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# International Adjudication of Land Disputes: For Development and Transnationalism

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## Article

Perry S. Bechky\*

# International Adjudication of Land Disputes: For Development and Transnationalism

**Abstract:** This short article offers two observations about international adjudication of land disputes. First, the article shows that such adjudication is intended to further development, but that this goal is served better, if counter-intuitively, by rejecting the so-called *Salini* contribution-to-development test in favor of case-by-case adjudication on the merits. Second, the article locates such adjudication within the modern trend toward transnationalism, a trend that unites international investment law with human rights law. In light of these observations, the article concludes that international adjudication of land disputes may contribute to such human values as development, human rights, and the rule of law.

**Keywords:** investment arbitration, international adjudication, land disputes, transnationalism, development

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Liz Alden Wily's paper and other contributions to this special issue discuss "the current land rush," "a contemporary surge in global, large-scale land acquisitions."<sup>1</sup> With this surge comes controversy. The Food and Agriculture Organization, for example, has published a report titled "Land Grab or Development Opportunity?"<sup>2</sup>

This short contribution to the special issue offers two observations about international adjudication of land disputes. Part 1 shows that such adjudication is intended to further development, but that this goal is served better, if counter-intuitively, by rejecting the so-called *Salini* contribution-to-development

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<sup>1</sup> Liz Alden Wily, *The Law and Land Grabbing: Friend or Foe?*, this special issue.

<sup>2</sup> Lorenzo Cotula et al., *Land Grab or Development Opportunity? Agricultural Investment and International Land Deals in Africa* (London/Rome: IIED/FAO/IFAD, 2009).

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test in favor of case-by-case adjudication on the merits. Part 2 locates such adjudication within the modern trend toward transnationalism, a trend that unites international investment law with human rights law.

## 1 Land disputes and development

In an arbitration filed in 2011 at the International Centre for Settlement of Investment Disputes (“ICSID”), a Malaysian company called Ekran Bhd. claimed that a local government in Hainan, China, had violated the bilateral investment treaty (“BIT”) between China and Malaysia by terminating Ekran’s leasehold rights to develop “arts and culture facilities” on 900 hectares of land. China argued the local government had the right to terminate the lease, because the investor had failed to develop the land.<sup>3</sup>

Cases like *Ekran*<sup>4</sup> evoke *Salini*’s development test.<sup>5</sup> Article 25 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.”<sup>6</sup> In 2001, in *Salini v. Morocco*, an ICSID tribunal held that the “investment requirement” has objective content that limits ICSID jurisdiction. 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.<sup>7</sup>

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<sup>3</sup> The parties quickly agreed to suspend the case, which was ultimately “discontinued” in May 2013, all before an arbitral tribunal was established. See Luke Eric Peterson, *China is Sued for the First Time in an ICSID Arbitration*, Investment Arbitration Rep. (26 May 2011); ICSID, *List of Concluded Cases*, available at: <[www.icsid.worldbank.org](http://www.icsid.worldbank.org)>. Little information about the case has been made public, including whether China paid to settle it.

<sup>4</sup> Ekran Bhd. v. China, ICSID Case No. ARB/11/15 (discontinued 16 May 2013).

<sup>5</sup> Indeed, Tomer Broude has suggested that cases like this deserve their own classification as “international development disputes,” in that they “requir[e] determinations under international law that have significant ramifications for the design and implementation of development policy.” Tomer Broude, “Development Disputes in International Trade”, in Y.S. Lee et al. (eds.), *Law and Development Perspective on International Trade Law* (Cambridge: Cambridge University Press, 2011), pp. 8–9. Broude’s suggestion raises interesting questions about what practical consequences might follow from such a classification, questions whose answers he has not yet fleshed out. See *id.*, p. 24.

<sup>6</sup> See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* 18 March 1965, 575 U.N.T.S. 159, art. 25(1) (emphasis added).

<sup>7</sup> *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).

ICSID tribunals ever since have wrestled with *Salini's* objective approach to investment: some have followed it, others have rejected it, while still others have proposed a variety of alternatives to its four-part “test.”<sup>8</sup>

One may readily imagine a government invoking *Salini's* last prong to object to ICSID jurisdiction over a case like *Ekran*. Such an argument would follow this path: the company did not develop the land as it was supposed to do, therefore it did not contribute to economic development, therefore it did not make an “investment” as construed by *Salini*, therefore its claim did not “aris[e] directly out of an investment” as required by Article 25, and therefore ICSID lacked jurisdiction over the claim.

