

Justice and Investment Arbitration



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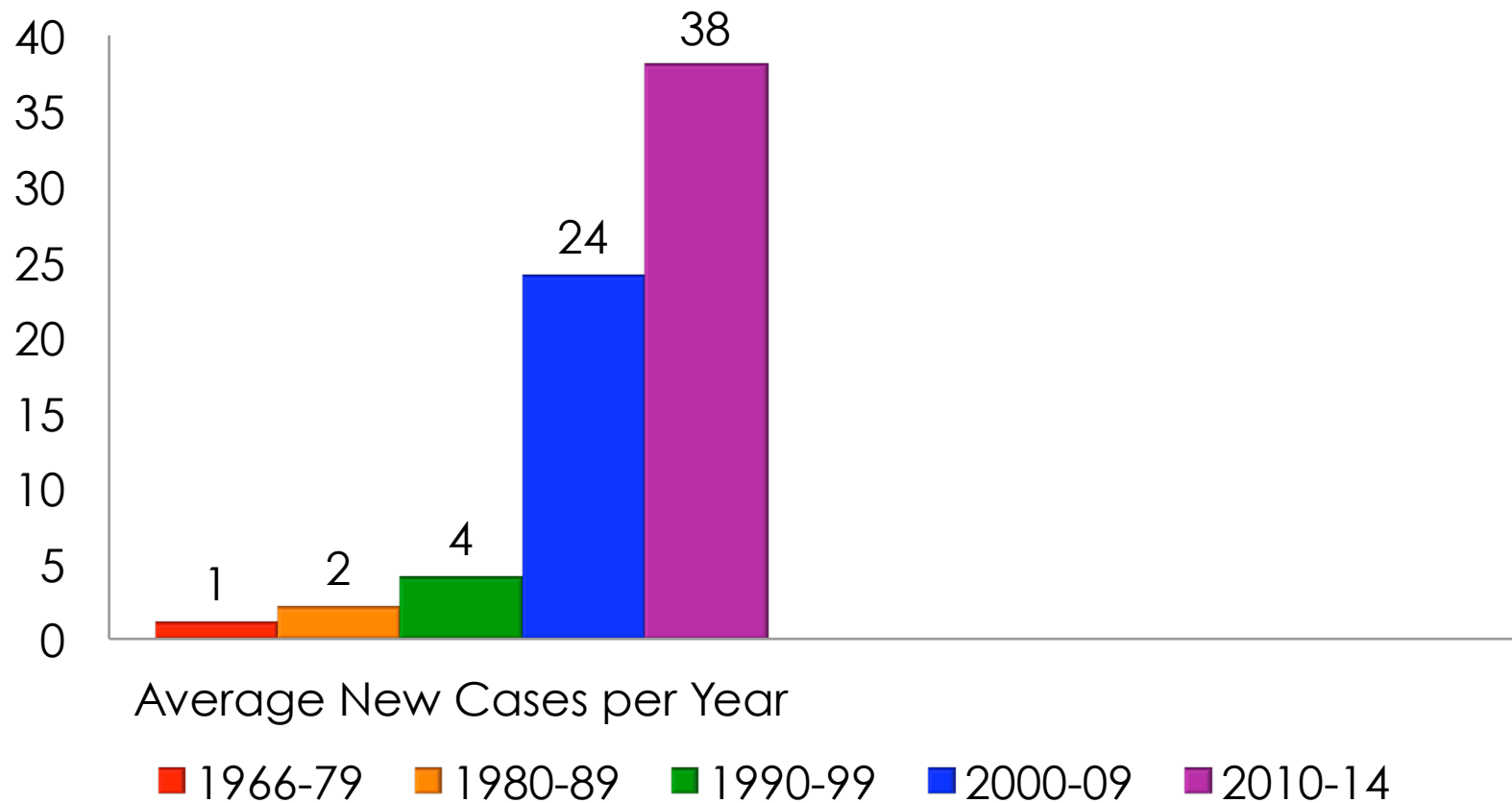
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Background

