, 2012) (“Parties thus have much, though not unlimited, discretion”); see also *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pak.*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, ¶ 133 & n.153 (Aug. 6, 2003), 18 ICSID Rev. 307, 347 (“The ICSID Convention does not delimit the term ‘investment,’ leaving to the Contracting Parties a large measure of freedom to define that term as their specific objectives and circumstances may lead them to do so That freedom does not, however, appear to be unlimited”); cf. *Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.)*, 2008 I.C.J. 136, ¶ 145 (June 4) (holding that, even when a treaty “provide[s] a State . . . with a very considerable discretion, this exercise of discretion is still subject to the obligation of good faith codified in Article 26” of the Vienna Convention).

88. See generally *Temple of Preah Vihear (Cambodia v. Thai.)*, 1962 I.C.J. 6 (finding Thailand precluded from contesting a treaty after having enjoyed its benefits for fifty years). 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 ENCYCLOPEDIA PUB. INT’L LAW, www.mpepil.com (last visited Sept. 12, 2012).

89. See Vienna Convention, *supra* note 72, art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”). *Pacta sunt servanda* is “the fundamental principle of the law of treaties,” Draft Articles on the Law of Treaties with Commentaries, *supra* note 72, at 211, “an antecedent,

phrase from the European Court of Human Rights,⁹⁰ it appropriately gives each member state “a margin of appreciation” when defining *investment* for the purpose of determining when submitting disputes to ICSID best suits its own interests.⁹¹ The good faith limitation is unlikely to have much bite in actuality, because only rarely (if ever) will an ICSID member state submit to ICSID, whether in error or in bad faith, a dispute that cannot reasonably⁹² be regarded as arising directly out of an investment. The limitation is nevertheless important in principle, because it anchors the party-centric approach to the text of Article 25 and the “cardinal injunction”⁹³ to construe it in good faith.⁹⁴

underlying ‘constitutional’ principle” on which “the normative character of a treaty depends.” HENKIN, *supra* note 77, at 28.

90. See generally YUTAKA ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR (2001); STEVEN GREER, THE MARGIN OF APPRECIATION: INTERPRETATION AND DISCRETION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2000); Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT’L L. 907 (2005).

91. See SCHREUER, *supra* note 23, at 117 (advocating an approach in which member states have “much freedom,” but not “unlimited freedom,” in deciding what transactions qualify as investments).

92. Cf. RICHARD GARDINER, TREATY INTERPRETATION 157 (2008) (“[O]ne component of good faith in interpretation is reasonableness.”).

93. *Id.* at 153 (quoting Maritime Delimitation and Territorial Questions (Qatar v. Bahrain), 1995 I.C.J. 6, at 39 (Feb. 15) (Schwebel, J., dissenting)).

94. See Vienna Convention, *supra* note 72, art. 31.1 (“A treaty shall be interpreted in good faith . . .”); Draft Articles on the Law of Treaties with Commentaries, *supra* note 72, at 211 (“The motif of good faith, it is true, applies throughout international relations; but it has a particular importance in the law of treaties . . .”); Michel Virally, *Good Faith in Public International Law*, 77 AM. J. INT’L L. 130, 133 (1983) (“[G]ood faith presents itself as an absolutely necessary ingredient to the operation of the whole international legal order . . .”).

In this regard, while Mortenson similarly advocated deference to state approaches to interpreting *investment*, he went too far in embracing any activity that is “plausibly economic,” a construction that appears to extend *in principle* beyond a good-faith construction of *investment*, although I agree with Mortenson that this scenario would rarely arise in reality. Mortenson, *supra* note 57, at 301–10, 315–16. Likewise, Yulia Andreeva erred by characterizing bilateral definitions of *investment* as *lex specialis*. Yulia Andreeva, *Salvaging or Sinking the Investment? MHS v. Malaysia Revisited*, 7 LAW & PRAC. OF INT’L CTS. & TRIBUNALS 161, 169 (2008). This characterization, by operation of the implicit Latin maxim, would permit member states to derogate from the ICSID Convention.

Conversely, while Georges Abi-Saab appears to have endorsed *Salini*, we share much analytical common ground. We agree that the absence of “an express definition of investment [in Article 25] does not automatically imply that the definition is totally left to the BITs”; that the undefined word should be construed in accordance with its ordinary meaning in light of its context and the Convention’s object and purpose; and that *investment*, “whilst flexible enough, is not infinitely elastic. It leaves much latitude and a wide margin of interpretation and further specification to States in their BITs; but not to the point of rendering it totally vacuous, without any legal effect.” *Abaclat v.*

This party-driven approach presents, to be sure, a radically different vision of subject-matter jurisdiction than that embraced by the U.S. federal courts. Litigants may not manufacture federal court jurisdiction by consent.⁹⁵ They cannot waive jurisdictional defects.⁹⁶ Indeed, jurisdictional defects may be raised on appeal for the first time, even by the party that originally invoked federal jurisdiction⁹⁷ or *sua sponte* by the appellate courts.⁹⁸ But this restrictive view of jurisdiction—which closes the door to the federal courts, even when causing inefficiency⁹⁹ or injustice¹⁰⁰—is driven by the 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 fifty states.¹⁰¹ No such considerations exist at ICSID. The international community has no interest in preventing a national government from

Argentine Republic, ICSID Case No. ARB/07/5, Dissenting Opinion of Georges Abi-Saab, ¶¶ 38–52 (Oct. 28, 2011).

95. 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3522 n.15 (3d ed. 2012).

96. See FED. R. CIV. P. 12(h)(3) (requiring the district court to dismiss a case “at any time” it determines it lacks subject-matter jurisdiction, unlike other defenses, which are waived if not promptly raised).

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

98. See, e.g., *Louisville & Nashville R.R. Co. v. Mottley (Mottley I)*, 211 U.S. 149, 152 (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.”).

99. The result of *Mottley I*, for example, was to force the parties to re-litigate 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 (Mottley II)*, 219 U.S. 467, 472 (1911) (reaching the merits of the federal questions not decided in 1908).

100. In *Capron*, the Court allowed a plaintiff who originally claimed jurisdiction but then lost at trial to later challenge the judgment against him for lack of jurisdiction. 6 U.S. at 126–27. 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. 490 U.S. at 545–46. Congress later reversed *Finley*’s result. See 28 U.S.C. § 1367 (2006) (authorizing pendent parties jurisdiction).

101. Wright and Miller stated:

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.

WRIGHT & MILLER, *supra* note 95, § 3522.

voluntarily submitting a dispute to international arbitration.¹⁰² Rather, quite opposite to domestic considerations in the United States, party consent is the *sine qua non* of ICSID jurisdiction.¹⁰³

Against this party-driven approach to ICSID jurisdiction, Professor M. Sornarajah has applauded *Salini's* objective approach as a means to restrict what he sees as the undue breadth of *investment* in many newer BITs.¹⁰⁴ He has argued that the ICSID Convention reflects "the traditional meaning of investment" at the time of its drafting in 1964, which "did not go beyond . . . a long-term project for the exploitation of resources or a project contract."¹⁰⁵ In his view, "the definition of investment in the ICSID Convention remains unaffected" by later BITs and "the use of the term 'investment' has a temporal meaning varying from treaty to treaty depending on the period in which it was drafted."¹⁰⁶ ICSID, however, should not be shackled to a 1960s conception of *investment*, which the drafters did not write into the Convention.¹⁰⁷ The Convention gives life to an institution and ought, to the extent consistent with good faith and other rules of treaty interpretation, be construed to allow that institution air to breathe and space to grow.¹⁰⁸ Such dynamism is all the more important given the nature of the Centre as a place devoted to the peaceful settlement of disputes. By leaving *investment* undefined, the Convention's drafters built flexibility into their creation. Their emphasis on consent "as an essential characteristic of

102. Cf. Mortenson, *supra* note 57, 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").

103. See *supra* notes 51–56, 68–79. A potential exception to the otherwise firm U.S. rule against consenting to federal jurisdiction is telling, because it allows party consent in one circumstance where that consent cures the constitutional problem driving the rule—namely, where a state itself consents to be sued in federal court. According to Wright and Miller:

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.

WRIGHT & MILLER, *supra* note 95, § 3522.

104. See M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 10–18, 190–96, 310–13 (3d ed. 2010).

105. *Id.* at 310, 311.

106. *Id.* at 12 n.32.

107. See *supra* text accompanying notes 2–5 and 57–67.

108. ICSID tribunals should heed, *mutatis mutandis*, Chief Justice Marshall's exhortation that "we must never forget that it is a *constitution* we are expounding." *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819). Neither the analogy nor the interpretative liberality should be pushed too far. See JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 65–74, 82–100 & n.138 (2005).

the entire system of the Convention”¹⁰⁹ empowers member states (within the limits of good faith) to adapt the institution to their needs, as those needs may vary geographically and temporally. Bounded deference thus better respects state autonomy and other values of the international community.¹¹⁰

Last, as readers will have noticed, this Article does not proffer its own definition of *investment*, proposing instead an approach that allows states to choose their own definitions within the confines of good faith. Some commentators have suggested that this approach is insufficient, contending that one must first define *investment*—or, at least, outline its core parameters—before one can determine whether another definition fits within an acceptable range of variance from one’s own baseline standard. Part III.B will explain why *Salini*’s contribution-to-development prong is inconsistent with the proper role of an ICSID tribunal.¹¹¹ No more need be done here. In an actual case, a tribunal may or may not find it necessary to lay more groundwork to apply the good faith test to the facts before it. For most definitions actually found in BITs, a tribunal may well be able to conclude that the definition before it is reasonable without need to belabor alternative definitions and parameters. The key lies in embracing pluralism and deference. A spirit of pluralism—captured in Justice Oliver Wendell Holmes’s observation that “words are flexible”¹¹²—helps a tribunal avoid the mistake that *investment* has one true meaning against which all others must be tested. Likewise, a spirit of deference helps a tribunal see that states have the freedom to choose among the possible definitions and the tribunal’s role is limited to determining the reasonableness, not the correctness, of a state’s choice.¹¹³

109. Broches, *supra* note 44, at 352.

110. Cf. HENKIN, *supra* note 77, at 11 (“The essential quality of statehood in a state system is the autonomy of each state.”); *id.* at 101 (“Commitment to state autonomy has been shaken since the Second World War, but it is still a basic, perhaps the basic, value of the system.”).

