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# Salini's Nature: Arbitrators' Duty of Jurisdictional Policing

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*SALINI'S NATURE:*  
ARBITRATORS' DUTY OF JURISDICTIONAL POLICING

*Perry S. Bechky\**

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## **1 Introduction**

*Salini v. Morocco* is a canonical case in international investment law.<sup>1</sup> Before *Salini* in 2001, little attention was paid to the “investment requirement” in the ICSID Convention – the idea that ICSID tribunals should determine, as a condition of their jurisdiction, that the dispute arises from an “investment.”<sup>2</sup> After, cases and commentators rigorously debated the investment requirement. The *Salini* debate unfolded along two main dimensions: whether tribunals should give the word *investment* an objective definition and, if so, exactly what that definition should be.<sup>3</sup>

This symposium contribution aims in a different direction. It focuses not on *Salini's* merits, but on *Salini's* nature. Clearly, *Salini* imposes a duty on the tribunal: the duty to police ICSID's jurisdictional limits, particularly the investment requirement. But what are the sources and contours of this duty to police, and to whom is it owed? The *Salini* duty is neither express nor

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<sup>1</sup> *Salini Construttori S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 23, 2001), *translated in* 42 I.L.M. 609 (2003).

<sup>2</sup> *Ibid.*, ¶ 52.

<sup>3</sup> Parts of this contribution are adapted from Perry S. Bechky, “Microinvestment Disputes”, 45 *Vanderbilt Journal of Transnational Law* (2013), 1043, which argued against *Salini's* objectivism in general and its contribution-to-development prong in particular.

owed solely to the parties, but is rather a duty inferred from the ICSID Convention and owed also to non-parties – a remarkable duty to emerge given the arbitral tradition of party control.

Part 2 introduces *Salini*. Part 3 explains why *Salini*'s nature should be understood as a duty that investor-state arbitrators owe in part to non-parties. Part 4 further explores the nature of the *Salini* duty through an analogy to the jurisdictional responsibilities of the U.S. federal courts. Part 5 concludes by discussing *Salini*'s movement beyond ICSID.

## 2 A Brief Introduction to *Salini*

*Salini* arose from a construction project in Morocco, where two Italian companies contracted to build approximately 50 kilometres of a highway.<sup>4</sup> When a dispute arose concerning the contract, the companies filed an ICSID claim alleging breach of the bilateral investment treaty (BIT) between Italy and Morocco. Morocco argued that jurisdiction depended on the existence of an investment within the meaning of both the BIT and the ICSID Convention. Morocco contended the BIT's definition was so far-reaching as to "dilute the notion of investment into a broader notion of economic rights,"<sup>5</sup> such that passing the BIT test alone was not dispositive and the tribunal also should assess separately whether claimants had made an investment within the meaning of ICSID Convention.<sup>6</sup> This has come to be known as the "double keyhole" approach, where claimants need two keys to unlock the doors to ICSID.<sup>7</sup> In other words, on this view, only a subset of "BIT investment" qualifies as "ICSID investment."<sup>8</sup>

Article 25(1) of the ICSID Convention allows ICSID tribunals to exercise jurisdiction over certain "legal dispute[s] arising directly out of an

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<sup>4</sup> *Salini*, *supra* note 1, at ¶ 2.

<sup>5</sup> *Ibid.*, ¶ 38.

<sup>6</sup> *Ibid.*, ¶ 36.

<sup>7</sup> Christoph H. Schreuer, et al., *The ICSID Convention: A Commentary* (2<sup>nd</sup> ed., 2001), 117.

<sup>8</sup> *Malaysian Historical Salvors, Sdn., Bhd. v. Malaysia*, ICSID Case No. ARB/05/10, Dissenting Opinion of Judge Mohamed Shahabuddeen ("Shahabuddeen Dissent"), ¶ 32 (Feb. 19, 2009) (describing "ICSID investment" as "a special kind of investment").

investment.”<sup>9</sup> Morocco’s objection required the tribunal to decide whether the word *investment* in Article 25 limits the kinds of cases that Member States may choose to submit to ICSID arbitration via treaties (like BITs), contracts, and statutes. The tribunal had little to work with in construing Article 25. The Convention omits any definition of the word *investment*. The negotiating history reveals the drafters could not agree whether and, if so, how to define *investment*, so they decided to omit one.<sup>10</sup> Also, “there ha[d] been almost no cases where the notion of investment within the meaning of Article 25 of the Convention was raised.”<sup>11</sup>