Part 1

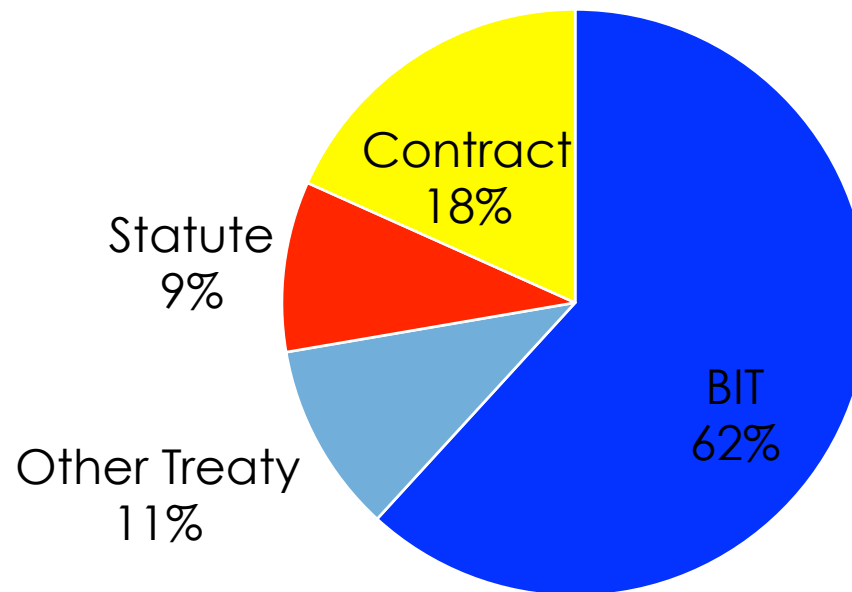
ICSID Awakens



Source: *ICSID Caseload—Statistics 2015-1*

The BIT Revolution

Basis of ICSID Jurisdiction



Source: *ICSID Caseload—Statistics 2015-1*

Changes

- ▣ The BIT Revolution created investment arbitration as we know it today
- ▣ Not only more cases, but different nature
 - ▣ Rise of quasi-constitutional cases
- ▣ Investors as the only potential claimants under BITs
- ▣ Seeds of controversy

Justice-Based Objections to ISD

Part 2

Senator Warren's Objections



- ▣ Who will benefit from the TPP? American workers? Consumers? Small businesses? Taxpayers? Or **the biggest multinational corporations in the world?**
- ▣ Agreeing to ISDS in this enormous new treaty would tilt the playing field in the United States further in favor of **big** multinational corporations.
- ▣ If the tilt toward **giant corporations** wasn't clear enough, consider who would get to use this special court: only international investors, which are, by and large, **big** corporations.

Washington Post, 2015.02.25

Academic Objections 1

- Judith Resnik, et al: Our legal system rests on the conviction that every individual, regardless of wealth or power, has an equal right to bring a case to court. To protect and uphold the rule of law, our ideals of fairness and justice must apply in all situations and equally to everyone. ISDS, in contrast, is a system built on **differential access**. ISDS provides **a separate legal system available only to certain investors** who are authorized to exit the American legal system. Only foreign investors may bring claims under ISDS provisions. **This option is not offered to nations, domestic investors, or civil society groups** alleging violations of treaty obligations. Under ISDS regimes, foreign investors alone are granted legal rights unavailable to others – freed from the rulings and procedures of domestic courts.

Academic Objections 2

- Erwin Chemerinsky, et al: ISDS grants foreign corporations a **special legal privilege**.
- Gus Van Harten: **[O]nly foreign investors** can bring an ISDS claims [sic] to protect their assets.... The actors that typically have the most valuable foreign-owned assets, and the deepest pockets to fund litigation, are **transnational corporations and individual tycoons**.... ISDS discriminates in favour of foreign investors and against all other actors whose rights may be affected by state decisions.