111. See *infra* Part III.B.

112. *Int’l Stevedoring Co. v. Haverty*, 272 U.S. 50, 52 (1926).

113. By way of analogy, when the U.S. Supreme Court established the deference a U.S. court owes to administrative construction of an ambiguous statute, it observed that the “the question for the court is whether the agency’s answer is based on a permissible construction of the statute” and “[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.” *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 & n.11 (1984).

III. ICSID, DEVELOPMENT, AND SALINI'S DEVELOPMENT PRONG

A. *Development as ICSID's Object and Purpose*

Andreas Lowenfeld briefly captured the “[w]ave of [e]xpropriations” 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 under Communist rule . . . 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).¹¹⁴

In a series of debates through the 1960s into the 1970s, the UN General Assembly struggled over the state of customary international law on the property rights of aliens.¹¹⁵ 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.¹¹⁶

The World Bank would have known these events and controversies, of course. Indeed, in 1956–1958, a World Bank team helped to negotiate compensation for Egypt's nationalization of the Suez Canal. A member of that team became president of the World Bank in 1963.¹¹⁷

The purposes of the World Bank include “promot[ing] private foreign investment.”¹¹⁸ It can certainly be said that the World Bank

114. LOWENFELD, *supra* note 62, at 483–84.

115. *See, e.g., id.* at 486–94 (describing the UN debates).

116. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428–30 (1964).

117. LOWENFELD, *supra* note 62, at 484, 537 n.2; *see also* *George David Woods*, THE WORLD BANK, <http://go.worldbank.org/SY4JPEAC50> (last visited Sept. 28, 2012) (describing Woods's presidency); *Suez Canal Compensation Discussed*, THE WORLD BANK, <http://go.worldbank.org/K48G1PWPA0> (last visited Sept. 28, 2012) (identifying George Woods as one of the Bank's representatives in the Suez discussions);

118. Articles of Agreement of the International Bank for Reconstruction and Development, art. I(ii), July 22, 1944, 2 U.N.T.S. 134 [hereinafter *Articles of Agreement*]. The clause continues “by means of guarantees or participations in loans

conceived ICSID and sponsored the talks to create it for the purpose of promoting investment. The Bank's executive directors asserted, for example, that "the primary purpose of the [ICSID] Convention" was to "stimulate a larger flow of private international investment."¹¹⁹

This account, however, is incomplete. Investment promotion is only ICSID's "intermediary purpose," not its "ultimate purpose."¹²⁰ Ultimately, the Bank initiated ICSID "to further [the Bank's own] overall purpose of promoting economic development in the world's poor countries."¹²¹ The Bank's mission is even captured in its name: the International Bank for Reconstruction and *Development*. Its statement of purposes makes clear that "facilitating the investment of capital for productive purposes" is itself meant to serve the end of "assist[ing] in the . . . development" of member states.¹²² Ibrahim Shihata, a general counsel of the World Bank and secretary-general of ICSID, thus wrote, "ICSID must be regarded as an instrument of international policy for the promotion of investments and of economic development."¹²³ Support for this view of ICSID as an instrument of

and other investments made by private investors," *id.*, 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." Broches described ICSID as being within the Bank's "institutional ambit" though outside its "professional experience and competence," and thus characterized it as a "semi-extra-curricular exercise." Broches, *supra* note 44, at 345, 347.

119. *Executive Directors' Report*, *supra* note 34, ¶ 12; accord *Convention on the Settlement of Investment Disputes: Hearing on H.R. 15785 Before the Subcomm. on Int'l Orgs. and Movements of the H. Comm. on Foreign Affairs*, 89th Cong. 2 (1966) (statement of Fred Smith, General Counsel, U.S. Dep't 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.").

120. Anne van Aaken & Tobias A. Lehmann, *International Investment Law and Sustainable Development: Developing a New Conceptual Framework* 19 (Univ. of St. Gallen Law Sch. Law & Econ. Research Paper Series, Working Paper No. 2011-10, 2011), available at <http://ssrn.com/abstract=1893692>.

121. LOWENFELD, *supra* note 62, 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. Elihu Lauterpacht, *Foreword* to SCHREUER, *supra* note 23, at 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 3, art. 42(1), 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 62, at 540.

122. Articles of Agreement, *supra* note 118, art. I(i); see also Broches, *supra* note 44, at 342 ("[A]s a development institution . . . the Bank was and is vitally concerned with capital flows from the developed to the developing countries.").

123. SHIHATA, *supra* note 46, at 314; see also *Executive Directors' Report*, *supra* note 34, ¶ 9 ("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."). Sornarajah has stressed that support among

development can be found in the preamble to the ICSID Convention, which is predicated on “the need for international cooperation for economic development, and the role of private international investment therein.”¹²⁴

Alan Sykes likewise justified granting investors a direct right of action on the ground that doing so generates economic benefits for well-intentioned 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 premium and the cost of capital for a developing country.¹²⁵ Espousal is too uncertain to reduce adequately this premium;¹²⁶ depoliticization is intended to give investors more confidence in the investment climate to stimulate investment flows to further development. 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.”¹²⁷

developing states for ICSID is contingent upon its nexus to development: “The very essence of the system of investment protection . . . is economic development. . . . Subjection to . . . the ICSID system is achieved at the cost of a surrender of sovereignty, and this is justified by the belief that economic development will take place as a result.” SORNARAJAH, *supra* note 104, at 313.

124. ICSID Convention, *supra* note 3, pmb1.

125. Alan O. Sykes, *Public vs. Private Enforcement of International Economic Law: Of Standing and Remedy* 14–15 (Univ. of Chi. Inst. for Law & Econ. Olin Research Paper Series, Working Paper No. 235, 2005), available at http://ssrn.com/abstract_id=671801.

126. See *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, ¶ 79 (Feb. 5) (stating that diplomatic protection is “a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case”); Aron Broches, *Note to the Executive Directors*, in 2 HISTORY OF THE ICSID CONVENTION 1, 61–192 ¶ 2(b) (1968) (“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.”).

127. Sykes, *supra* note 125, at 15–16. See generally Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT’L L. 639 (1998) (arguing that developing countries sign BITs to compete for capital against other developing countries by enhancing the credibility of their commitments to foreign investors); Zachary Elkins et al., *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, 2008 U. ILL. L. REV. 265 (same). Some empirical support for Sykes’s account may be found in Todd Allee & Clint Peinhardt, *Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment*, 65 INT’L ORG. 401 (2011) (arguing that foreign direct investment (FDI) increases in non-OECD countries by \$21–\$24 million per year with each BIT signed, but decreases by \$55 million per year for each pending ICSID case and by \$791 million per year if the country has lost (or by \$300–\$350 million per year if it has settled) an ICSID case within the past two years).

Investment promotion should thus be viewed as a means to the end of economic development. Indeed, nearly fifty years after ICSID's founding, one might venture that economic development is not ICSID's ultimate purpose either. Rather, economic development serves to improve human welfare, a true end.¹²⁸ In other words, one might drop the modifier "economic" in favor of a broader vision of human development.¹²⁹ At the least, based on the intervening decades of learning, one should acknowledge that economic development does not occur in a vacuum, but in conjunction with the development of legal and social institutions.¹³⁰

B. Salini's *Development Prong*

Schreuer has identified five "typical characteristics" of investments.¹³¹ 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."¹³²

Fedax v. Venezuela, the first ICSID decision centered on the meaning of *investment*, relied on Schreuer's characteristics, calling them the "basic features" of an investment.¹³³ Faced with the question of whether promissory notes qualify as investment under Article 25, the tribunal briefly ticked off how the notes possessed each of the five features.¹³⁴ This recitation ended, "And *most importantly*, there is clearly a significant relationship between the transaction and the development of the host State"¹³⁵

128. Cf. William Michael Reisman, *International Law and Organization for a New World Order: The Uppsala Model, General Report of JUS 1981*, in THE SPIRIT OF UPPSALA: PROCEEDINGS OF THE JOINT UNITAR-UPPSALA UNIVERSITY SEMINAR ON INTERNATIONAL LAW AND ORGANIZATION FOR A NEW WORLD ORDER 27, 40 (Atle Grahl-Madsen & Jiri Toman eds., 1984) ("[H]uman rights, most broadly understood, have been taken as the major goal and the major justification of world order.").

129. See SCHREUER, *supra* note 23, at 134 (arguing that development should include "development of human potential, political and social development and the protection of the local and the global environment").

130. See van Aaken & Lehmann, *supra* note 120, at 7 ("There is no longer any doubt that institutions are important for economic development as well as for [sustainable development]."). See generally KENNETH W. DAM, THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT (2006).

131. See SCHREUER, *supra* note 23, at 128. Four of Schreuer's characteristics were adopted by *Salini*, while the last, expectation of profit, sometimes finds support among *Salini*'s progeny. See *supra* notes 8, 15 and accompanying text.

132. SCHREUER, *supra* note 23, at 128 (emphasis omitted).

133. See *Fedax N.V. v. Republic of Venez.*, ICSID Case No. ARB/96/3, Decision on Jurisdiction, ¶ 43 (July 11, 1997).

134. *Id.*

135. *Id.* (emphasis added).

Two years later, in *CSOB v. Slovakia*, the tribunal considered whether a loan constituted an investment under Article 25.¹³⁶ The tribunal laid primary emphasis on two factors: Slovakia's consent, which "creates a strong presumption that [the parties] considered their transaction to be an investment within the meaning of the ICSID Convention";¹³⁷ and CSOB's contribution to the development of Slovakia's banking sector. On the latter, the tribunal reasoned that the reference to promoting development in the ICSID Convention's preamble supports 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."¹³⁸ 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."¹³⁹ Although the respondent had argued for an approach to *investment* broadly similar to that advocated by Schreuer and *Fedax*,¹⁴⁰ the tribunal seems to have regarded CSOB's contribution to Slovakia's development as sufficient alone to qualify as an investment under Article 25.¹⁴¹

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 its more rigid manifestations as a "fixed and inflexible"¹⁴² checklist of mandatory criteria. With this, the development language of the preamble transformed from a door-opening aid into a door-closing obstacle for otherwise eligible claimants.