The contribution-to-development rule has some appeal. First, development should be understood as ICSID's purpose, or at least its intermediate purpose en route to improving human welfare, a true end.<sup>9</sup> Development is enshrined in the preamble to the ICSID Convention, which is predicated on “the need for international cooperation for economic development.” Indeed, concern for development explains ICSID's very existence: the World Bank – that is, the International Bank for Reconstruction and *Development* – conceived ICSID, sponsored the talks to create it, and continues to house ICSID and provide it other institutional support “to further [the Bank's own] overall purpose of promoting economic development in the world's poor countries.”<sup>10</sup> The contribution-to-development test might therefore be seen as an interpretative gloss furthering the “object and purpose” of the ICSID Convention.<sup>11</sup>

Second, the contribution-to-development rule appeals to a certain sense of fairness: it requires a *quid pro quo*, much like the consideration requirement in common law contracts. By consenting to ICSID arbitration, states give something valuable to investors. One may reasonably suppose that what developing

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**8** See Perry S. Bechky, *Microinvestment Disputes*, 45 Vand. J. Transnat'l L. (2012), 1043, 1045–1047 (surveying the cases). For my “third way” alternative to *Salini's* objectivism or pure subjectivism, see *id.*, pp. 1053–1063 (advocating “bounded deference”).

**9** Cf. UN Declaration on the Right to Development, A/Res/41/128, 4 December 1986, ¶2(1) (“The human person is the central subject of development...”). The arguments in this paragraph are developed further in Bechky (2012), *supra* note 8, pp. 1064–1067.

**10** Andreas F. Lowenfeld, *International Economic Law* (2nd ed., Oxford: Oxford University Press, 2008), p. 537; see also Int'l Bank for Reconstruction and Dev., *Report of the Executive Directors on the Convention of the Settlement of Investment Disputes Between States and Nationals of Other States*, ¶ 9 (18 March 1965) (“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.”).

**11** See Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, art. 31.1.

countries expect to receive in return is investment that contributes to development.<sup>12</sup> The contribution-to-development test might therefore be seen as a means of assuring that a claimant gave the *quid* before it gets the *quo*.

Third, Wily's paper also discusses Chief Justice John Marshall's opinion for the U.S. Supreme Court in *Johnson and Graham's Lessee v. M'Intosh*, which points to a third argument of particular interest to this special issue.<sup>13</sup> That case arose from competing claims to ownership of the same land, one derived from the U.S. Government and the other from the Piankeshaw Indians. The Court held that no title to land could be acquired from Indians. After reviewing the history of European discovery and conquest of North America and the applicable rules of international law, the Court concluded that Indians had only "the right of occupancy" on land where they lived, but not the right to "dispose of the soil," as they had lost that latter right by conquest.<sup>14</sup>

The Court acknowledged that "this restriction [on transferability] may be opposed to natural right, and to the usages of civilized nations," and defended its holding essentially on the ground of practical necessity. Yet, the Court added:

Although we do not mean to engage in the defense of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them.

...

[T]he tribes of Indians inhabiting this country were fierce savages whose occupation was war and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country was to leave the country a wilderness...<sup>15</sup>

The Court thus appears to have accepted that the desirability of development provided "some excuse" for seizing control of Indian lands. Put differently, in Chief Justice Marshall's eyes, the Indians' failure to contribute to development had weakened their claim to the land.<sup>16</sup> Where contribution-to-development was

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<sup>12</sup> See, e.g., M. Sornarajah, *The International Law on Foreign Investment* (3rd ed., Cambridge: Cambridge University Press, 2010), p. 313 ("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.").

<sup>13</sup> See Wily, *supra* note 1, p. 9.

<sup>14</sup> *Johnson & Graham's Lessee v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574, 583, 591 (1823).

<sup>15</sup> *Id.*, pp. 589–590.

<sup>16</sup> The defendant, relying on Grotius and Pufendorf as well as Locke, argued that "the North American Indians could have acquired no proprietary interest in the vast tracts of territory which they wandered over," because such use was "not exclusive" and therefore not sufficient "to prevent their being appropriated by a people of cultivators." *Id.*, pp. 569–570. The Court did not expressly adopt defendant's argument.

once invoked against indigenous populations, *Salini* now seems to hold investors to the same standard. The contribution-to-development test might therefore be seen as sauce for the gander.