Justice-Based Case for ISD

Part 3

The Traditional Approach to International Claims

- ▣ Only states could bring claims
- ▣ If a state chose to “espouse” the claim of its nationals, the state became the “sole claimant.” *Mavrommatis (PCIJ 1924)*
- ▣ “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.” *Barcelona Traction (ICJ)*
- ▣ Many “lump-sum settlements”
 - ▣ “[I]nfluenced and distorted by the relative political and economic power of the parties, and their desire to regularize disrupted relationships, factors which are not relevant in attempting to set forth neutral principles of international law.” *Banco Nacional de Cuba (SDNY 1980)*

Heavily political process

ICSID: A Profound Change

- ▣ Investors control their own claims
- ▣ Aron Broches: “The most striking feature of the [ICSID] Convention.”
- ▣ Together with human rights law, part of a fundamental shift in conceptions of sovereignty and the role of “nonstate actors”
- ▣ *International law* → Transnational law

Important step from politics toward law: access to a neutral, effective tribunal

Desmond Tutu

- ▣ [S]outhern Africa was building a house of justice, a place where ... victims of injustice could turn with confidence. That house is now in grave danger...
- ▣ [I]ndividual access to the SADC court constitutes a key legal instrument that has brought hope to victims of the abuse of power in SADC countries....
- ▣ Without it, the region will lose a vital ally of its citizens, its investors and its future.



Jan Paulsson, Enclaves of Justice

- ▣ Explicitly rejects the view that increasing FDI is needed to make the case for ISD
- ▣ Recounts a litany of problems with courts of the world
 - ▣ Not limited to poor countries
- ▣ Advocates “build[ing] **enclaves of justice** where we can”
- ▣ “The error is to think that injustice is abnormal. It may be more realistic to think that ... justice is a surprising anomaly.”

Equalization of access

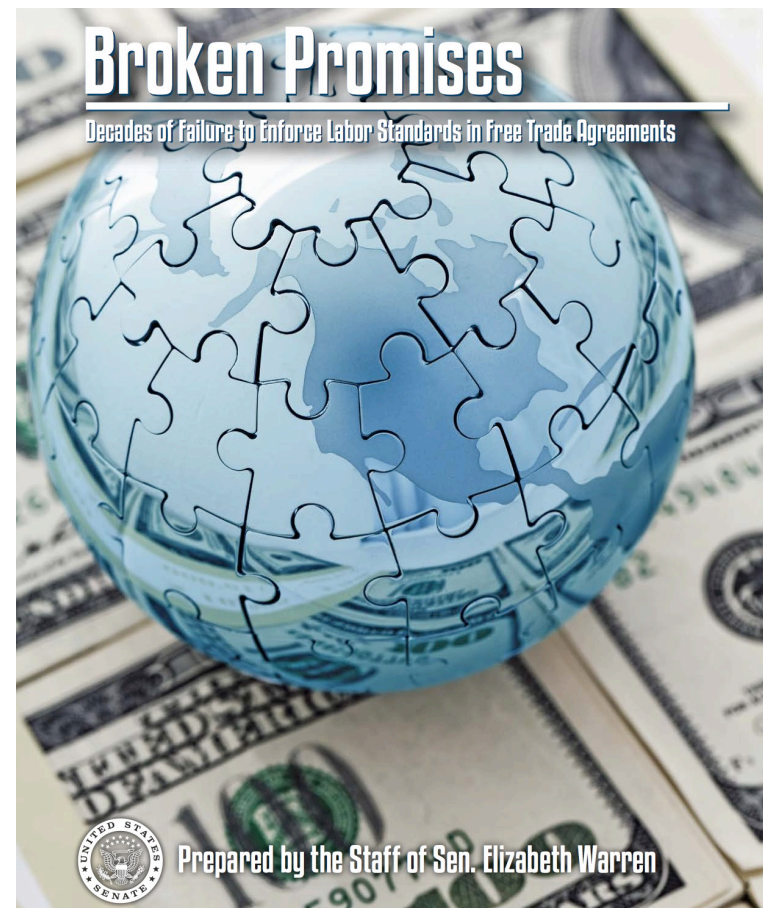
- ▣ Let's build more enclaves of justice:
 - ▣ Small businesses (SMEs)
 - ▣ Domestic investors
 - ▣ Claimants other than investors
 - ▣ Other creative uses of arbitration

- ▣ Let's equalize up, not equalize down

Senator Warren 2

[T]he United States **repeatedly fails to enforce** or adopts unenforceable labor standards in free trade agreements. Lack of enforcement ... and other flaws with the treaties have allowed countries with weaker laws and standards and widespread labor and environment abuses to undermine treaty provisions, leaving U.S. workers and other interested parties **with no recourse**.