In this circumstance, the tribunal could have adopted a “subjective” approach, where the tribunal deferred to the definition of *investment* used in the governing BIT. It could have tried “bounded deference,” accepting the BIT definition so long as the dispute arises out of a transaction that may be characterized reasonably and in good faith as an investment.<sup>12</sup> The tribunal considered, however, that “it would be inaccurate to consider that the requirement that a dispute be ‘in direct relation to an investment’ is diluted by the consent of the Contracting Parties. To the contrary, ... the investment requirement must be respected as an objective condition.”<sup>13</sup> The tribunal

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<sup>9</sup> ICSID Convention, art. 25(1).

<sup>10</sup> 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 *Harvard International Law Journal* (2010), 257, 280–96; see also Schreuer, *supra* note 7, at 115-16.

<sup>11</sup> *Salini*, *supra* note 1, at ¶ 52.

<sup>12</sup> See Bechky, *supra* note 3, at 1058-60 (arguing for bounded deference, limited by good faith); Mortenson, *supra* note 10, at 261 (“The only exceptions to this rule should come where states’ definitions of investment are so disconnected from meaningfully economic activity as to be absurd.”); Aron Broches, “The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States”, 136 *Recueil des Cours* (1972), 331, reprinted in Aron Broches, *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* (1995), 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”).

<sup>13</sup> *Salini*, *supra* note 1, at ¶ 52.

thus set out to discern for itself an “objective” definition of *investment* as used in Article 25. It stated:

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.<sup>14</sup>

The tribunal then determined that the claimants satisfied all four elements and “[c]onsequently ... consider[ed]” that they had made an investment within the meaning of Article 25.<sup>15</sup>

Later tribunals have generally attributed to *Salini* the creation of a four-part “test.”<sup>16</sup> Some tribunals have followed “the *Salini* test,”<sup>17</sup> other tribunals have rejected it,<sup>18</sup> while still others have suggested modifying it into three-<sup>19</sup>, five-<sup>20</sup>, and six-part tests.<sup>21</sup> Some tribunals have changed one or more of the

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<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*, ¶¶ 53–58.

<sup>16</sup> See, e.g., *Phoenix Action, Ltd. v. Czech Rep.*, ICSID Case No. ARB/06/5, Award, ¶¶ 39 n.18, 81–83 (Apr. 15, 2009) (describing *Salini* as “seminal”).

<sup>17</sup> See, e.g., *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, ¶¶ 130–38 (Nov. 14, 2005) (applying a four-part “*Salini* test”).

<sup>18</sup> See, e.g., *Abaclat v. Argentine Rep.*, 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. 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.”).

<sup>19</sup> See, e.g., *Fakes v. Turkey*, ICSID Case No. ARB/07/20, Award, ¶¶ 110–14 (July 14, 2010) (accepting the first three *Salini* criteria, while reviewing and rejecting other candidates); *Deutsche Bank AG v. Sri Lanka*, ICSID Case No. ARB/09/02, Award, ¶¶ 294–95, ¶¶ 305–07 (Oct. 31, 2012) (same).

<sup>20</sup> See, e.g., *Joy Mining Mach., Ltd. v. Egypt*, ICSID Case No. ARB/03/11,

*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.<sup>22</sup>

The *Salini* test thus provoked lively debate between objectivists and subjectivists, and among the former. This debate is crucial to shaping ICSID’s docket and, more, its character. *Salini*’s contribution-to-development prong proved particularly contentious – Judge Shahabuddeen, for example, starkly described the debate over this prong as a “titanic struggle” for ICSID’s soul.<sup>23</sup>

I have criticized *Salini* elsewhere on various grounds, opposing its objective approach as an untoward intrusion into space best left to states (within the bounds of good faith) and its contribution-to-development prong for actually impeding development.<sup>24</sup> Nevertheless, for present purposes, the views of *Salini*’s proponents are what matters, as they are the ones who have created *Salini*’s duty and shaped its nature.

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Award on Jurisdiction, ¶ 53 (Aug. 6, 2004) (adding to the *Salini* criteria a requirement of “regularity of profit and return”).