Nevertheless, despite its allure, *Salini*'s temptation should be resisted.<sup>17</sup> Contribution to development is not part of the "ordinary meaning" of the word "investment." By reading this test into Article 25, tribunals are displacing the judgment of Member States about how best to use ICSID.<sup>18</sup> The ICSID Convention gives Member States broad discretion to determine in good faith which matters to submit to ICSID arbitration, relying on State consent as the touchstone of ICSID jurisdiction, and arbitral tribunals ought not constrain that discretion unduly.

Tribunals, moreover, are ill-equipped to make the kinds of judgments necessary to determine whether an investment has made a contribution to development. Indeed, one 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.'"<sup>19</sup> The trouble with trying to define "development" is exacerbated by the radically different states of development that exist in the world. Is it even possible for an investment to contribute to the development of a country that is already developed?<sup>20</sup> Is it fair to set the jurisdictional bar higher for claims against developed countries than for claims against developing countries?

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<sup>17</sup> Some of the arguments in the discussion that follows are elaborated in Bechky (2012), *supra* note 8, pp. 1067–1072, 1084–1093.

<sup>18</sup> In this regard, post-*Salini* state practice generally evidences a continuing desire to have ICSID hear cases without a contribution-to-development test, even where states have otherwise adopted elements of *Salini*. For example, the ASEAN regional investment treaty and the China-Japan-Korea trilateral investment treaty both consent to ICSID arbitration of disputes arising from an "investment" and both incorporate elements of *Salini* into their definitions of "investment," but neither takes *Salini*'s contribution-to-development prong. See ASEAN Comprehensive Investment Agreement arts. 4(c) & n.2, 33(1), 26 February 2009; Agreement for the Promotion, Facilitation and Protection of Investment, China-Japan-Korea, arts. 1(1), 15(3), 13 May 2012; but see Southern African Development Community, *SADC Model Bilateral Investment Treaty Template with Commentary*, art. 2 & cmt. (2012) (advocating inclusion of contribution-to-development in the definition of "investment").

<sup>19</sup> Phoenix Action, Ltd. v. Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 85 (15 April 2009).

<sup>20</sup> To be sure, the answer to this rhetorical question depends on one's understanding of "development." Under at least some conceptions, "development" is an ever-continuing project such that no country can ever be fully "developed." See, e.g., UN Declaration on the Right to Development (1986), *supra* note 9, pmb. ("[D]evelopment is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals").

The development prong may even harm the cause of development.<sup>21</sup> It adds cost and unpredictability to ICSID arbitration, diminishing ICSID's promise as a means to attract investment by assuring investors access to a reliable forum for resolving disputes.<sup>22</sup> The impact falls most heavily on smaller investors, who have the greatest need for the assurance ICSID provides. While it is difficult to prove that any one small investment has contributed to development of the host state, the cumulative impact of small investments is massive. For example, smaller businesses generate 95.4% of new jobs in low-income countries.<sup>23</sup>

*Salini's* development prong should therefore be rejected (even where the rest of *Salini* is followed). The better alternative is to let investors have their "day in court," with case-by-case adjudication on the merits of each claim. This alternative, it must be stressed, does not mean that investors will always win. To the contrary, states enjoy a considerable degree of freedom to regulate land in the public interest.<sup>24</sup> Consider several examples evidencing this regulatory flexibility:

- The U.S. Model BIT provides, "Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."<sup>25</sup>

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**21** The word "may" in the main text 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 smaller investors will affect their actions on the margins. In this regard, I believe that ICSID's own premise is essentially theoretical, as the empirical jury is still out. See Bechky (2012), *supra* note 8, pp. 1092–1093.

**22** See, e.g., *Pantechniki SA Contractors and Engineers (Greece) v. Albania*, ICSID Case No. ARB/07/21, Award, ¶ 43 (30 July 2009) (criticizing the development prong for "introduc[ing] elements of subjective judgment... which (a) transform arbitrators into policy-makers and above all (b) increase unpredictability about the availability of ICSID to settle given disputes").

**23** Meghana Ayyagari et al., *Small vs. Young Firms Across the World: Contribution to Employment, Job Creation, and Growth* 14 (World Bank Dev. Research Grp., Policy Research Working Paper No. 5631, 2011).

**24** In this regard, a commenter suggested that the state's freedom also entails the freedom to decide which cases to submit to ICSID. I agree. Consent is the cornerstone, the *sine qua non* of ICSID jurisdiction. See Bechky (2012), *supra* note 8, pp. 1053, 1057–1063. The point of *Salini's* development prong, however, is that arbitrators may decide – even where the state *has consented* to jurisdiction – that ICSID cannot hear a case simply because the arbitrators conclude that the claimant failed to prove that it had contributed to development of the host state. It is the consent imperative, not *Salini's* objectivism, that best aligns with state discretion to set development policy.