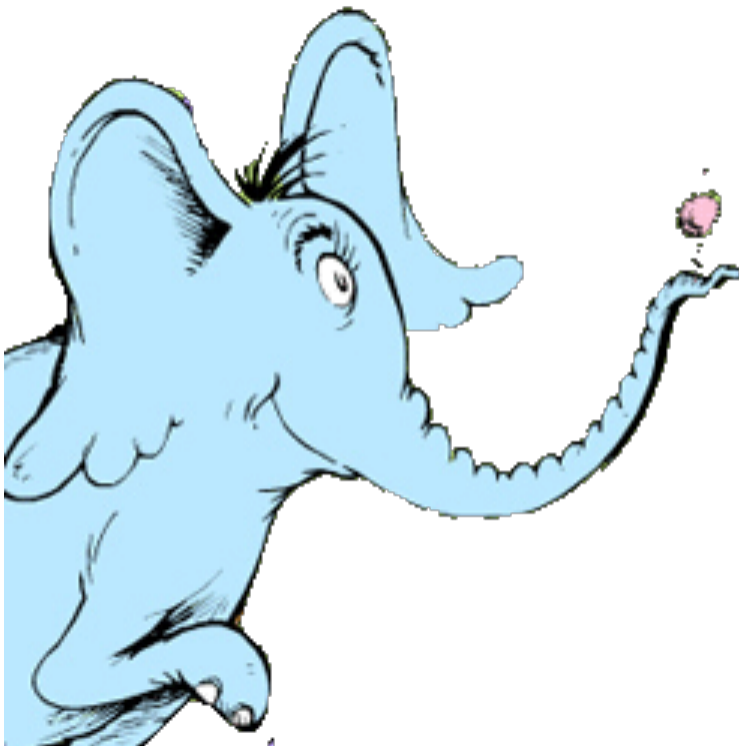
Even when DOL receives formal complaints alleging that free trade agreements have been violated, action is **slow and ineffective**.



SME Access to ISD

Part 4

Small businesses



- ▣ [A]fter all, [a] person's a person, no matter how small.
 - ▣ Yes ✓

- ▣ I'm going to protect them. No matter how small-ish!
 - ▣ Feasible?
 - ▣ Desirable?

Horton the Elephant from
Horton Hears a Who by Dr. Seuss

Patrick Mitchell v D.R. Congo

- A US lawyer started a small law firm in Congo. Congo evicted everyone from the office, sealed the office, and seized documents and other items. They arrested two Congolese lawyers who worked at the firm and held them for 8 months. They effectively put the firm out of business.
- Claim under US-Congo BIT
- ICSID Tribunal awarded \$750,000, plus interest and a \$95,000 contribution for costs
- Overturned on ground that the law firm is not an “investment” covered by the ICSID Convention. Ordered Mitchell to pay Congo a \$100,000 contribution for costs.

SMEs Need Access

- ▣ More of their business, maybe all, may be at risk. Less diversification.
- ▣ Less leverage with host government to negotiate arbitration agreements or to settle disputes
- ▣ Less leverage with home government for espousal
 - ▣ Cecilia Malmstrom, EU Trade Commissioner: “effectively cut[s] off small companies from the system”
- ▣ More affected by weaknesses in legal systems

Obstacles to SME Access

- ▣ Mainly costs:
 - ▣ Legal costs
 - ▣ Tribunal costs
 - ▣ Risk of paying respondent's costs under "loser pays" rule
 - ▣ Less access to alternative funding arrangements

- ▣ Jurisdictional obstacle, as seen in *Mitchell*
 - ▣ Seems to be improving

- ▣ May be less familiar with ISD as an option and how to preserve and use ISD rights