The liberal approach is preferable. It respects member states' autonomy,¹⁴³ maximizing their freedom to use ICSID as they deem best. A fixed *Salini* test with a mandatory development prong sets

136. Československa Obchodní Banka, A.S. v. Slovak Republic (CSOB), ICSID Case No. ARB/97/4, Decision on Jurisdiction, ¶ 76 (May 24, 1999), 14 ICSID Rev. 250, 276-77.

137. *Id.* at 274, ¶ 66.

138. *Id.* at 273, ¶ 64.

139. *Id.* at 276-77, ¶ 76 (emphasis added).

140. *Id.* at 277-78, ¶ 78.

141. *See id.* at 282-83, ¶¶ 90-91 (concluding that risk and expectation of return are not required elements of *investment* and that "CSOB's claim and the related loan facility . . . qualify as investments" where they "are closely connected to the development of CSOB's banking activity" in Slovakia).

142. Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanz., ICSID Case No. ARB/05/22, Award, ¶ 314 (Jul. 24, 2008).

143. *See supra* note 110 and accompanying text.

Article 25's "outer limits" of ICSID jurisdiction more restrictively than does the "ordinary meaning" of *investment*.¹⁴⁴

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

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. . . .¹⁴⁵

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 (substantially) 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. Tribunals are bound to construe undefined terms in accordance with their ordinary meaning and the customary rules of treaty interpretation.¹⁴⁶ 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 states with broad discretion to determine in good faith which matters to submit to ICSID arbitration.¹⁴⁷ Tribunals should, accordingly, abandon *Salini's* development prong

144. See Vienna Convention, *supra* note 72, art. 31.1 (requiring that a treaty be interpreted "in accordance with [its] ordinary meaning").

145. See LEWIS CARROLL, *THROUGH THE LOOKING-GLASS*, reprinted in MARTIN GARDNER, *THE ANNOTATED ALICE* 269–70 (1960). For brevity, I have edited Carroll's text into dialogue form.

146. In this regard, one might note that, when construing the ICSID Convention in its "context and in the light of its object and purpose," Vienna Convention, *supra* note 72, art. 31.1, tribunals may appropriately limit *investment* to its economic sense—lest any state try to submit to ICSID a dispute over priestly robes (in Shakespeare's original usage), military blockades (in a usage attributed to the Duke of Wellington), or material for dental coatings. See COMPACT OXFORD ENGLISH DICTIONARY (2d ed. 1991) (*investment* definitions 1, 2b, 4, 5b).

147. See *supra* Part II.B.

as an unwarranted restriction on state discretion even if they otherwise persist with *Salini's* objective approach.¹⁴⁸

Furthermore, if *investment* is to have an objective meaning in Article 25, whatever that meaning might be, it must be the same meaning for all ICSID members. If an investor must demonstrate that its investment made a (substantial) contribution to development in the host state as a condition of ICSID jurisdiction, as the *Salini* line would have it, this condition must apply wherever the investment is made. But what does it mean to make a substantial contribution to development in the United States or Japan? Is it even possible to contribute to development in a country that is already “developed”? At the very least, it is much more difficult for an investor to prove that it made a substantial contribution to development in a developed country than in a developing country. The development prong therefore creates an imbalance of obligations among ICSID members. Consider: If a German investor builds a factory in Panama and a Panamanian investor builds a factory in Germany—with identical contributions, durations, and assumptions of risk—it is possible that *Salini* would lead ICSID tribunals to find that only the former made a contribution to development, effectively allowing Germany a jurisdictional out not available to Panama.

Other critiques of the mandatory development prong abound. For example, although some proponents of the *Salini* test attribute credit to Schreuer’s “typical features” of investment, he has denied paternity.¹⁴⁹ He has called “unfortunate” the trend toward calcification of his “typical features” into a “rigid list of criteria,” arguing that it will neither “facilitate the task of tribunals” nor “make decisions more predictable.”¹⁵⁰ He has warned that a test insisting on

148. Two recent developments are instructive. In *Fakes*, the tribunal adopted a three-prong version of *Salini*, accepting only those “three criteria [that] derive from the ordinary meaning of the word ‘investment.’” The Association of Southeast Asian Nations (ASEAN) countries likewise built a three-prong variant of *Salini* into the definition of *investment* in their new regional investment treaty. Notably, ASEAN and *Fakes* both omitted *Salini's* development requirement—although, as it happens, they did not agree on which three of Schreuer’s other four characteristics to use. Compare *Fakes v. Republic of Turk.*, ICSID Case No. ARB/07/20, Award, ¶¶ 110–12 & n.73 (July 14, 2010) (considering that “the criteria of (i) a contribution [of assets], (ii) a certain duration, and (iii) an element of risk, are both necessary and sufficient”), with ASEAN Comprehensive Investment Agreement art. 4(c) & n.2, Feb. 26, 2009, available at <http://www.aseansec.org/20632.htm> (“The [required] characteristics of an investment include the commitment of capital, the expectation of gain or profit, or the assumption of risk.”), and SCHREUER, *supra* note 23, at 128 (identifying five “typical characteristics of investments under the Convention”).

149. See SCHREUER, *supra* note 23, at 133 (“The First Edition of this Commentary cannot serve as authority for this development.”).

150. *Id.*

a showing of contribution to development needs “particular care.”¹⁵¹ He has favored 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.”¹⁵² And he has supported 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.”¹⁵³

Some tribunals have rejected *Salini*’s development prong. One held that contribution to development is “implicitly covered” by any investment, rendering a separate prong unnecessary.¹⁵⁴ Another rejected the contention that the ICSID Convention’s preamble requires a development prong, holding that “economic development. . . is an expected consequence, not a separate requirement, of the investment projects carried out by a number of investors in the aggregate.”¹⁵⁵

A third tribunal found it “impossible to ascertain” whether an investment contributes to development, “the more so as there are highly diverging views on what constitutes ‘development.’”¹⁵⁶ It proposed focusing on contribution to the economy, rather than to development, and adopting the rebuttable presumption that investments so contribute.¹⁵⁷ This approach is superior to *Salini*, helpfully moving from the vague and value-laden question of whether

151. *Id.* at 134.

152. *Id.*

153. *Id.*; accord *Casado v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, ¶ 234 (May 8, 2008) (“The acquisition and expansion of the daily *El Clarín*, whose circulation was . . . the country’s largest, undoubtedly contributed to economic, social and cultural development.”); see also *van Aaken & Lehmann*, *supra* note 120, at 3 (“[E]conomic growth alone is not enough. Rather, the economic, social, and environmental aspects of any action are interconnected and have to be viewed together.”).

154. *Fakes v. Republic of Turk.*, ICSID Case No. ARB/07/20, Award, ¶ 102 & n.65 (July 14, 2010) (quoting *Consorzio Groupement L.E.S.I.—DIPENTAS v. People’s Democratic Republic of Alg.*, ICSID Case No. ARB/03/08, Award, ¶ II.13(iv) (Jan. 10, 2005)).

155. *Id.* ¶ 111.

156. *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, ¶ 85 (Apr. 15, 2009). Brigitte Stern, the president of the *Phoenix Action* tribunal, later elaborated on this comment, asking rhetorically: “[I]s the creation of a big department store that lowers the prices for local consumers, but destroys the work of many small shops, an investment that fosters development?” Brigitte Stern, *The Contours of the Notion of Protected Investment*, 24 ICSID REV.—FOREIGN INV. L.J. 534, 543 (2009). Stern concluded that arbitrators are ill-equipped to answer such questions, which must instead be answered by states in formulating policies about the types of investments they wish to protect under BITs. *Id.* at 543–44.

157. *Phoenix Action*, ICSID Case No. ARB/06/5, Award, ¶¶ 85–86.

an investment aimed to “contribute to development” to the more readily ascertainable question of whether it aimed to “contribute to the economy.”¹⁵⁸ It would be better still, however, to eliminate the development prong than to recast it in a way that continues to limit member state autonomy with an even weaker textual basis, while collapsing the complexity of development into a single criterion.

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

A. *Surveying the Landscape of Microinvestment Disputes*

Salini's impact on two recent microinvestment disputes—*Mitchell v. Congo* and *Malaysian Historical Salvors v. Malaysia*—is detailed below.¹⁵⁹ First, however, this section will survey briefly the landscape of other (arguable) microinvestment disputes.¹⁶⁰

158. Compare the views of Devashish Krishan:

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, contributed 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.

Devashish Krishan, *A Notion of ICSID Investment*, 6 TRANSNAT'L DISP. MGMT., 2009, at 15–16. 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 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 Int'l Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Objection to Jurisdiction, ¶ 77 (Oct. 17, 2006). Apparently the tribunal deemed worthy any contribution to the tourism sector because of 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. The reason given thus amounts to no reason at all.

159. See *infra* Parts IV.B–C.

160. In this section, I rely mainly on Susan Franck's data set, cited (gratefully) with her permission. See *Generation 1 Dataset and Related Materials*, WASHINGTON & LEE UNIV. SCH. OF LAW, <http://law.wlu.edu/faculty/page.asp?pageid=1185> (last visited Sept. 28, 2012). Franck coded awards in investment treaty arbitrations for, inter alia, the amount claimed, which is quite helpful for a survey of this nature. Nevertheless, the data has several germane limitations: Franck did not code for the value of the investment or the nature or size of the claimant, factors irrelevant to her research; she focused on cases brought under investment treaties, not on investment claims pursuant to contracts or statutes; only forty-four of the eighty-two cases (54 percent) in Franck's

ICSID tribunals decided several microinvestment disputes before *Salini*. In these cases, the size of the investment did not figure prominently in the jurisdictional analysis.¹⁶¹ *Maffezini v. Kingdom of Spain* illustrates how adherence to a party-centric approach to Article 25 simplifies the jurisdictional analysis.¹⁶² In that case, Spain raised various jurisdictional objections. After noting that Maffezini's contributions to the Spanish company qualified as investments under the Argentina–Spain BIT, the tribunal commented simply, “These provisions complement and are consistent with the requirements of Article 25 of the Convention.”¹⁶³

Several microinvestment disputes have been brought to investor–state arbitration outside ICSID.¹⁶⁴ These cases are not subject to Article 25, but this solution to the *Salini* problem is imperfect at best and may vanish altogether.¹⁶⁵

data set “quantified an investor’s claimed damages either fully or partially”; and the data ends with awards published before June 1, 2006, quite long ago by ICSID standards. Franck, *supra* note 24, at 17, 57.