**25** 2012 U.S. Model Bilateral Investment Treaty, Annex B, ¶ 4(b).

- The U.S. Model BIT also provides, “Nothing in this Treaty shall be construed... to preclude a Party from applying measures that it considers necessary for... the protection of its own essential security interests.”<sup>26</sup>
- Drawing on Article XX of the General Agreement on Tariffs and Trade, the Canadian Model BIT exempts nondiscriminatory measures “necessary: (a) to protect human, animal or plant life or health;... or (c) for the conservation of living or non-living exhaustible natural resources.”<sup>27</sup>
- The ASEAN regional investment treaty has language similar to both the Canadian “general exceptions” and the U.S. “security exceptions.”<sup>28</sup>

These examples demonstrate that states often have significant latitude to regulate land to promote development. To be sure, none of them expressly references “development” by name. Regardless, their language provides ample space within which states may act to promote development, which is undeniably a “legitimate public welfare objective.” Indeed, just as Argentina has argued (with some success) that the measures it took in response to its 2001 financial crisis were justified under the “essential security” exception,<sup>29</sup> one may imagine circumstances where a government could invoke the same exception to defend measures taken to assure that land is developed properly to meet the needs of “food security” or “energy security.” In the end, whether government action in any particular land controversy violates an investment treaty must be assessed case-by-case in light of the specific facts and treaty language at issue.

Finally, a critical instrument for assuring that international land deals serve the goal of development must not be overlooked: the lease itself. States should take care that each lease clearly specifies the lessee’s obligations – including making the necessary contributions (such as capital and technology) to develop the land according to specified schedules and regulatory standards that assure benefits (and avoid environmental and other harms) to the local population – and consequences for breach. Leases, moreover, should assure lessees that they will not be subjected to arbitrary or unreasonable government actions, but without shackling the government’s ability to protect the public interest in the uncertain future.

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<sup>26</sup> *Id.*, art. 18.

<sup>27</sup> Canada Model Agreement for the Promotion and Protection of Investments, art. 10(1) (2004).

<sup>28</sup> ASEAN Comprehensive Investment Agreement (2009), *supra* note 18, arts. 17–18.

<sup>29</sup> See generally Jürgen Kurtz, *Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis*, 59 *Int’l & Comp. L.Q.* (2010), 325 (reviewing five cases against Argentina and proposing “human security” as a means to determine when financial crises implicate “essential security interests”).



## 2 Land disputes and transnationalism

One criticism sometimes heard about investor-State dispute settlement is that it gives rights to foreigners above and beyond the rights available to citizens.<sup>30</sup> George Gershwin has supplied one response to this criticism: It ain't necessarily so. International adjudication may be made available for disputes between land-owners and their own governments – indeed, it is sometimes available already.<sup>31</sup>

Consider the “white farmer” cases against Zimbabwe, which arose from Zimbabwe’s notorious response to the colonial legacy of land concentration.<sup>32</sup> *Funnekotter*<sup>33</sup> is a typical investor-State case: an ICSID tribunal found that Zimbabwe’s actions expropriated the claimants’ farmlands without compensation, in violation of the BIT between the Netherlands and Zimbabwe. *Campbell*<sup>34</sup> is more interesting for present purposes: citizens of Zimbabwe brought an international claim against their own government.

*Funnekotter* is transnational in the important sense that states have opened the door of international adjudication to private persons, recognizing private persons as subjects (and not mere objects) of international law.<sup>35</sup> *Campbell* is still more profoundly transnational, as it exemplifies state acceptance of the

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**30** See, e.g., Lori Wallach and Todd Tucker, *Public-Interest Analysis of Leaked Trans-Pacific Partnership (TPP) Investment Text*, at 1 (June 13, 2012) (criticizing the draft TPP for giving “foreign firms ... greater rights than domestic firms,” including “a two-track legal system, with foreign firms empowered to skirt domestic courts and laws”); Sarah Anderson, et al., Collective Statement, at 3–7, in Report of the Advisory Committee on International Economic Policy regarding the Model Bilateral Investment Treaty, an. B (30 September 2009) (proposing seven changes to U.S. policy to “ensur[e] that foreign investors do not have greater rights than U.S. investors”).

**31** To be clear, adjudication of disputes against one’s own government is not available at ICSID, as Article 25(1) of the ICSID Convention limits ICSID jurisdiction to cases between one Contracting State and investors from another Contracting State. Still, as discussed in this section, there are other international fora capable of hearing such disputes.