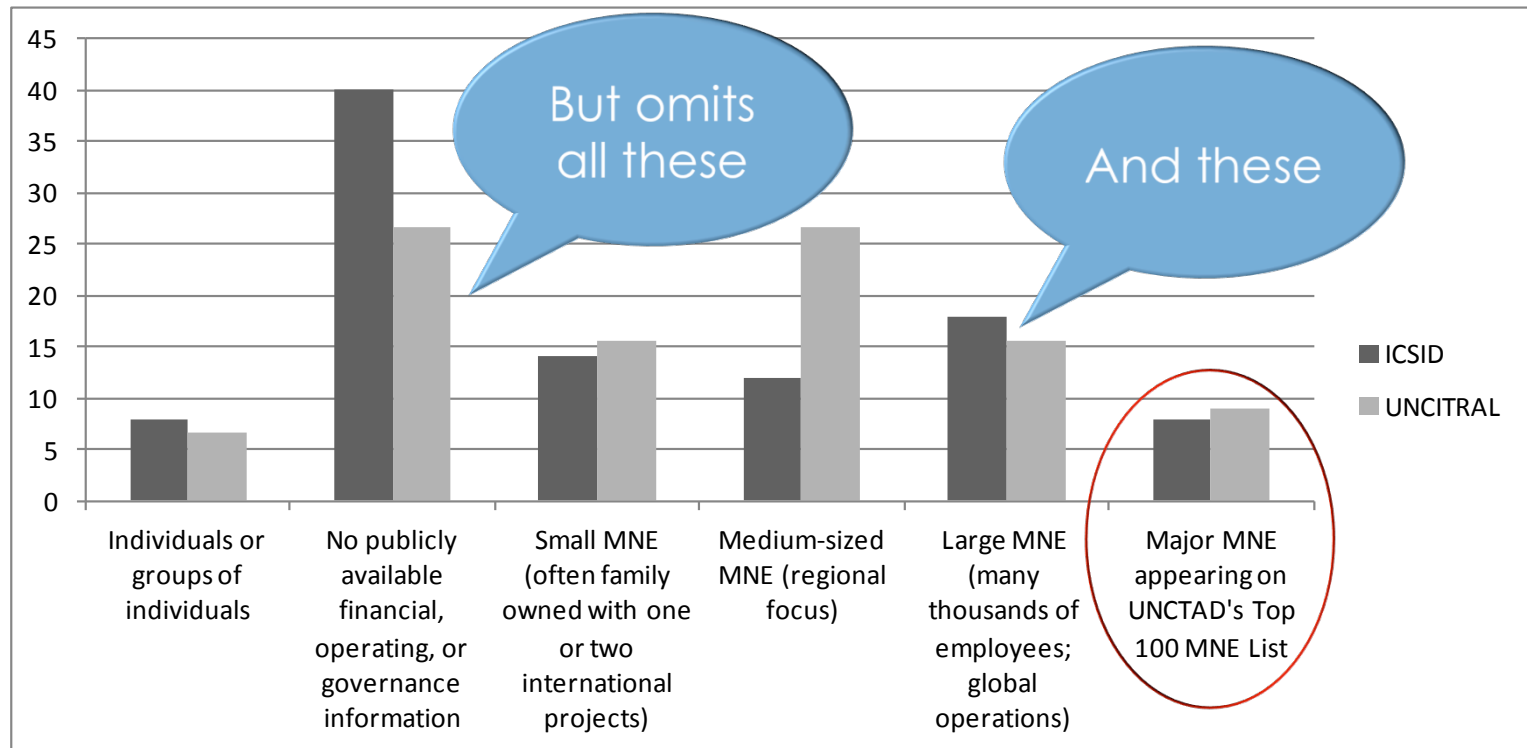
Downplaying the Problem

- ▣ Payam Akhavan, et al: Investment treaty arbitration permits foreign investors—whether they are small, medium or large entities, and whether they are human beings or corporations—to challenge government measures that violate the treaty obligations negotiated for their protection.
 - ▣ True, but does not address practical barriers for smaller investors.

- ▣ IBA: There are ... misconceptions in the present discourse about ISDS that can be identified and addressed The erroneous assertions together with correcting facts include:
 - ▣ Assertion: ISDS is most often used by very large multinational corporations.
 - ▣ Fact: Data show that **only 8 per cent** of ISDS proceedings are commenced by very large multinational corporations.