161. See *Gruslin v. Malaysia*, ICSID Case No. ARB/99/3, Award (Nov. 27, 2000), 5 ICSID Rep. 484, 489–90 (2002) (holding, in a dispute claiming about half the value of an investment of \$2.3 million, that jurisdiction was lacking because the claim fell outside the scope of Malaysia’s consent); *Tradex Hellas, S.A. v. Republic of Alb.*, ICSID Case No. ARB/94/2, Decision on Jurisdiction, ¶¶ 167, 178–80, 195 (Dec. 24, 1996), 5 ICSID Rep. 47 (2002) (holding, in a dispute arising from an investment valued at \$2.2 million, that consent was not expressed validly in a BIT that had not yet entered into force, but was found instead in Albania’s investment statute).

162. See *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, ¶¶ 65–70 (Jan. 25, 2000), 5 ICSID Rep. 296 (2002). Maffezini claimed that, after he contributed 35 million pesetas, another 30 million pesetas were taken from his account without authorization. He won the 30 million pesetas plus interest. *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, ¶¶ 39–43, 94–97 (Nov. 9, 2000), 5 ICSID Rep. 419 (2002). Maffezini’s contributions totaled about \$600,000 and his claim was worth about \$200,000 plus interest when filed in July 1997. See *Historical Exchange Rates*, OANDA—FOREX TRADING AND EXCHANGE RATES SERVS., <http://www.oanda.com/currency/historical-rates/> (last visited Oct. 9, 2012).

163. *Maffezini*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, ¶ 68. For other pre-*Salini* microinvestment disputes, see, e.g., *Olguín v. Republic of Para.*, ICSID Case No. ARB/98/5, Decision on Jurisdiction (Aug. 8, 2000), 6 ICSID Rep. 156 (2004) (involving a claim worth about \$562,397, plus an adjustment for currency devaluation); *Fedax N.V. v. Republic of Venez.*, ICSID Case No. ARB/96/3, Decision on Jurisdiction, ¶¶ 13, 25–36 (July 11, 1997) (involving promissory notes worth \$598,950 in dispute).

164. See *Bogdanov v. Moldova*, Award, ¶¶ 5.1(ii), 5.2 (Arb. Inst. of the Stockholm Chamber of Comm. 2005) (awarding 310,000 Moldovan lei, approximately \$24,603 per Franck’s calculations, in principal damages, representing about half the value of the “transferred assets” in dispute); *Link-Trading Joint Stock Co. v. Moldova*, Final Award, ¶ 9, (UNCITRAL 2002) (involving a claim worth about \$3,458,813.25 in Moldovan lei). ICSID was not available as a forum in these cases because Moldova did not become a member state until 2011. See INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, LIST OF CONTRACTING STATES AND OTHER SIGNATORIES OF THE CONVENTION, available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main>.

165. See *infra* note 252.

Last, in *Abaclat v. Argentina*, ICSID addressed a “mass claims” case that joined the claims of many microinvestors.¹⁶⁶ Argentine government bonds had been sold widely to retail customers in Italy, with the result that Argentina owed “\$13.5 billion owned by Italian [retail] bondholders (approximately 600,000 persons).”¹⁶⁷ After Argentina defaulted on its sovereign debt in 2001, more than 180,000 of these retail bondholders, including many individuals, joined together in a single ICSID case.¹⁶⁸ Most of the claimants qualified individually as microinvestors, as the total debt amounted to only about \$22,500 per bondholder. Yet, the claimants’ strategy of acting together in a mass claims proceeding plainly distinguishes *Abaclat* from a microinvestment dispute. Their strategy raises new questions about ICSID’s willingness and ability to decide mass claims. If successful in *Abaclat*, mass collaboration may help some future claimants manage certain difficulties that commonly trouble microinvestors (such as the cost of arbitration relative to the amount in dispute),¹⁶⁹ but mass claims will remain radically distinct from microinvestment disputes, and many microinvestors will continue to find themselves without the option of collaborating with masses of co-claimants.

B. Mitchell v. Democratic Republic of the Congo

Patrick Mitchell owned Mitchell & Associates, a small law firm in the Democratic Republic of the Congo (Congo). On March 5, 1999, Congolese authorities sealed the firm’s premises, seized documents and other items, and detained two attorneys. The premises remained sealed and the attorneys remained imprisoned for more than eight months.¹⁷⁰ With these actions, Congo effectively put Mitchell & Associates out of business.¹⁷¹

166. *Abaclat v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶¶ 294–98 (Aug. 4, 2011).

167. *Id.* ¶ 64.

168. *Id.* ¶¶ 1, 58. Withdrawals later reduced this number to sixty thousand claimants. *Id.* ¶¶ 294, 640.

169. See *infra* text accompanying notes 238–45.

170. *Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on Annulment, ¶ 1 (Nov. 1, 2006) (quoting *Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Award, ¶ 23 (Feb. 9, 2004)). The *Mitchell* award has not been made public, so all references to it here rely on quotations found in the annulment decision.

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.” LUKE ERIC PETERSON, RESEARCH NOTE: EMERGING BILATERAL INVESTMENT TREATY ARBITRATION

Mitchell, a U.S. citizen, brought an ICSID claim under the 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. It awarded him \$750,000 plus interest. The tribunal also ordered Congo to pay \$95,000 as a contribution to Mitchell’s share of the tribunal’s fees and costs.¹⁷²

Congo had objected to the tribunal’s jurisdiction, arguing, *inter alia*, 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.¹⁷³ 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.¹⁷⁴

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.¹⁷⁵ The tribunal thus laid emphasis on the bits and pieces of Mitchell & Associates without adequate attention to the whole as a going concern. The fault is shared with the BIT itself: its definition of *investment* omits an express reference to any “enterprise,” and although the tribunal could have construed the definition’s broad, exemplary language to include

AND SUSTAINABLE DEVELOPMENT (2003), available at http://www.iisd.org/pdf/2003/investment_investsd_note_2003.pdf; Luke Eric Peterson, *ICSID Award Against Democratic Republic of Congo Annulled*, INVESTMENT TREATY NEWS, Nov. 24, 2006, available at http://www.iisd.org/pdf/2006/itn_nov24_2006.pdf.

171. See *Mitchell*, ICSID Case No. ARB/99/7, Decision on Annulment, ¶ 24 (quoting *Mitchell*, ICSID Case No. ARB/99/7, Award, ¶ 55).

172. *Id.* ¶ 5.

173. *Id.* ¶ 24 (quoting *Mitchell*, ICSID Case No. ARB/99/7, Award, ¶ 47).

174. *Id.* ¶ 24 (quoting *Mitchell*, ICSID Case No. ARB/99/7, Award, ¶ 55). The tribunal’s jurisdictional analysis drew a dissent from one arbitrator. See *Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Stay of Enforcement of the Award, ¶¶ 12, 26 (Nov. 30, 2004), 20 ICSID Rev.—FOREIGN INV. L.J. 587 (2005) (discussing the relevance of the dissent to Congo’s request for a stay of enforcement pending the decision on annulment).

175. *Mitchell*, ICSID Case No. ARB/99/7, Decision on Annulment, ¶ 24 (quoting *Mitchell*, ICSID Case No. ARB/99/7, Award, ¶ 48).

an enterprise,¹⁷⁶ the United States has achieved greater clarity in later treaties.¹⁷⁷

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."¹⁷⁸ 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. . . ."¹⁷⁹

Congo requested that an ad hoc committee annul the tribunal award, contending that the tribunal manifestly exceeded its powers and failed to provide reasons for its decision. Congo argued, *inter alia*, 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 \$100,000 as a contribution to Congo's share of the committee's fees and costs.¹⁸⁰

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."¹⁸¹ 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."¹⁸² It held that Article 25 limits jurisdiction to investments with four interdependent characteristics, including "contribution to the economic development of the host country."¹⁸³ It regarded the development prong as

176. See Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Dem. Rep. Congo, art. I(c), Aug. 3, 1984, available at http://unctad.org/sections/dite/ia/docs/bits/us_demo_rep_congo.pdf [hereinafter, U.S.-Congo BIT] (defining *investment*).

177. See, e.g., Free Trade Agreement, U.S.-S. Kor., art. 11.28, June 30, 2007, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text> (defining *investment* to include "an enterprise" and "shares, stock, and other forms of equity participation in an enterprise"). 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.

178. *Mitchell*, ICSID Case No. ARB/99/7, Decision on Annulment, ¶ 23.

179. *Id.* ¶ 24 (quoting *Mitchell*, ICSID Case No. ARB/99/7, Award, ¶ 56).

180. *Id.* ¶ 67.

181. *Id.* ¶ 31.

182. *Id.* ¶ 32.

183. *Id.* ¶ 27.

“fundamental,” “essential,” and “unquestionable”—deeming it “doubtless covered” implicitly by ICSID decisions where it “had not been mentioned expressly.”¹⁸⁴

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.”¹⁸⁵ Nevertheless, the committee was unable to accept that Mitchell’s small law firm made the kind of contribution to development it deemed necessary. 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,”¹⁸⁶ noting this was the first ICSID case about a law firm.¹⁸⁷ It considered irrelevant the “minimal” funds contributed by Mitchell to start and operate his firm.¹⁸⁸ Thus, while the committee disclaimed any desire to discriminate against “smaller” investments, its whole analysis began 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 analysis, deciding these only mattered if “the services of the ‘Mitchell & Associates’ firm . . . constitute [an] investment within the meaning of the Convention and the [BIT].”¹⁸⁹ The committee thus considered that the firm’s services had to make a contribution to development.¹⁹⁰ The committee added that this requirement could only be satisfied if the firm “had concretely assisted [Congo], for example by providing it with legal services in a regular manner or by specifically bringing investors.”¹⁹¹

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 . . .

184. *Id.* ¶¶ 30, 33.

185. *Id.* ¶ 33.

186. *Id.* ¶¶ 34, 39 (quoting Broches).

187. *Id.* ¶ 34. This argument is specious: ICSID cannot be expected to have addressed every single industry, and for each industry that ICSID has addressed, one case was the first to do so.

188. *Id.* ¶ 38.

189. *Id.* (emphasis added).

190. *Id.* ¶ 39.