**32** In 1999, before Zimbabwe started its “fast track land reform” program, about 28% of all arable land was owned by about 4,500 commercial farmers, mainly whites. Human Rights Watch, *Fast Track Land Reform in Zimbabwe* (2002), pp. 2–7.

**33** *Funnekotter v. Zimbabwe*, ICSID Case No. ARB/05/6, Award (22 April 2009). A similar case under Zimbabwe’s BITs with Germany and Switzerland is still pending. See *von Pezold v. Zimbabwe*, ICSID Case No. ARB/10/25.

**34** *Mike Campbell (Pvt) Ltd. v. Zimbabwe*, SADC (T) Case No. 02/2007, Judgment (28 November 2008).

**35** Cf. Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 Recueil des Cours (1972), 331 (“[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.”).

principle that international law constrains states' treatment of their own citizens in their own territories. This is the transnationalism of human rights law,<sup>36</sup> and its constraints are the defining feature of modern international law.<sup>37</sup>

The Zimbabwe cases thus spotlight the common ground between human rights law and international investment law.<sup>38</sup> They share concern for property rights, if more centrally in investment law<sup>39</sup>; there are even human rights treaties that expressly extend the "human right" to property to legal persons.<sup>40</sup> They share other concerns as well: for the rule of law, for constraints on illegal and arbitrary government actions, for access to fair and independent tribunals, and for effective remedies. Some individuals suffer from a mix of multiple offenses, as "investment concerns" like property takings and contract breaches may be combined with such "human rights concerns" as imprisonment, false accusations, and violence.<sup>41</sup> As a result, similar cases may be heard before human

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**36** Cf. Restatement (Third) on the Foreign Relations Law of the United States, Part VII, introductory note (1987) ("The difference in history and in jurisprudential origins between the older law of responsibility for injury to aliens and the newer law of human rights should not conceal their essential affinity and their increasing convergence.").

**37** Cf. Philip C. Jessup, *A Modern Law of Nations: An Introduction* (New York: Macmillan, 1948), 2 (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").

**38** For examples of other works on the convergence side of the ongoing "investment and human rights" debate, see Susan L. Karamanian, "Human Rights Dimensions of Investment Law", in E. de Wet and J. Vidmar (eds.), *Hierarchy in International Law: The Place of Human Rights* (Oxford: Oxford University Press, 2012); Pierre-Marie Dupuy and Jorge E. Viñuales, "Human Rights and Investment Disciplines: Integration in Progress", in M. Bungenberg et al. (eds.), *International Investment Law* (Baden Baden: Nomos, 2012); Timothy G. Nelson, *Human Rights Law and BIT Protection: Areas of Convergence*, 11 J. World Investment & Trade (2011), 27, 34–35, 46–47 (discussing the Zimbabwe cases).

**39** The right to property is protected, to varying degrees, in various human rights instruments. See Universal Declaration of Human Rights, art. 17, G.A. Res. 217 (III) (A), U.N. Doc.A/777 (10 December 1948); American Convention on Human Rights, art. 21, 22 November 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; African (Banjul) Charter on Human and Peoples' Rights art. 14, 27 June 1981, 21 I.L.M. 58 (1982).

**40** See Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, 20 March 1952, E.T.S. No. 9.

**41** For example, among more typical issues arising under the Oman-Yemen BIT, an ICSID tribunal ordered Yemen to pay \$1 million in moral damages for "physical duress" of a business executive. See *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, ¶¶ 284–91 (6 February 2008). Now, a Turkish investor has started an arbitration seeking damages from Turkmenistan, after the UN Human Rights Committee found that Turkmenistan had imprisoned him inhumanely. See *Bozbey v. Turkmenistan*, Communication No. 1530/2006, U.N. Doc. CCPR/C/100/D/1530/2006, ¶¶ 5, 7.3, 9 (2010); Jarrod Hepburn and Luke Eric Peterson, *After Claims of Human Rights Violation are Borne Out, Businessman Pursues Ad-Hoc Investment Treaty Arbitration against Turkmenistan*, Investment Arb. Rep. (3 April 2013).

rights and investment tribunals. Indeed, similar arguments may be advanced in support of such tribunals, so finding common ground may help both the human rights and business communities.