<sup>21</sup> See, e.g., *Phoenix Action*, *supra* note 16, at ¶ 114 (adding to the *Salini* criteria requirements that assets must be invested in good faith and in conformity with the domestic laws of the host state).

<sup>22</sup> See, e.g., *Helnan Int’l Hotels A/S v. 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.” (internal punctuation omitted)). The subsequent award for the respondent was partially annulled on other grounds. *Helnan*, Decision on Annulment, ¶ 73 (June 14, 2010).

<sup>23</sup> Shahabuddeen Dissent, *supra* note 8, at ¶ 62.

<sup>24</sup> See generally Bechky, *supra* note 3.

### 3 *Salini's Duty*

*Salini* construes the jurisdictional grant of Article 25, particularly the phrase specifying that the “dispute aris[es] directly out of an investment.”<sup>25</sup> Article 25 does not address the tribunal’s power to dismiss a case beyond its jurisdiction, which instead appears in Article 41:

- (1) The Tribunal shall be the judge of its own competence.
- (2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre ... shall be considered by the Tribunal....

Article 41(2) clearly obliges tribunals to decide jurisdictional objections and *Salini* may be seen as a specific application of this mandate.

The duty to decide *Salini* objections when made is owed to the parties, plainly, but further consideration is needed to assess whether *Salini's* duty is also owed to non-parties. I suggest elsewhere that two key factors help to identify when investor-state arbitrators owe duties to non-parties: whether the parties can waive or vary the obligation and whether other persons have an interest in the obligation, especially an interest backed by a means of enforcement.<sup>26</sup> For example, ICSID arbitrators owe ICSID itself the duty to write a reasoned award: this duty is expressly set forth in the ICSID Convention, it cannot be waived or varied by the parties, it serves ICSID’s institutional interests (for example, by facilitating annulment review), and ICSID can discipline violations.<sup>27</sup>

Examining these two standards shows that ICSID arbitrators also owe the *Salini* duty to non-parties.

#### 3.1 *Party Waiver*

The question whether ICSID parties may waive *Salini's* duty has two aspects, one generally applicable to jurisdictional policing and the other specific to policing the investment requirement.

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<sup>25</sup> ICSID Convention, art. 25(1).

<sup>26</sup> See generally Perry S. Bechky, “Investor-State Arbitrators’ Duties to Non-Parties”, publication forthcoming.

<sup>27</sup> *Ibid.* (discussing Art. 48(3)).

Starting with the general aspect, Article 41(2) suggests that parties may waive jurisdictional defects simply by refraining from objecting. The plain text of the Convention is limited to the tribunal's duty to consider objections made by a party. Article 41(1) might arguably be read to require tribunals to satisfy themselves as to their own jurisdiction even in the absence of a party objection, but the more natural construction of this kompetenz-kompetenz language is to preserve the tribunal's authority to decide jurisdictional challenges from interference by the parties and other adjudicators.<sup>28</sup>

The ICSID Arbitration Rules lend further support to the idea that tribunals are not generally obliged to police jurisdictional defects in the absence of a party objection. Rule 41(2) is discretionary: "The Tribunal *may* on its own initiative consider, at any stage of the proceeding, whether the dispute ... is within the jurisdiction of the Centre..."<sup>29</sup> This discretion contrasts sharply with a tribunal's duty where the respondent defaults: "The tribunal *shall examine* the jurisdiction of the Centre ... and, if it is satisfied, decide whether the submissions made are well-founded in fact and in law."<sup>30</sup> This contrast suggests that the duty to police jurisdictional defects against unmade objections is limited to the specific context of default.

Yet, Christoph Schreuer persuasively argues, "Obviously, it is wise for a tribunal to address all relevant jurisdictional questions ... even if they are not raised by the parties."<sup>31</sup> He adds, "[I]t is sensible and desirable for a tribunal to briefly discuss all jurisdictional questions that are relevant to the case, even if the parties have not raised them."<sup>32</sup> While Schreuer takes care to avoid the language of obligation here,<sup>33</sup> his argument has force: it is

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<sup>28</sup> See Schreuer, *supra* note 7, at ¶¶ 41-5, 9 (describing the "primary purpose" of Article 41 as preventing frustration of the proceedings by unilateral action of one party and the "secondary effect" as making the tribunal's power exclusive from other adjudicators).