191. *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.*

law firm established in a foreign country.”¹⁹² 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 an indefinite duration and bear risk in the expectation of profit. They also hire and train employees, buy goods and services, pay taxes and fees, and otherwise generate economic activity. What they lack is physicality: the physical footprint is small, the equipment needed is small, bricks and mortar are largely absent. Most of the value of a law firm is invisible, lying in know-how and goodwill. This invisibility probably explains why the committee deemed that Mitchell’s law firm was not “readily recognizable” as an investment. An investment in a small law firm, to be sure, does not look like an investment in a factory or power plant, but it is still an investment. The committee seems to have been deceived by appearances.

Size also played an explicit role in the committee’s reasoning, as when it dismissed Mitchell’s financial contribution as “minimal.” This was a mistake. The committee should have recognized that law is not a capital-intensive industry. Small law firms may be started by “hanging a shingle” on leased office space with some furniture and basic office equipment. Even large law firms do not require overmuch capital, especially when compared with services such as telecommunications and transportation. This makes law firms small investments, but still investments. While the committee worried about drawing lines to avoid a rule allowing all law firms access to ICSID, it neglected to consider the costs of a rule excluding many law firms—and, apparently, also many accountants, architects, consultants, doctors, engineers, and other knowledge-intensive professional services. The committee’s line-drawing led it to examine the recipients of the services provided by Mitchell & Associates. The committee should not have embarked on this path: a law firm’s status as an investment 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. Nor should the committee have assumed that providing services to a government necessarily makes a greater contribution than does providing services to private persons. In the end, it is difficult to conceive that a larger investment—whether more physically visible or more capitally intense, which often go together, of course—would be subjected to the same misguided analysis about the nature of its customers.

The committee’s analysis, moreover, discounted the value of legal know-how, disregarded the contributions that law firms make to economic growth (by, for example, drafting contracts and obtaining

192. *Id.* ¶ 40.

permits),¹⁹³ and ignored the possibility that law firms contribute to the development of the rule of law, which both contributes to economic growth¹⁹⁴ and ought to count inherently as a contribution to development properly understood.¹⁹⁵ 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.¹⁹⁶ Due to its cramped view of what contributes to development, the committee missed an opportunity to hold Congo accountable to the values of the international community.

C. Malaysian Historical Salvors v. Malaysia

In 1991, the government of Malaysia contracted with a marine salvage company, Malaysian Historical Salvors (Salvors), to find and salvage the cargo of a British ship that sank in the Strait of Malacca in 1817.¹⁹⁷ The contract (as described by the tribunal, a sole arbitrator) required Salvors "to utilize its expertise, labour and equipment to carry out the salvage operation, and to invest and expend its own financial and other resources, and assume all risks of the salvage operation."¹⁹⁸ Salvors "finance[d] the salvage operation in its entirety."¹⁹⁹ Salvors acted on a "no finds-no pay" basis, under which it bore "all the costs" and "attendant risks" of the operation. It would "recover its expenditure and make a profit only if" it successfully salvaged and auctioned the ship's cargo.²⁰⁰

Salvors worked on this project for "almost four years," recovering 24,000 items.²⁰¹ Malaysia placed in its national museum some of the

193. See Peter Egger & Hannes Winner, *Does Contract Risk Impede Foreign Direct Investment?*, 139 SWISS J. ECON. & STAT. 155, 156, 164 (2003) (arguing that the viability of contracts correlates with FDI inflows, even when accounting for other measures of the quality of legal institutions).

194. See, e.g., DAM, *supra* note 130, at 93–94 (discussing studies on the correlation between confidence in the judiciary and economic growth).

195. Contributing to the rule of law fits comfortably within Schreuer's conception of *development*, which encompasses "development of human potential" and "political and social development." SCHREUER, *supra* note 23, at 134.

196. See Peterson, *supra* note 170.

197. Malaysian Historical Salvors, Sdn., Bhd. v. Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶ 7 (May 17, 2007).

198. *Id.* ¶ 8.

199. *Id.* ¶ 9.

200. *Id.* ¶ 10.

201. *Id.* ¶ 13.

salvaged goods.²⁰² The rest were auctioned in 1995, earning almost \$3 million. The contract provided for Malaysia to pay Salvors 70 percent of both the auction proceeds and “the best attainable value” for the items Malaysia kept, which Salvors valued at over \$400,000.²⁰³ Salvors claimed that Malaysia paid it only \$1.2 million, leaving about \$1.2 million more in controversy.²⁰⁴

In 2004, after some proceedings in other fora, Salvors filed an ICSID case under the Malaysia–UK BIT.²⁰⁵ Malaysia objected to jurisdiction on several grounds. The sheer number of jurisdictional papers in this small case, filed over the course of fifteen months, is striking: correspondence, memorials, post-hearing submissions, two rounds of additional comments, and still more “gratuitous submissions.”²⁰⁶ Salvors litigated at ICSID for nearly five years—from filing its initial claim in May 2004 through an annulment decision in April 2009—solely on jurisdiction.

Malaysia objected, inter alia, that the contract in dispute was merely a “service contract,” not an “investment contract.”²⁰⁷ Although its first memorial on jurisdiction did not mention *Salini*, or otherwise argue that Salvors failed to contribute to development, this came to be the decisive issue in the case.²⁰⁸ And Salvors’s small size figured prominently in the analysis.

The tribunal identified “seven decided cases of importance” on the definition of *investment* in Article 25, in a line from *Salini* as “the starting point” to *Mitchell*.²⁰⁹ Before discussing these cases, it first

202. Malaysian Historical Salvors Sdn., Bhd. v. Malaysia, ICSID Case No. ARB/05/10, Decision on Annulment, ¶¶ 4–5 (Apr. 16, 2009).

203. *Salvors*, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶¶ 11–14.

204. *Id.* ¶ 13–14.

205. *Id.* ¶¶ 15–18. Salvors was incorporated in Malaysia. *Id.* ¶ 2. Oddly, the tribunal never explained the basis of Salvors’s claim to British nationality under the BIT. The claim was presumably based on British ownership, something Malaysia contended arose too late for jurisdictional purposes under the BIT, an issue the tribunal did not decide. *Id.* ¶¶ 41.1, 148–49; Malaysian Historical Salvors, Sdn., Bhd. v. Malaysia, ICSID Case No. ARB/05/10, Respondent’s Memorial on Objections to Jurisdiction, ¶¶ 87–88, 107 (Mar. 11, 2006) (discussing the various intergovernmental agreements that may have applied to the claimant). In a wonderful example of transparency, the parties consented to ICSID publishing their jurisdictional arguments. See *Case Details: Pleadings*, INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ViewPleadings> (last visited Oct. 9, 2012).

206. See *Salvors*, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶¶ 29–37, 50–52 (May 17, 2007) (detailing the filings made). All this does not even include the claimant’s preregistration correspondence with ICSID, the jurisdictional hearing in Frankfurt, and the entire annulment proceeding.

207. *Salvors*, ICSID Case No. ARB/05/10, Respondent’s Memorial on Objections to Jurisdiction, ¶ 108(c); accord *Salvors*, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶ 41.3.

208. *Salvors*, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶¶ 47, 66–68.

209. *Id.* ¶¶ 56, 74.

explained why it found certain other cases “not . . . of significant assistance . . . in the present circumstances.”²¹⁰ Tellingly, the tribunal distinguished one case that had held that a capital contribution is an investment on the ground that the contribution in that case involved “substantial amounts” of capital, when “the Tribunal is not satisfied that the amount invested by [Salvors] could be described as ‘substantial amounts.’”²¹¹

The tribunal reviewed the “seven decided cases of importance,” “discern[ing] a broad trend which emerges from ICSID jurisprudence on the ‘investment’ requirement.”²¹² In short, the tribunal applied the four *Salini* criteria.²¹³ Here again, size drove the analysis.

First, although Malaysia conceded that Salvors “made contributions in money, in kind and in industry,” the tribunal nevertheless deemed it noteworthy that “the size of the contributions were in no way comparable to those found in *Salini*” and other cases.²¹⁴ It repeatedly noted that Salvors’s contribution was smaller than the bank guarantee found not to be an investment in *Joy Mining v. Egypt*.²¹⁵

Second, concern for size manifested itself again in the tribunal’s analysis of the development prong, which had “considerable, even decisive, importance.”²¹⁶ The tribunal held that a contribution to development does not suffice unless the contribution is “significant.”²¹⁷ “[T]he requirement of significance” is needed, the tribunal warned, lest any contribution, “however small,” qualify.²¹⁸ Following *Mitchell*, the tribunal commented that the salvage contract “is not a ‘readily recognizable’ ‘investment.’”²¹⁹ It accepted that

210. *Id.* ¶ 57.

211. *Id.* ¶ 63 (distinguishing *Alcoa Minerals of Jamaica, Inc. v. Jamaica*, ICSID Case No. ARB/74/2).

212. *Id.* ¶¶ 56, 104.

213. Preferring a “Newtonian rather than a Cartesian approach (i.e. moving from the particular to the general rather than *vice versa*),” *id.* ¶ 106, the tribunal never quite articulated a clear test and reserved some flexibility in application, *id.* ¶ 106(e), but its analysis tracked the four prongs of *Salini*, *id.* ¶¶ 107–46. The tribunal considered a possible fifth prong accepted by some post-*Salini* tribunals (regularity of profits), but concluded it was not apt in the particular circumstances of this case. *Id.* ¶ 108.

214. *Id.* ¶ 109.

215. *Id.* ¶¶ 109, 123, 134 n.19, 143 n.21.

216. *Id.* ¶ 123; *see also id.* ¶¶ 112, 130 (explaining the importance of contribution to development for its analysis).

217. *Id.* ¶ 123.

218. *Id.*

219. *Id.* ¶¶ 126–30. The tribunal also followed *Mitchell* in deeming meaningful the fact that Salvors was the first claimant in the marine salvage industry. *Id.*; *see supra* note 187 (discussing *Mitchell*’s point about the claimant being the first in its industry).