- ▣ Latest: On Thursday, EU Parliament tweeted the same 8% stat

The Supposed Basis of the 8% Stat



OECD 2012

Signs of progress

- ▣ Meg Kinnear, ICSID Secretary-General
- ▣ CETA and EU-Singapore FTA: “sympathetic consideration” to requests for a sole arbitrator, “especially” when made by an SME
- ▣ Markus Krajewski’s model BIT: The Contracting Parties recognise that access to the Tribunal may be difficult for small enterprises with limited financial means. Within one year after the entry into force of this agreement, the Committee of the Contracting Parties shall develop appropriate remedies. These may include the establishment of a **legal aid mechanism** or the **relaxation of the requirements** of Article 29 [re 3d party participation by investor’s home state] or a **limitation of the right of the respondent to appeal** a decision of the Tribunal pursuant to Article 33 for certain claims or certain groups of investors.

Lee Caplan

- Current potential solutions include political risk insurance, strategic alliances, and streamlining the arbitral process. Future solutions might entail measures of institutionalized support for SMEs, such as reducing entry costs to arbitration, providing pro bono advocacy [as suggested by Roberto Dañino], and offering specialized training to SMEs and their legal counsel.
- Streamlining arbitral procedure: For example, the parties may consent to have a sole arbitrator (rather than three arbitrators) preside over the proceedings, submit simultaneous pleadings, and dispense with oral hearings, if possible.

ICC Guidelines on Small Claims

- ▣ Settle or mediate
- ▣ Claimant presents entire case in its Request for Arbitration
- ▣ Respondent presents entire case in its Answer
- ▣ Parties can agree on special procedures
- ▣ Sole arbitrator
- ▣ “Consider the appropriate procedure for producing the Terms of Reference”
- ▣ Arbitrator can try to exclude procedures that are not “truly necessary”
- ▣ The parties should ensure that their expenditure is proportional to what is at stake in the arbitration
- ▣ Avoid or limit discovery
- ▣ Avoid or limit experts

Imagining a Small Claims Facility

Part 5

Concerns about a Small Claims Facility (SCF)

- ▣ Less process, more risk of error
- ▣ Too many claims may push states to exit
- ▣ Too many claims may backlog the system
- ▣ Less process, probably less transparency and public participation

Design SCF to address these concerns

Imagining an SCF 1

- ▣ Clearly and formally outside the ICSID Convention, like the Additional Facility
- ▣ Consent specifically required
 - ▣ Allow consent to SCF while preserving jurisdictional objections
- ▣ A firm damage cap (say, \$5MM), which may be raised from time to time
- ▣ Screening-out cases that are too large or, more controversially, otherwise inappropriate
 - ▣ Unless fully addressed by the specific consent mechanism

Imagining an SCF 2

- ▣ Reduced administrative fees, perhaps subsidized by a small “tax” on winning claimants
- ▣ Offer both parties the opportunity to find affordable qualified counsel, as with the Advisory Committee on WTO Law
- ▣ Mediation to settle case or reduce issues in dispute
 - ▣ Mandatory or optional?
- ▣ Sole arbitrator
- ▣ Limits on arbitrator’s compensation, both hourly rate and the number of hours for each stage of the case

Imagining an SCF 3

- Case in one of the official languages of the state party
- Hearings by video or in a neighboring country, which is near the state party and party to the New York Convention
- Establish a “public counsel” charged with arguing the public interest. Plainly, care is needed in designing this position. A pluralistic approach might be best, where the public counsel is charged with presenting the arbitrator with a variety of nonparty perspectives.
- Awards enforceable through the New York Convention, not the ICSID Convention

Imagining an SCF 4

- ▣ Is it possible to isolate the effects of errors from the ISD system? Limits on *res judicata* effects? Limits on writing, publishing, or relying on awards?
- ▣ Training programs for counsel, arbitrators, and states
- ▣ Flexibility to make changes, not bound in a treaty
- ▣ Mandatory periodic reviews, like the DSU Review



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Conclusion

Thomas Wälde suggested adding a “scooter model” for SMEs to the current “Rolls Royce” approach to ISD. The SCF suggested here is a scooter. A scooter will never be a Rolls Royce, but a scooter can get the core job done – here, access to a neutral, effective tribunal. And it can get unbeatable gas mileage.

Thank you!

For more information, please see Perry Bechky, “Microinvestment Disputes” in *Vanderbilt Journal of Transnational Law* (2012) and “International Adjudication of Land Disputes: For Development and Transnationalism” in *Law & Development Review* (2014). Please do not hesitate to contact me:



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