<sup>29</sup> ICSID Arbitration Rules, Art. 41(2); see also Schreuer, *supra* note 7, at ¶ 44 ("The tribunal's authority to examine questions of jurisdiction and competence on its own motion is *essential*.") (emphasis added).

<sup>30</sup> ICSID Arbitration Rules, Art. 42(4) (emphasis added).

<sup>31</sup> See Schreuer, *supra* note 7, at ¶¶ 41-67.

<sup>32</sup> *Ibid.*, at ¶ 41-51.

<sup>33</sup> By comparison, Schreuer notes the obligations that pertain when a party

imprudent for a tribunal to exercise its jurisdiction without addressing apparent concerns about the legitimacy of its doing so. To be sure, disciplining failure to act wisely is difficult – but arbitrators are subject to the discipline of the marketplace, where a reputation for sound judgment is vital for future appointments.<sup>34</sup> Schreuer also raises the intriguing possibility – presumably limited to extreme circumstances – that an award could be annulled for failure to state its reasons if it omits its jurisdictional reasoning on “a point that is open to debate.”<sup>35</sup>

Turning more specifically to *Salini* policing of the investment requirement, *Salini* expressly dismissed the idea of party variance, calling it “inaccurate” to allow the parties to “dilute[] the investment requirement.”<sup>36</sup> A subsequent tribunal likewise declared, “The parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the ICSID Convention.”<sup>37</sup> The whole point of *Salini*’s objectivism is to stand in opposition to the “subjective” view that tribunals should accept the definition of *investment* used by parties in the investment treaties that gave rise to the ICSID claims. Indeed, the *Salini* line of cases achieves its practical force precisely because these cases defined *investment* far more

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objects or defaults. *Ibid.*, at ¶¶ 41-52-55, 65.

<sup>34</sup> See generally Yves Dezalay & Bryant G. Garth, *Dealing in Virtue* (1996). Catherine Rogers observes that institutional control over appointments is “the primary means through which arbitrators are regulated.” Catherine A. Rogers, *Ethics in International Arbitration* ¶ 6.61 (2014).

<sup>35</sup> See Schreuer, *supra* note 7, at ¶¶ 41-68. This enforcement mechanism is weakened, to be sure, by the fact that annulment is available only where a party requests it. ICSID Convention, art. 52(1). However, Schreuer argues that “[a]n agreement between the parties to the effect that reasons need not be stated would be invalid and would not preclude a subsequent application for annulment on this ground.” Schreuer, *supra* note 7, at 996-97 (quoting MINE Annulment).

<sup>36</sup> *Salini*, *supra* note 1, at ¶ 52.

<sup>37</sup> *Joy Mining Machinery Ltd. v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, Aug. 6, 2004, ¶50; see also *Phoenix Action*, *supra* note 16, at ¶96 (“[BITs] cannot contradict the definition of the ICSID Convention. In other words, they can confirm the ICSID notion or restrict it, but they cannot expand it in order to have access to ICSID.”).

narrowly than investment treaties traditionally did.<sup>38</sup> In this respect, at least, *Salini* undeniably constrains party autonomy by imposing a duty on the tribunal beyond the parties' ability to control.

### 3.2 ICSID's Interests

*Salini*'s proponents see an important ICSID interest at stake. Judge Shahabuddeen, for example, argues that ICSID vitally needs objectivism to preserve its distinct identity as an institution devoted to "investment disputes," lest it become "just another" arbitral institution.<sup>39</sup> In particular, Judge Shahabuddeen made an impassioned case for adhering to *Salini*'s fourth prong: requiring that the investor made a contribution to development of the host state as a jurisdictional condition. In his view, this requirement is what separates "ICSID arbitration ... from any other kind of arbitration."<sup>40</sup> Similarly, Professor Sornarajah contends:

Being a subsidiary body of the World Bank, ICSID would not have any competence to supply arbitration services to a system that was not connected with economic development, which falls within its mandate. The supply of general arbitration services ... falls clearly outside the mandate of both the World Bank and ICSID.<sup>41</sup>

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<sup>38</sup> See, e.g., Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. I, Nov. 14, 1991, 1991 U.S.T. Lexis 176 ("[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]."). To be precise, investors are not parties to investment treaties, but as a party to an investment treaty arbitration an investor acts pursuant to the treaty and thus within the scope of the terms defined therein.

<sup>39</sup> Shahabuddeen Dissent, *supra* note 8, at ¶ 63.