Salvors provided “gainful employment” to Malaysians, “cultural and historical benefits” for Malaysia, and “direct financial benefits” to the treasury through the auction proceeds—but it found these benefits were not “material,” were not of sufficient “quality or quantity,” and were ordinary benefits of a kind resulting from “any normal service contract.”²²⁰ In the end, the tribunal appears to have concluded that a “significant contribution” is only made where the investor produced a “lasting” economic benefit for the host state, typically in the form of “infrastructure.”²²¹

Finally, the tribunal exported its development conclusion into its analysis of the duration of Salvors’s activities in Malaysia. It noted that *Salini* had discussed a minimum time of two to five years, which Salvors’s four-year effort satisfied “in a quantitative sense,” but only because of the “fortuity” that Salvors was unable to find and salvage the wreck in eighteen months as originally contemplated.²²² Then, it held that duration also has a “qualitative sense,” which is tied to contribution to development, so a claimant failing the development prong fails the duration prong as well.²²³

Despite all this emphasis on size, the tribunal disclaimed that size was determinative: “It should not be thought that investments of relatively small cash sums can never amount to an ‘investment.’”²²⁴ However, the next sentence suggested that all this means is that some large investments take forms other than cash (e.g., intellectual property).²²⁵ It is difficult to conceive of any small investment capable of satisfying the tribunal’s test of a lasting, significant contribution to infrastructure.

The tribunal accordingly dismissed the case for lack of jurisdiction. This decision rested solely on the meaning of *investment* in Article 25, as the tribunal declined to decide any other issue, including whether Salvors had made an investment under the definition in the BIT.²²⁶

Salvors requested annulment of the award. It won. The ad hoc committee, split two to one, annulled the award on the ground that the tribunal had manifestly exceeded its powers by failing to exercise its properly invoked jurisdiction.²²⁷ The committee faulted the

220. *Salvors*, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶¶ 131–32, 144.

221. *See id.* ¶¶ 143–44 (“The benefit [of Salvors’s project] was not lasting, in the sense envisaged in the public infrastructure or banking infrastructure projects.”).

222. *Id.* ¶ 110.

223. *Id.* ¶¶ 110–11.

224. *Id.* ¶ 139.

225. *Id.*

226. *Id.* ¶¶ 146–49.

227. *Malaysian Historical Salvors Sdn., Bhd. v. Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶ 80 (Apr. 16, 2009).

tribunal for “exclud[ing] small contributions” from ICSID’s ambit and adopting a construction at odds with “the decision of the drafters of the ICSID Convention to reject a monetary floor in the amount of an investment.”²²⁸ Evidencing its commitment to ICSID access for small claims, the committee ordered Malaysia to bear the full costs of the annulment procedure (but not Salvors’s attorney fees), declaring:

[I]t was not the intent of the drafters of the ICSID Convention to exclude claimants advancing claims of minor financial dimension. If such claimants are left to pay not only the costs of their legal representation but half of the ICSID costs as well, the practical result could be to discourage if not debar small claims.²²⁹

A few words of elaboration about the committee’s analysis are needed. The committee considered that the ordinary meaning of *investment* is “the commitment of money or other assets for the purpose of providing a return” and found no reason to deviate from that meaning in Article 25.²³⁰ The committee emphasized the definition in the BIT, apparently accepting the view that member states have unbridled freedom to define *investment* as they wish when consenting to ICSID jurisdiction.²³¹ Given the importance of the

228. *Id.* ¶ 80(b)–(c).

229. *Id.* ¶ 82.

230. *Id.* ¶ 57. Among the reasons I believe that member-state discretion must be bounded by good faith is the statement in the Executive Directors’ Report that jurisdiction is limited by the “nature of the dispute.” See *Executive Directors’ Report*, *supra* note 34, ¶ 25. The committee appears to have conceded that this language places one restriction on member-state discretion: “‘investment’ does not mean ‘sale.’” *Salvors*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶ 72.

231. The committee argued:

It cannot be accepted that the Governments of Malaysia and the United Kingdom concluded a treaty providing for arbitration of disputes arising under it in respect of investments so comprehensively described, with the intention that the only arbitral recourse provided . . . could be rendered nugatory by a restrictive definition of a deliberately undefined term of the ICSID Convention

. . . .

. . . [T]reaties . . . today are the engine of ICSID’s effective jurisdiction. To ignore or depreciate the importance of the jurisdiction they bestow upon ICSID, and rather to embroider upon questionable interpretations of the term “investment” as found in Article 25(1) of the Convention, risks crippling the institution.

Salvors, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶ 62, ¶ 73. The interpretative significance given here to the wave of investment treaties may be seen as a procedural extension of the views of the committee’s president, Judge Schwebel, about the import of those treaties in generating substantive customary law on the treatment of investments. See Stephen M. Schwebel, *The Influence of Bilateral Investment Treaties on Customary International Law*, 98 PROC. AM. SOC’Y INT’L L. 27 (2004) (arguing that BITs have reshaped custom on protection of foreign investment).

BIT to the committee's analysis, it found that the tribunal had committed a "gross error" by failing to consider and apply the BIT's definition of *investment*.²³² Finally, where the tribunal (like in *Mitchell* Annulment) seems to have been driven by a quest for line-drawing to limit access to ICSID, the committee tilted the other way: it favored access to ICSID for all investments, however defined in the BIT, regardless of size, and particularly where ICSID is the only forum specified in the BIT.²³³

The dissent made an impassioned case for requiring a contribution to development as a jurisdictional condition. In the dissent's view, this requirement is what "separate[s] an ICSID investment from any other kind of investment" and "ICSID arbitration . . . from any other kind of arbitration."²³⁴ The dissent further insisted that the contribution to development must be significant, contending that in the absence of an express textual command to include "minor but negligible matters" within the scope of *investment*, basic principles of international law mandate the requirement of significance.²³⁵ Without this requirement, the dissent warned, ICSID would protect even "an entity which is systematically earning its wealth at the expense of the development of the host State."²³⁶ Accordingly, the dissent proclaimed, "ICSID would seem to have lost its way: it is time to call back the organization to its original mission."²³⁷

V. A MICROINVESTMENT CRITIQUE

As illustrated by the opinions in *Mitchell* Annulment and *Salvors* Award, one risk posed by *Salini*'s contribution-to-development test—

232. *Salvors*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶ 74.

233. See, e.g., *id.* ¶¶ 62, 82 (expressing concern for assuring "international recourse" for small investors and reducing *Salvors*'s share of the costs to facilitate such recourse).

234. Malaysian Historical *Salvors*, Sdn., Bhd. v. Malaysia, ICSID Case No. ARB/05/10, Dissenting Opinion of Judge Mohamed Shahabuddeen, ¶ 30 (Feb. 19, 2009). The dissent used the phrase "an ICSID investment" twenty-eight times, *id. passim*, apparently to emphasize the point that *investment* in Article 25 can and does mean something narrower than the ordinary meaning of the word in other contexts. See, e.g., *id.* ¶ 32 ("[A]n ICSID investment [i]s a special kind of investment."). The dissent appears to have contrasted "an ICSID investment" with "purely commercial enterprises," contending that the former "might indeed be made in favour of private entities but not for their own enrichment exclusively . . ." *Id.* ¶¶ 17, 22.

235. See *id.* ¶¶ 34–36 (mentioning *de minimis*, good faith, *ex re sed non ex nomine*, proportionality, and abuse of rights).

236. *Id.* ¶ 22.

237. *Id.*

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 v. Republic of Turkey* 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”²³⁸

In a worst-case scenario, a ruling that a microinvestment is not an investment under Article 25 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,²³⁹ as do a number of other BITs.²⁴⁰

238. *Fakes v. Republic of Turk.*, ICSID Case No. ARB/07/20, Award, ¶ 112 n.73 (July 14, 2010).

239. See Agreement for the Promotion and Protection of Investments, Malay.-U.K., art. 7, May 21, 1981, U.K.T.S. NO. 16 (1989).

By contrast, the BIT at issue in *Mitchell* afforded an alternative known as the ICSID Additional Facility. See U.S.–Congo BIT, *supra* note 176, art. VII(2)(b). The Additional Facility may decide “legal disputes which are not within the jurisdiction of the Centre because they do not arise directly out of an investment.” INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, ADDITIONAL FACILITY RULES, art. 2(b) (2006), available at https://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf. 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 Convention” apply, including the Convention’s special provisions on enforceability of awards. *Id.* art. 3; see also SCHREUER, *supra* note 23, at 27, 141–43, 1120–23 (discussing the Additional Facility); sources cited *supra* note 40 (discussing enforcement).

Where no international forum is available, domestic court litigation may be an option, but courts may not enforce treaty rights, 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, may otherwise defer to domestic actions, and may even themselves deny justice to foreign litigants. See generally LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 141–48, 198–211 (Oxford Univ. Press, 2d ed. 1996) (1990) (discussing various limitations on the enforcement of treaties by U.S. courts); JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW (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.

240. Although I am not aware of any statistics on point, the following examples suffice to show that the Malaysia–UK BIT is not alone among BITs in designating ICSID as the sole forum for dispute settlement: Albania–UK, Gambia–Netherlands, Germany–Swaziland, Guyana–UK, Netherlands–Yemen, and U.S.–Morocco. Agreement on Encouragement and Reciprocal Protection of Investments, Gam.-Neth., art. 9, Sept. 25, 2002, 67 (2002) NR. 1; Agreement for the Promotion and Protection of Investments, Alb.-U.K., art. 8, Mar. 30, 1994, U.K.T.S. NO. 17 (1996); Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Ger.-Swaz., art. 11(2), Apr. 5, 1990, BGBL. II at 957; Agreement for the Promotion and Protection

Even with the annulment in *Salvors*, it should be seen that the development prong imposed costs, risks, and delay on the claimant. These burdens are much plainer, of course, in *Mitchell*, where the ad hoc committee annulled the claimant's award and went so far as to order him to pay Congo \$100,000.²⁴¹ Burdens like this may dissuade microinvestors from filing meritorious claims²⁴² because they are inherently challenged to afford investment arbitration, and each incremental cost further tilts the field against them.²⁴³ These

of Investments, Guy.-U.K., art. 8(1), Oct. 27, 1989, U.K.T.S. No. 47 (1990); Treaty Concerning the Encouragement and Reciprocal Protection of Investments, U.S.-Morocco, art. VI(3), July 22, 1985, 1985 U.S.T. 222; Agreement on Encouragement and Reciprocal Protection of Investments, Neth.-Yemen, art. 9, Mar. 18, 1985, 9 (1985) NR. 1. Likewise, in *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pak.*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, ¶ 151 (Aug. 6, 2003), 18 ICSID Rev. 307, the tribunal noted, "It is important in this connection to observe that Article 9(2) of the [Swiss-Pakistan] BIT provides only one recourse to an investor, that is, recourse to a tribunal constituted under the ICSID Convention." In the 1990s, the French Model BIT (Article 8) provided for ICSID only; the British and German Model BITs (Articles 8 and 11, respectively) preferred ICSID only, while including alternative language that allowed investors other choices as well; and the Chilean and Portuguese Model BITs (Articles 8 and 9, respectively) provided for only ICSID or local courts. See U.N. CONFERENCE ON TRADE AND DEV., *BILATERAL INVESTMENT TREATIES IN THE MID-1990S*, Annex II (1998) (collecting Model BITs). The newer BITs I have seen tend to provide arbitral options other than ICSID, but this does not change the fact that the ICSID-only BITs remain in effect (and are likely to do so for the foreseeable future).