*Campbell* illuminates this nexus. The Southern African Development Community (“SADC”)<sup>42</sup> created a court with jurisdiction over “disputes between natural or legal persons and States,” regardless of the claimant’s nationality.<sup>43</sup> The SADC empowered private persons to bring claims against member states in any case concerning “interpretation and application” of the SADC Treaty.<sup>44</sup> The SADC Treaty specified only a few general principles and undertakings, including “human rights, democracy, and the rule of law” and a ban on racial discrimination.<sup>45</sup>

*Campbell* was the SADC Tribunal’s first judgment. In *Campbell*, the Tribunal found that it had jurisdiction, because the claim concerned “human rights” and “the rule of law.” The Tribunal rejected Zimbabwe’s argument that these principles alone could not support jurisdiction without a protocol “to give effect” to them. On the merits, the Tribunal held that access to courts and a fair hearing are “fundamental rights” and “essential elements of the rule of law,” and that Zimbabwe had deprived the white farmers of their land without opportunity for judicial review. The Tribunal also held that Zimbabwe had discriminated *de facto* against the farmers on the basis of race, while observing that it would not have found a better land reform program to be discriminatory. Ultimately, the Tribunal ordered Zimbabwe to pay the farmers “fair compensation” and “to take all necessary measures ... to protect the possession, occupation and ownership of the [claimants’] lands.”<sup>46</sup> Thus, leaving aside differences in process and substantive law, the human rights tribunal in *Campbell* played effectively the same roles as the ICSID tribunal in *Funnekotter*.

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<sup>42</sup> The SADC members are Angola, Botswana, D.R. Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe. The SADC has suspended Madagascar’s membership since a 2009 coup. See Stephen Kingah, *The Southern African Development Community*, Rep. Int’l Orgs. (2010).

<sup>43</sup> Protocol on Tribunal in the Southern African Development Community, 7 August 2000, art. 15.1.

<sup>44</sup> *Id.*, art. 14(a). SADC cases may not be brought unless the claimant “has exhausted all available remedies or is unable to proceed under the domestic jurisdiction,” *id.*, art. 15.2, but this condition was readily satisfied in *Campbell* where Zimbabwe law had ousted the domestic courts of jurisdiction over the white farmers’ claims. *Campbell* (2008), *supra* note 34, pp. 21–23.

<sup>45</sup> Treaty of the Southern African Development Community, 17 August 1992, arts.4(c), 6.2.

<sup>46</sup> For further discussion of *Campbell*, see, e.g., Erika de Wet, *The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa*, 28 ICSID Rev. 45 (2013), 1.

The political reactions to *Campbell* are also telling. Mike Campbell, his wife Angela, and his son-in-law Ben Freeth were beaten severely.<sup>47</sup> Robert Mugabe expressly refused to honor the SADC judgment.<sup>48</sup> When the Tribunal referred the case to the SADC Summit to take “appropriate action” to enforce the judgment,<sup>49</sup> the Summit instead effectively dissolved the Tribunal and suspended its work pending a treaty amendment to abolish private access.<sup>50</sup> The Summit moved to end private access to the Tribunal, apparently at Zimbabwe’s urging, in the face of a report commissioned by the Summit itself that defended *Campbell*, rejected several challenges Zimbabwe made to the Tribunal’s legitimacy, expressly declined to recommend ending private access lest individuals “be left without effective protection” where domestic remedies are inadequate and recommended reforms to strengthen the Tribunal.<sup>51</sup>

Among those rising to defend the Tribunal was Archbishop Desmond Tutu, the human rights icon. Archbishop Tutu’s comments warrant quotation at length, as they invoke and intertwine human rights and investment arguments:

[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...

The future of the SADC Tribunal hangs in the balance. Without it, the region will lose a vital ally of its citizens, its investors and its future.

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47 Video of the three victims after they were beaten is shown in a documentary, Mugabe and the White African (2009).

48 See, e.g., *Campbell v. Zimbabwe*, SADC (T) Case No. 03/2009, Ruling (5 June 2009) (finding Zimbabwe had not complied with the *Campbell* judgment, where *inter alia* “President Robert Mugabe ... qualified the Tribunal’s decision as ‘nonsense’ and ‘of no consequence’”).

49 *Id.*, acting under Protocol (2000), *supra* note 43, art. 32.5.