<sup>40</sup> *Ibid.*, ¶ 30.

<sup>41</sup> See M. Sornarajah, *The International Law on Foreign Investment* (3d ed. 2010), 313-14; accord *Abaclat*, Dissenting Opinion of Georges Abi-Saab, ¶¶ 41-54 (identifying contribution-to-development as a "hard-core" element of *investment* in Article 25, which cannot be varied by the parties because of the importance of development to the mandates of ICSID and the World Bank); *Deutsche Bank AG v. Sri Lanka*, ICSID Case No. ARB/09/02, 23 Oct. 2012, Dissenting Opinion of Makhdoom Ali Khan, ¶ 46 (arguing that the development prong "preserves a vital link between an investment and the intended purpose of the Convention").

Proponents thus justify *Salini* with ICSID's institutional interest in preserving its legitimacy, which might be threatened by (perceptions of) jurisdictional overreach.<sup>42</sup> In particular, the threat to legitimacy comes not only from overreach *in abstracto*, but especially from abandoning ICSID's "original mission" of promoting development.<sup>43</sup>

ICSID may enforce this duty. If a tribunal fails to dismiss a claim "manifestly" lacking jurisdiction, the award may be annulled.<sup>44</sup> ICSID may discipline breaches of this duty through its control over appointments. And, reportedly, there has even been one case where the absence of an investment was so plain that the ICSID Secretariat simply refused to register the claim.<sup>45</sup>

#### 4 Jurisdictional Policing in U.S. Federal Courts

*Salini's* approach may seem familiar to U.S. readers, as U.S. federal courts are charged with policing the limits of federal subject-matter jurisdiction. The federal courts adhere to a strict and vigilant duty of jurisdictional policing. The Supreme Court has described this duty as "inflexible and without exception."<sup>46</sup>

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<sup>42</sup> See, e.g., *Abaclat* Dissent, ¶ 274 ("This misguided tendency [to extend jurisdiction unduly far] ... is undermining the credibility not only of the ICSID system, but of the very idea of objective international adjudication, by eroding the confidence of States, whose consent remains the basis of jurisdiction, in the objectivity and good judgement of those to whom they may entrust the ascertainment of their rights.").

<sup>43</sup> Shahabuddeen Dissent, *supra* note 8, at ¶ 22; but see Bechky, *supra* note 3, at 1064-72, 1084-93 (arguing that *Salini* and especially its fourth prong harm the cause of development).

<sup>44</sup> ICSID Convention, art. 52(1)(b) (allowing annulment if "the Tribunal has manifestly exceeded its powers"). For discussion of the party role in seeking annulment, see *supra* note 35.

<sup>45</sup> ICSID must register arbitral claims, unless it finds that the claim is "manifestly outside the jurisdiction of the Centre." ICSID Convention, art. 36(3). ICSID officials have disclosed several instances where ICSID refused to register a claim, including a claim based on a "simple sale." *Salini*, ¶ 52 (citing Ibrahim F.I. Shihata & Antonio R. Parra, *The Experience of the International Centre for the Settlement of Investment Disputes*, 14 ICSID Rev. 299 (1999)).

<sup>46</sup> *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*,

Litigants may not manufacture federal jurisdiction by consent.<sup>47</sup> They cannot waive jurisdictional defects. Courts – even the Supreme Court – must address jurisdictional defects *sua sponte*<sup>48</sup>: “[S]ubject-matter delineations must be policed by the courts on their own initiative even at the highest level.”<sup>49</sup>

Defects in subject-matter jurisdiction may be raised at any time, however late.<sup>50</sup> Even the party that initially invoked federal jurisdiction may move to dismiss for lack of subject-matter jurisdiction.<sup>51</sup> Courts will dismiss cases for lack of subject-matter jurisdiction regardless whether that will cause inefficiency<sup>52</sup> or even injustice<sup>53</sup> to the parties.

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456 U.S. 694 (1982) (quoting *Mansfield, Coldwater & Lake Michigan Rwy. Co v. Swan*, 111 U.S. 379 (1884)).

<sup>47</sup> 13 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* (3d ed. 2012), § 3522 n. 15.

<sup>48</sup> 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.”).

<sup>49</sup> *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999).

<sup>50</sup> 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 defences, which are waived if not promptly raised).