241. *Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on Annulment, ¶ 67 (Nov. 1, 2006).

242. Even in a NAFTA case where a majority of the tribunal ordered the unsuccessful claimant to pay 75 percent of both tribunal costs and Mexico's attorney fees, the tribunal acknowledged that its "loser pays" approach ought not apply "in the case of an investor with limited financial resources where considerations of access to justice may play a role." *Int'l Thunderbird Gaming Corp. v. United Mexican States*, Arbitral Award, ¶¶ 214, 220-21 (UNCITRAL 2006). Thomas Wälde dissented from the order of costs, stressing that it "makes recourse to independent justice for smaller companies prohibitive." *Int'l Thunderbird Gaming Corp. v. United Mexican States*, Separate Opinion of Thomas Wälde, ¶ 142 (UNCITRAL 2005). Compare, in the different context of the "American rule" disfavoring the shifting of attorney fees in U.S. civil litigation, *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967) ("[S]ince litigation is at best uncertain, one should not be penalized for merely defending or prosecuting a lawsuit, and . . . the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel.").

In this regard, Stephan Schill has argued that tribunals in investment arbitration generally should (and generally do) engage in one-way cost-shifting in favor of successful claimants, but not against unsuccessful claimants, in order to adequately incentivize the prosecution of claims. Stephan W. Schill, *Arbitration Risk and Effective Compliance*, 7 J. WORLD INVESTMENT & TRADE 653, 655 (2006). Microinvestors present a compelling instance for Schill's thesis: having lost their business, they are especially vulnerable to the additional risk of adverse cost-shifting and they may need the prospect of favorable cost-shifting to afford to pursue a winning claim.

243. Susan Franck has mined her data set for information about the costs of arbitral tribunals and attorney fees in investment treaty arbitration. See Franck, *supra* note 24, at 69 (considering a total of 102 awards). She found eleven awards where

burdens also pressure microinvestors to settle on unfavorable terms.²⁴⁴ 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,²⁴⁵ given the conclusory assertions and weak analyses often found in such cases.²⁴⁶

tribunals quantified cost-shifting of attorney fees, with an average of \$655,407 shifted. *Id.* She also found seventeen awards quantifying tribunal costs, with an average of \$581,333. *Id.* These prices are obviously problematic for microinvestment disputes.

In another article, Franck surveyed the literature about the cost 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 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. Others have made similar observations:

There is growing—albeit largely anecdotal—evidence that . . . the high costs 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-arbitration.

Lee M. Caplan, *Making Investor-State Arbitration More Accessible to Small and Medium-Sized Enterprises*, in THE FUTURE OF INVESTMENT ARBITRATION 297, 298, 304 (Catherine A. Rogers & Roger P. Alford eds., 2009); see also Jack J. Coe, Jr., *Toward a Complementary Use of Conciliation in Investor-State Disputes—A Preliminary Sketch*, 12 U.C. DAVIS J. INT’L L. & POL’Y 7, 8–12 (2005) (discussing remarks by the CEO of Metalclad about the difficulties and expense of investment arbitration, including \$4 million in fees, notwithstanding that Metalclad won an award of almost \$17 million); Loukas Mistelis, *International Arbitration—Corporate Attitudes and Practices—12 Perceptions Tested: Myths, Data and Analysis Research Report*, 15 AM. REV. INT’L ARB. 525, 584 (2004) (concluding “international [commercial] arbitration is at least as expensive as litigation for middle and smaller sized cases”).

244. Franck revealed that settlement rates are quite low (7 percent) in her data set. Franck, *supra* note 24, 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.

245. Cf. *Malaysian Historical Salvors, Sdn., Bhd. v. Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶¶ 119–21 (May 17, 2007) (noting that, “[i]n this Tribunal’s view, the main reason why the PSEG tribunal did not discuss the *Salini*

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,²⁴⁷ these arrangements may be inhibited by the increased risk of jurisdictional defeat²⁴⁸ and the greater costs that must be incurred to minimize that risk.²⁴⁹ This concern ought not be overstated, however, as microinvestor claimants inherently face significant obstacles to obtaining financial support because their expected recovery is limited.²⁵⁰

criteria was because the investment in question was a ‘readily recognizable investment,’” where claimant had an \$800 million contract to build a power plant).

246. See, e.g., *supra* text accompanying note 158 (discussing *Helnan*).

247. For claims by knowledgeable insiders about this trend, see, for example, Mark Kantor, *Third-Party Funding in International Arbitration: An Essay About New Developments*, 24 ICSID REV. 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 *S&T Oil Equip. & Mach., Ltd. v. Juridica Inv. Ltd.*, 456 F. App’x 481, 482–83 (5th Cir. 2012) (affirming lower court’s refusal 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); *RSM Prod. Corp. v. Grenada*, ICSID Case No. ARB/05/14, Order Discontinuing the Proceeding and Decision on Costs, ¶¶ 68–69 (Apr. 28, 2011) (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); ICSID LAWYERS, www.icsidlawyers.com (last visited Sept. 28, 2012) (“If we determine your [investment arbitration] claim is meritorious, various legal fee payment types are possible, including contingency fee agreement (where we find funding on your behalf to advance your claim).”).

248. 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. Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 66–68 (2010).

249. Continuing with the analogy to U.S. pleadings standards, one survey of approximately two hundred employment lawyers who had filed a federal complaint since the standards began to change in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), found that 94 percent alleged more facts in their complaints and 75 percent had to respond to motions to dismiss more often. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 5, 11–12 (2010), available at [www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/\\$file/costciv2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/$file/costciv2.pdf).

250. One third-party funder, which is known to have funded at least one ICSID case, announced that it “focuses exclusively on [cases] where the amount in dispute exceeds US\$25,000,000.” *About Juridica: Investment Policy*, JURIDICA INV. LTD., <http://www.juridicainvestments.com/about-juridica/investment-policy.aspx> (last visited Sept. 28, 2012). 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*, KLUWER ARBITRATION BLOG (Dec. 2, 2010), <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

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 awards²⁵¹— and a recent case outside ICSID suggests the possibility that a *Salini*-like analysis may close access to other tribunals as well.²⁵² Moreover,

US\$1 million on due diligence, covering both legal and quantum issues.”). Likewise, a survey of U.S. civil litigators found that “[a]lmost 90% of plaintiffs’ lawyers” in the survey, 74 percent 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 percent), who almost never use contingency fees as their usual arrangement (0.1 percent). ABA SECTION OF LITIG., MEMBER SURVEY ON CIVIL PRACTICE: FULL REPORT 172–76 (2009), available at <http://www.abanet.org/litigation/survey/1209-report.html>.

251. See *supra* text accompanying note 40 (comparing enforceability provisions of the New York and ICSID Conventions). It is possible that the greater automaticity of ICSID awards, which a textual comparison of the two Conventions suggests, may prove less meaningful in actual practice. See Edward Baldwin et al., *Limits to Enforcement of ICSID Awards*, 23 J. INT’L ARB. 1 (2006) (arguing that enforcement of ICSID awards is less automatic than often believed); Gaëtan Verhoosel, *Annulment and Enforcement Review of Treaty Awards: To ICSID or Not To ICSID*, 23 ICSID REV. 119, 146–47 (2008) (concluding that enforcement of ICSID awards is “undeniably pretty good,” while enforcement of non-ICSID awards is “not so bad at all”). In my view, it is too soon to reach an empirical conclusion on the comparative enforceability of investment arbitration awards, especially as enforceability is presently confronting its greatest test yet. See, e.g., *Argentina v. BG Group PLC*, 665 F.3d 1363, 1373 (D.C. Cir. 2012) (vacating a non-ICSID award because claimant had not litigated in Argentine courts for eighteen months before commencing arbitration, as specified in the Argentina–UK BIT); Proclamation No. 8788, 77 Fed. Reg. 18,899, ¶ 2 (Mar. 26, 2012) (imposing trade sanctions because Argentina “has not acted in good faith in enforcing [ICSID] arbitral awards in favor of United States citizens”).

252. Romak, a Swiss company, brought a BIT claim against Uzbekistan seeking payment of a commercial arbitral award arising out of an unpaid sale of wheat. *Romak S.A. v. Republic of Uzb.*, Case No. AA280, Award, ¶¶ 7, 13 (Perm. Ct. Arb. 2009). Uzbekistan objected to the tribunal’s jurisdiction, arguing that Romak had not made an investment in Uzbekistan. *Id.* ¶ 97. The BIT defined *investments* to “include every kind of assets,” followed by an exemplary list that included “claims to money.” *Id.* Romak advocated a literal construction of this definition, arguing that its rights to payment under the wheat contract and the arbitral award qualified as investments under the BIT. *Id.* ¶ 101. The tribunal rejected this argument, reasoning that the BIT allowed investors to choose ICSID, that the language granting that choice would be rendered useless if *investment* in the BIT were given a wider scope than ICSID permits, and that *investment* in the BIT should be given the same construction, regardless whether claimant chose ICSID or UNCITRAL arbitration. *Id.* ¶¶ 192–95. After discussing *Salini* and its progeny, *id.* ¶¶ 196–205, the tribunal decided that the word *investments* in the BIT has “an inherent meaning” or “plain meaning” that corresponds with the first three prongs of *Salini*. *Id.* ¶¶ 207–08. The tribunal was “further comforted . . . by the reasoning adopted by other arbitral tribunals,” including *Salini*. *Id.* ¶ 207. The tribunal then applied its three-part definition of *investments*, concluding that Romak did not satisfy any of the three parts. *Id.* ¶¶ 209–43. The

from a public perspective, proceedings before alternative tribunals are generally less transparent than ICSID and less open to public participation as amici.²⁵³

Inhibiting microinvestors' access to ICSID is particularly unfortunate because they may have the most need for treaty-based protection.²⁵⁴ While large businesses sometimes enjoy sufficient leverage to secure contractual commitments to international arbitration,²⁵⁵ small businesses are typically less able to protect themselves politically in the host state or to secure diplomatic protection from their home state.²⁵⁶ And small businesses are more affected by weaknesses in legal systems,²⁵⁷ especially in countries

tribunal did not address *Salini's* development prong, although the parties had disputed whether Romak satisfied it. *Id.* ¶¶ 105(iv), 108(iv). Although I agree with the tribunal's implicit position that a contribution to development is not part of the "inherent meaning" of *investment*, the tribunal thereby left a gap between its approach and that of *Salini*, thus undercutting its position that *investment* should be given the same construction regardless of forum. See *supra* text accompanying notes 145–48 (arguing that *Salini's* development prong is not consistent with the ordinary meaning of *investment*). Sornarajah apparently would close that gap by reading an "inherent limitation" into all BITs, "confin[ing]" their protection to "investments that promote economic development." SORNARAJAH, *supra* note 104, at 314.