50 After placing a moratorium on the Tribunal’s work, the SADC decided not to reappoint or replace Tribunal judges whose terms expired and then “resolved that a new Protocol on the Tribunal should be negotiated and that its mandate should be confined to ... disputes between Member States.” Communiqué, Extraordinary Summit Heads of State and Government of the Southern Africa Development Community, Windhoek, Namibia, ¶¶ 6–8 (20 May 2011); Final Communiqué, 32nd Summit of SADC Heads of State and Government, Maputo, Mozambique, ¶ 24 (18 August 2012). For criticism of the Summit’s decision, see, e.g., de Wet (2013), *supra* note 46, pp. 14, 18–19; for a “realist” appraisal of the Summit’s decision, see Laurie Nathan, *The Disbanding of the SADC Tribunal: A Cautionary Tale*, 35 Hum. Rts. Q. (2013), 870.

51 See Frederick Cowell, *The Death of the Southern African Development Community Tribunal’s Human Rights Jurisdiction*, 13 Human Rts. L. Rev. (2013), 153, 161–164; Lorand Bartels, Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal (2011).

As an African, I am sad that we should give this image of ourselves that we are basically not in favour of the rule of law. It is up to all of us to ensure that SADC not only reinstates the Tribunal but also strengthens it.

We need the support of SADC citizens, civil society and the wider community to save the SADC Tribunal so that the rule of law, development and human rights are protected throughout our region.<sup>52</sup>

Likewise, two southern African NGOs and the International Commission of Jurists advocated for the Tribunal in terms that moved beyond standard human rights arguments into the realm of investment law. For example:

[E]conomic growth and development will be severely set back should investors and businesses be denied the security of having disputes legally determined by a regional tribunal in the event the domestic setting offers no relief.

Also:

[I]f individual access is denied, those investing or doing business in Southern Africa will have no guarantee that, in the event of dispute, they will have access to regional remedy. Without the confidence that they may approach the SADC Tribunal for definitive determination of their entitlements and protection of their property, those considering investing in Southern Africa confront only substantial disincentive.<sup>53</sup>

SADC should restore the Tribunal with its right of private access intact. This would hold states to their stated principles and help move reality toward those principles.<sup>54</sup> It would promote the rule of law, sorely needed in Zimbabwe,<sup>55</sup> for the benefit of both Zimbabwe's citizens and international investors. It would also align SADC with other regional communities:

Both the Economic Community of West African States (ECOWAS) and the East Africa Community secure the rights of individual access to their respective courts, recognising that such access is critical to encouraging economic growth. All three economic communities are committed to securing an economic community that ultimately encompasses all of Africa. But SADC will set back integration efforts by offering its citizens, residents and

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<sup>52</sup> Desmond Tutu, *Too Late to Save the SADC Tribunal*, available at: <<http://www.osisa.org/law/blog/too-late-save-sadc-tribunal>>, accessed 13 August 2012.

<sup>53</sup> International Commission of Jurists, et al., *Submission regarding Amendments to the SADC Tribunal Protocol* (2012), pp. 16, 20 [hereinafter NGO Submission].

<sup>54</sup> Cf. Owen M. Fiss, *Against Settlement*, 93 Yale L.J. (1984), 1073, 1089 ("Civil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals.").

<sup>55</sup> According to one study, Zimbabwe ranks 96th out of 97 countries in fundamental rights and 90th in civil justice. See World Justice Project, *Rule of Law Index, 2012–13*, p. 156.

those who do business within its territory less protection than they can command in other parts of the continent.<sup>56</sup>

In a striking twist, following Mike Campbell's death, his son-in-law Ben Freeth and a farmer who had prevailed in another case at the SADC Tribunal have now alleged that SADC member states are violating human rights law by undermining the Tribunal.<sup>57</sup> They seek an order requiring the SADC states to restore the Tribunal's "jurisdiction and operation" and "to give effect to [its] rulings." They brought this case to the African Commission on Human and Peoples' Rights, under *its* rules allowing consideration of individual "communications" that "relat[e] to human or peoples' rights."<sup>58</sup>

Africa is not traveling alone down this transnational road.<sup>59</sup> Since 1998, the Council of Europe has allowed individuals to bring cases directly against states before the European Court of Human Rights ("ECHR").<sup>60</sup> Doing so caused a fifty-fold jump in activity in Strasbourg, from about 20 cases per year in the system's first 40 years to about 1,000 cases per year since 1998.<sup>61</sup> The ECHR has heard many land disputes – notably including a case affecting the rights of about 80,000 Polish citizens.<sup>62</sup> In the Americas, private persons can petition the Inter-American Commission on Human Rights, but only the Commission (or a state) can initiate a case at the Inter-American Court of Human Rights.<sup>63</sup> Again, this

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<sup>56</sup> NGO Submission (2012), *supra* note 53, p. 20.