<sup>51</sup> See, e.g., *Capron v. Van Noorden*, 6 U.S. 126 (1804).

<sup>52</sup> 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).

<sup>53</sup> In *Capron*, 6 U.S. at 126–27, 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. 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. *Ibid.*, p.545-46. Congress later reversed

Clearly, the federal courts are not motivated by a duty to the parties. Rather, “institutional interests” drive the strict doctrine of subject-matter jurisdiction.<sup>54</sup> the federal courts owe exacting respect to the balance created by the Constitution and Congress between the national government and the fifty states.<sup>55</sup> The federal courts’ duty to police jurisdictional limits, then, may best be seen as a duty owed to the fifty states<sup>56</sup> – or perhaps through the states to the public as the ultimate beneficiaries of the U.S. system of government.

By contrast, the rules on personal jurisdiction are far more flexible, because they do not raise the same structural concerns as subject-matter jurisdiction, but are instead widely regarded as protecting a personal right of

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*Finley’s* result. See 28 U.S.C. § 1367 (2006) (authorizing pendent parties jurisdiction).

<sup>54</sup> *Ruhrgas*, at 526 U.S. at 583.

<sup>55</sup> Wright & 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 47, at § 3522.

<sup>56</sup> A potential exception to the otherwise firm 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 & 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 47, at § 3522.

the parties.<sup>57</sup> Accordingly, parties may consent to personal jurisdiction, expressly or implicitly.<sup>58</sup> Objections to personal jurisdiction are waived if not raised at the outset of litigation.<sup>59</sup>

The analogy to federal courts raises questions about how far the *Salini* duty of jurisdictional policing extends. Proponents of *Salini* itself, or similar forms of ICSID jurisdictional policing,<sup>60</sup> apparently embrace a strong version of the duty comparable to the federal court approach. The question whether

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<sup>57</sup> As the Court reasoned in *Insurance Corp. of Ireland*:

The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.<sup>10</sup>

<sup>10</sup> It is true that we have stated that the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-a-vis other States.... The restriction on state sovereign power ... however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause.... [I]f the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.

456 U.S. at 702–03 & n.10; accord *Ruhrgas*, at 526 U.S. at 583 (“The character of the two jurisdictional bedrocks unquestionably differs.”); but see Allan Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 Tex. L. Rev. 689, 756 (1987) (arguing that “interstate federalism” concerns should be at the core of the law regulating personal jurisdiction over out-of-state defendants and that this emphasis would still not prevent such defendants from consenting to jurisdiction).

<sup>58</sup> *Insurance Corp. of Ireland*, 456 U.S. at 703-04.

<sup>59</sup> See FED. R. CIV. P. 12(b)(2), 12(h)(1).

<sup>60</sup> I am treating Schreuer as a proponent of the duty of jurisdictional policing exemplified by *Salini*, based on his approach to Article 41, even though Schreuer is also a critic of some aspects of *Salini*, especially its contribution-to-development prong. Schreuer, *supra* note 7, at 133-34.

a tribunal should *sua sponte* examine jurisdictional issues absent a party objection is telling.

On one end of the spectrum is the typical *Salini* posture: the *Salini* issues arise when the respondent state objects to jurisdiction. There is some tension in these cases with party autonomy, because the respondent is asking the tribunal to enforce a narrower definition of *investment* than the one it agreed in the applicable investment treaty. Even so, the tribunal is ruling on a party motion; it is not acting *sua sponte*.

The practice of tribunals varies where respondent does not object to jurisdiction: “Normally, tribunals restrict themselves to the objections raised by the parties without going into other jurisdictional questions,” but some tribunals have “explicitly satisfied themselves of jurisdictional requirements that were not raised by the parties.”<sup>61</sup>

What if both parties expressly consent to jurisdiction? Should the tribunal *sua sponte* examine *Salini* in the face of a clear, mutual submission by the parties? As explained above, ICSID tribunals have the authority but not the duty to address jurisdictional concerns *sua sponte*. Schreuer called it “wise” to examine such concerns in one passage, with which I concur, but he went further in another passage:

Failure to raise jurisdictional objections may be interpreted as implicit consent to jurisdiction.... But it must be remembered that not all of the Convention’s jurisdictional requirements are subject to the parties’ disposition. The Convention also contains objective requirements.... Thus, the existence of a legal dispute arising directly out of an investment is an objective fact which *must* be ascertained independently of the parties’ consent.... [A tribunal] cannot rely on the parties’ understanding when it comes to the Convention’s objective requirements.<sup>62</sup>

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<sup>61</sup> Schreuer, *supra* note 7, at ¶¶ 41-45.