253. See ICSID R. P. FOR ARB. PROCEEDINGS 32(2), 37(2), 48(4) (addressing public access to hearings, amicus briefs, and publication of summaries of awards); SCHREUER, *supra* note 23, at 697–707 (discussing confidentiality and transparency). NAFTA cases outside ICSID have been a notable exception, as the NAFTA parties have been important proponents of transparency in investment arbitration. See NAFTA Free Trade Comm'n, *Statement of Interpretation*, pt. A (July 31, 2001) (addressing public access to documents about NAFTA arbitration); NAFTA Free Trade Comm'n, *Statement on Non-Disputing Party Participation*, 44 I.L.M. 796 (2005) (addressing amicus participation in NAFTA arbitration).

254. See U.N. CONFERENCE ON TRADE AND DEV., THE ROLE OF INTERNATIONAL INVESTMENT AGREEMENTS IN ATTRACTING FOREIGN DIRECT INVESTMENT TO DEVELOPING COUNTRIES 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. . ."); *id.* at 52 ("There is anecdotal evidence from a number of home countries that SMEs are particularly interested in BITs.").

255. See Broches, *supra* note 44, at 344.

256. As Caplan wrote:

While larger enterprises sometimes pursue arbitration, they may feel, as a general matter, that it is less necessary or even 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.

Caplan, *supra* note 243, at 302; see also *id.* at 301 n.20 ("The small or medium investor would rarely carry the weight to cause the scales to tip in its favor." (quoting Nigel Blackaby, *Public Interest and Investment Treaty Arbitration*, 1 TRANSNAT'L DISP. MGMT., 2004)).

257. An economic analysis of "over 4,000 firms in 54 countries" concluded:

with comparatively weak legal systems.²⁵⁸ ICSID ought not adopt a jurisdictional requirement that impedes access for the very claimants most in need of effective, neutral dispute settlement. Such impediments effectively hang an “unwelcome” sign on ICSID’s door, which may in turn diminish support for investment arbitration among small enterprises, an essential business constituency.²⁵⁹

Depriving microinvestments of adequate access is also inconsistent with ICSID’s foundational syllogism: the availability of effective, neutral tribunals promotes investment flows and, therefore, promotes development.²⁶⁰ 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.²⁶¹ Collectively, the economic power of smaller enterprises is awesome: “[E]stablishments 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.”²⁶²

[T]he predicted effect of the summary legal obstacle on annual firm growth is 2.8% for large firms, whereas it is 5.7% for medium firms and 8.5% for small firms. . . . These results indicate that large firms are able to adjust to the inefficiencies of the legal system. However, the same does not seem to be the case for small and medium enterprises, which end up paying for the legal systems’ shortcomings in terms of slower growth.

Thorsten Beck et al., *Financial and Legal Constraints to Growth: Does Firm Size Matter?*, 60 J. FIN. 137, 137, 161 (2005).

258. The same analysis also observed:

The results indicate that firms in financially and legally developed countries with lower levels of corruption are less affected by firm-level obstacles. . . . Taking into account firm size reinforces the results. . . . [M]arginal improvements in legal efficiency translate into a relaxing of legal constraints for small and medium-sized firms (albeit significant at the 10% level).

Id. at 162–66.

259. I thank Luke Nottage for this observation.

260. To similar effect, Thomas Wälde dissented from *Thunderbird’s* order of costs against an unsuccessful claimant on the ground that raising barriers to arbitration for smaller companies “undermines the very purpose of [investment] treaties” by “leaving out entrepreneurs with initiative, willingness to take . . . risk.” *Int’l Thunderbird Gaming Corp. v. United Mexican States*, Separate Opinion of Thomas Wälde, ¶ 142 (UNCITRAL 2005); see also *id.* ¶¶ 5, 86, 140 (stressing the importance of making investment arbitration accessible to smaller, entrepreneurial investors).

261. See Caplan, *supra* note 243, 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.”).

262. Meghana Ayyagari et al., *Small vs. Young Firms Across the World: Contribution to Employment, Job Creation, and Growth* 12 (World Bank Dev. Research Grp., Policy Research Working Paper No. 5631, 2011), available at http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2011/04/11/000158349_20110

It has also been shown that smaller businesses transfer more technology to developing countries than do larger businesses.²⁶³

Governments can sometimes entice large investments individually by negotiating one-off deals, but this cannot be done for microinvestments. To encourage microinvestments, governments must instead craft good rules and institutions to attract them en masse. SMEs brim with untapped potential for more foreign direct investment (FDI).²⁶⁴

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 limit 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.²⁶⁵ Lee Caplan

411130747/Rendered/PDF/WPS5631.pdf. Also striking is the percentage of new jobs created by small businesses:

[I]n the 81 countries that had a net positive job creation . . . the job creation share for 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.

263. Caplan, *supra* note 243, at 298.

264. See OECD OUTLOOK, *supra* note 25, at 16 (“SMEs [including microenterprises] constitute the dominant form of business organisation in all countries world-wide, accounting for over 95% and up to 99% of the business population depending on the country.”); *id.* at 42 (“Up to two-thirds of microenterprises (<10 employees) are not internationalized, compared to one third of medium-sized enterprises. . . . Foreign direct investment (FDI) is a vehicle for SME internationalisation, although for most countries, only a fraction (1-4% of European-19 SMEs) have established subsidiaries abroad.”).

265. I might add that ICSID’s own premise is essentially theoretical. The empirical jury is still out. For a compilation of jousting empirical studies on the related question of whether BITs contribute to investment, see generally KARL P. SAUVANT & LISA E. SACHS, THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS (Karl P. Sauvants & Lisa E. Sachs eds., 2009). For some other empirical support for ICSID’s premises, see generally Peter Egger & Hannes Winner, *Does Contract Risk Impede Foreign Direct Investment?*, 139 SWISS J. ECON. & STAT. 155 (2003) (arguing that the viability of contracts correlates with FDI inflows); Iris Kesternich & Monika Schnitzer, *Who Is Afraid of Political Risk? Multinational Firms and Their Choice of Capital Structure*, 82 J. INT’L ECON. 208 (2010) (arguing that political risk has a negative relationship with equity ownership by foreign investors); Tim Büthe & Helen V. Milner, *Institutional Diversity in Trade Agreements and Foreign Direct Investment: Credibility, Commitment, and Economic Flows in the Developing World, 1971-2007*, Presentation to the American Political Science Association (Sept. 3, 2011), available at <http://ssrn.com/abstract=1796506> (arguing that the strength of investment-related dispute settlement mechanisms in preferential trade agreements correlates with FDI inflows, although their coding appears not to distinguish between investor-state and

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,” because at present, “[t]he scope of the problem is unfortunately unknown.”²⁶⁶ 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.²⁶⁷ The ICSID decisions only reveal those microinvestment disputes that have been brought to date, obscuring those not brought. Anecdotal evidence (and common sense) suggests there are other microinvestment disputes never submitted to ICSID.²⁶⁸ We can only presume, for now, that *Salini*’s burdens contribute to the dissuasion.

VI. CONCLUSION

Like Horton the Elephant, ICSID tribunals should conclude that investments are investments, no matter how small.²⁶⁹ They should discard *Salini*’s objective approach, or at least its development prong, thereby honoring the Hippocratic injunction to “do no harm” to microinvestors and the goal of development. The ICSID Convention sets no minimum size requirement, and none is warranted by ICSID’s history or objectives. To the contrary, assuring that the doors to ICSID remain open to microinvestment disputes serves ICSID’s values of depoliticization and development promotion.

state–state mechanisms). *But see* Axel Berger et al., *More Stringent BITs, Less Ambiguous Effects on FDI? Not a Bit!*, 112 *ECON. LETTERS* 270, 272 (2011) (arguing that data showing a correlation between FDI and the presence of investor–state dispute settlement in BITs is attributable to the special circumstances of transitional governments after the Cold War, when those governments actually tended to consent to investor–state dispute settlement in only one narrow class of cases).

266. *See* Caplan, *supra* note 243, at 307, 311. Absent adequate empirical evidence, Caplan also tempered his factual assertions. For example: “SMEs may not be as successful in resolving disputes through non-legal means, such as negotiation. Thus, when investment disputes arise, SMEs may place more stock in investor-state arbitration than larger enterprises.” *Id.* at 302.

267. One reviewer, inspired by the epigraph, called these unknowns “the elephant in the room.”

268. Caplan, *supra* note 243, 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.”).

269. DR. SEUSS, *supra* note 1.

More fundamentally, ICSID exists to help move the reality of the international community toward community values.²⁷⁰ Rejecting *Salini's* development prong serves such core community values as equal access to justice, fairness, *pacta sunt servanda*, peaceful settlement of disputes, and the rule of law. It also helps to move international society toward transnational society with a meaningful ability by private persons—no matter how small—to protect their own rights and interests.²⁷¹

270. Cf. Owen M. 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.").

271. See sources cited *supra* note 44.