<sup>57</sup> Tembani v. Angola, ACHPR Communication No. 409/12. The text of the communication is available at <<http://www.politicsweb.co.za>>. At this writing, Tembani's communication has been deemed "admissible" and the case is continuing. See Richard Lee, *African Commission to Hear SADC Tribunal Case* (22 November 2012), available at: <[www.osisa.org](http://www.osisa.org)>, accessed 18 June 2013.

<sup>58</sup> African (Banjul) Charter on Human and Peoples' Rights arts. 55–56, 27 June 1981, 21 I.L.M. 58 (1982).

<sup>59</sup> See generally NGO Submission (2012), *supra* note 53 (reviewing the individual access provisions of various regional and subregional tribunals).

<sup>60</sup> See Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby art. 34, 11 May 1994, E.T.S. No. 155.

<sup>61</sup> European Court of Human Rights, Overview 1959–2011 (2012), p. 4. Another important factor was the expansion of the Council of Europe after the Cold War: Russia alone accounted for 22% of cases pending on 31 December 2012, while seven of the top ten "high case-count states" had been Communist. European Court of Human Rights, Analysis of Statistics 2012 (2013), p. 8.

<sup>62</sup> See Note, *Broniowski v. Poland: A Recipe for Increased Legitimacy of the European Court of Human Rights as a Supranational Constitutional Court*, 39 U. Conn. L. Rev. (2006), 759.

<sup>63</sup> See American Convention on Human Rights, arts. 41(f), 44, 61.1, 22 November 1969, O.A.S.T. S. No. 36, 1144 U.N.T.S. 123. The Commission's role severely limits the number of cases brought to the Court. In 2012, the Commission received 1936 petitions and filed only twelve cases with the Court. Inter-American Commission on Human Rights, *2012 Annual Report* 53, 61 (2013).

Court hears land disputes – including several significant cases addressing the land rights of indigenous peoples.<sup>64</sup>

The Inter-American effort to secure land rights for indigenous peoples holds real promise for Africa. It also responds to another criticism sometimes heard of investor-State arbitration, that its availability tilts the political scales in favor of foreign investors at the expense of domestic interests.<sup>65</sup> Making international adjudication available for domestic and foreign claimants alike evens the scales. If a state could be brought to an effective, neutral international tribunal for entering a lease that infringed the land rights of citizens, that should encourage states to give more respect to those land rights when deciding whether to enter the lease and, if so, on what terms.

Of course, there will be practical difficulties in enforcing the land rights of Africans. According to Wily, “[l]ess than 10 percent” of the land in Sub-Saharan Africa is privately titled.”<sup>66</sup> The prospect of effective international adjudication capable of enforcing land rights makes it all the more important to find ways to formalize traditional land rights.<sup>67</sup>

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International adjudication of land disputes is not, as some might have it, always and necessarily at odds with human values. To the contrary, such adjudication may contribute to such human values as development, human rights, and the rule of law. States should build the legal infrastructure needed to make such adjudication available to landowners domestic and foreign. Unfortunately, the benefits are not inevitable either. Rather, they require attention to the details – to sound contracts, laws, policies, institutions, and governance. Accordingly, to say the least, states contemplating leases of land subject to traditional rights

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<sup>64</sup> See generally Thomas M. Antkowiak, *Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court*, 35 U. Penn. J. Int'l L. (forthcoming 2013), p. 113; Mauricio Iván Del Toro Huerta, *The Contributions of the Jurisprudence of the Inter-American Court of Human Rights to the Configuration of Collective Property Rights of Indigenous Peoples*, available at: <[http://www.law.yale.edu/documents/pdf/sela/Del\\_Toro.pdf](http://www.law.yale.edu/documents/pdf/sela/Del_Toro.pdf)>, accessed 18 June 2013.

<sup>65</sup> See, e.g., Anderson et al. (2009), *supra* note 30, p. 3 (criticizing “a system that currently elevates the interests of foreign investors over other groups – including labor, environmental and human rights organizations – which do not enjoy comparable private rights of action to enforce international legal obligations”).

<sup>66</sup> Wily, *supra* note 1, p. 6.

<sup>67</sup> See *id.*, pp. 22–24 (discussing options for formalizing land rights). For further information about the importance of securing land rights and about how to do so, see the website of Landesa, [www.landesa.org](http://www.landesa.org), an NGO that claims to have helped secure land rights for 400 million people in 45 countries.

should ensure that these rights are recognized and respected and that the leases protect these rights as well as the public interest.

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