<sup>62</sup> Schreuer, *supra* note 7, at ¶¶ 41-49 - 41-50 (emphasis added); accord *ibid.*, ¶ 41-42 (“[tribunal’s] duty to satisfy themselves that all jurisdictional requirements were fulfilled”). Ancillary to his view that tribunals should determine their own jurisdiction, even *sua sponte*, Schreuer contends that tribunals should entertain “belated jurisdictional objections” as it “would not make sense” to exclude them. *Ibid.*, ¶ 42 (reviewing the “not uniform” practice of tribunals addressing late objections). As testimony to the strength of the duty so put, it may override the time

Schreuer's "must" goes too far. "May" and arguably "should," but not "must."

I have criticized *Salini* elsewhere on various grounds, including that (in my view) ICSID generally lacks institutional interests that warrant a tribunal to substitute its understanding of *investment* for the definition used by the parties.<sup>63</sup> The analogy to U.S. courts does not support such a strict approach at ICSID, because the international community generally lacks any interest in preventing a national government from voluntarily submitting a dispute to international arbitration.<sup>64</sup> That said, even criticisms of *Salini* like mine recognize that extreme circumstances might arise, at least in theory, where the parties' definition of *investment* is so far removed from the ordinary as to justify a tribunal's self-policing.<sup>65</sup> Unless one takes the subjective approach

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limits for jurisdictional objections set forth in ICSID Arbitration Rule 41(1).

<sup>63</sup> Bechky, *supra* note 3, at 1061-62. Cf. *Pantechniki S.A. v. Albania*, Award, ICSID Case No. ARB/07/21, 30 Jul. 2009. In *Pantechniki*, Jan Paulsson (sitting as sole arbitrator) argued that "the notion of an autonomous investment requirement" to be enforced by tribunals "to reject an express definition [of *investment*] desired by two States-party to a treaty" without any contrary definition in the ICSID Convention "would be of a different nature" from two other provisions of Article 25:

The first is that the dispute must be legal. The second is that it must involve a Contracting State and a national of another Contracting State. Both of these limitations are *conscious institutional boundaries* established by the founders of ICSID. It stands to reason that these *constitutive limitations* cannot be ignored by those who would intrude into a system not designed for them or their problems.

*Ibid.*, ¶¶ 39-42 (emphasis added).

<sup>64</sup> Cf. Mortenson, *supra* note 10, 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").

<sup>65</sup> Bechky, *supra* note 3, at 1053-60 (arguing for "bounded deference" to parties, with tribunals policing whether the transaction at issue "may be characterized in good faith as an investment"); Mortenson, *supra* note 10, at 315 (arguing that the subjective approach does not "totally eliminate the tribunal's role as gatekeeper," but limits it to policing against "something absurd"); *Pantechniki*, ¶ 48 (acknowledging "it is conceivable that a particular transaction is so simple and

to the absolute end, *Salini*'s duty of jurisdictional policing survives in narrow spaces.

## 5 Conclusion

Many recent investment treaties incorporate elements of the *Salini* test into their definitions of *investment*<sup>66</sup> – a trend that promises in time to narrow the gap between the objectivist and subjectivist positions. Elements of *Salini*, but generally not all of it. The contribution-to-development prong does not figure prominently in these treaty definitions. More fundamentally, the “and” in *Salini*'s test has become an “or” – meaning that an investment needs only one objective characteristic, not all four specified in *Salini*.

Through this treaty practice, states are ratifying *Salini*'s concept, if not its particulars. They are weaving this concept more deeply into international investment law, assuring that ICSID tribunals will remain bound by the duty to police the investment requirement.

To the extent that states build *Salini* into investment treaties, its duty of jurisdictional policing will extend past ICSID tribunals to all investor-state arbitrators. This movement has already begun – with some non-ICSID tribunals following *Salini* even in cases under older investment treaties that do not include any *Salini* elements in their definition of *investment*. For example, in *Romak v. Uzbekistan*, a tribunal acting under the UNCITRAL Arbitration Rules, held that the word *investments* in the governing Swiss-Uzbek BIT has “an inherent meaning” or “plain meaning” that corresponds with the first three prongs of *Salini*.<sup>67</sup> The *Romak* tribunal pronounced itself “comforted ... by the reasoning adopted by other arbitral tribunals,” including *Salini*.<sup>68</sup> It argued that the same constraints should apply to the

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instantaneous that it cannot possibly be called an ‘investment’ without doing violence to the word”).

<sup>66</sup> See, e.g., U.S. Model Bilateral Investment Treaty 2012, art. 1 (“‘investment’ means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk....”) (emphasis added).

<sup>67</sup> *Romak S.A. v. Uzbekistan*, Case No. AA280, Award, ¶¶ 207–08 (Perm. Ct. Arb. 2009).

<sup>68</sup> *Ibid.*, ¶ 207.

word *investments* in the BIT regardless whether claimant chose to pursue its claim inside or outside ICSID.<sup>69</sup> A tribunal acting under the ICSID Additional Facility Rules (which are not governed by the ICSID Convention's jurisdictional limits)<sup>70</sup> followed *Romak* and applied the same three “inherent features” of *investment*.<sup>71</sup> This tribunal too deemed the scope of *investment* in the applicable Canada-Venezuela BIT “unaltered by what forum the dispute is before.”<sup>72</sup>

Extending *Salini* outside ICSID raises a fundamental question about *Salini's* nature. Within ICSID, *Salini* performs (what its proponents see as) vital institutional work – keeping the institution to its “original mission” and preserving its legitimacy.<sup>73</sup> On this view, arbitrators owe *Salini's* duty to ICSID itself or, perhaps, through ICSID to its Member States.

Outside ICSID, however, the institutional interests dissipate. Investment treaties provide for arbitration at various institutions whose jurisdiction is not limited by any investment requirement – and even for non-institutional arbitration under the UNCITRAL rules. If *Salini's* duty is no longer institutional when freed from its ICSID moorings, it is systemic – a duty inherent in the investor-state arbitrators' function that serves the interests of

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<sup>69</sup> *Ibid.*, ¶¶ 192–95. But see *White Industries Australia Ltd. v. India*, Award, 30 Nov. 2011, ¶¶ 7.4.8–7.4.9 (refusing to apply the *Salini* test as “simply not applicable” to a case under the UNCITRAL Arbitration Rules, because the test was developed for purposes of the ICSID Convention, this case was “not subject to the ICSID Convention,” and the test was meant to “impose[] a higher standard” in ICSID cases).

<sup>70</sup> For an introduction to the Additional Facility, see Schreuer, *supra* note 7, at 141–43, 1120–23.

<sup>71</sup> *Nova Scotia Power Inc. v. Venezuela*, ICSID Case No. ARB(AF)/11/1, Award, 30 Apr. 2014, ¶¶ 78, 80–81, 84. The tribunal reasoned that the BIT's definition of *investment* was not “self-sufficient,” if it “can even be properly described as a definition” because it “is clearly non-exhaustive on its own terms.” *Ibid.*, ¶¶ 77–78. As the tribunal based its resort to “inherent features” on the “open-ended nature of this part of the purported definition” in the BIT, *ibid.*, ¶ 78, it left open the possibility of a different result where a treaty has a broad but closed definition of *investment*.

<sup>72</sup> *Ibid.*, ¶ 75.

<sup>73</sup> Shahabuddeen Dissent, *supra* note 8, at ¶ 22.

the investor-state dispute system. Arbitrators owe this duty not to ICSID as an institution, but to the creators of the investment arbitration system (states) and its ultimate beneficiaries (the global public).

The fact that systemic duties are due to the public, not to a readily identifiable individual, does not render them unenforceable. Other arbitral institutions may enforce *Salini's* duty, just as it may be enforced by ICSID itself. Appointing authorities and reviewing courts also have enforcement capabilities. An arbitrator who breaches a systemic duty may suffer reputational discipline.

*Salini's* duty of jurisdictional policing thus illustrates a duty that investor-state arbitrators owe to non-parties. It is a duty, moreover, with both institutional and systemic elements. The fact that the investment arbitration system imposes duties on arbitrators for the benefit of non-parties says something profound about that system. *Salini's* nature helps reveal the system's nature, a system more akin to public adjudication than to traditional notions of arbitration as a purely private matter controlled solely by and for the parties.