The ICSID and Investor-State Arbitration

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In Trakman and Ranieri (eds), Regionalism in International Investment Law, Oxford University Press (2013)

[2016] UNSWLRS 20

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"RIGHTS-BASED PROCESSES, including binding arbitration and traditional court trials, have limited remedies and may not address the full range of interests and needs that the parties may have. Disputes resolved on the basis of power (e.g. through gunboat diplomacy, or at the extreme, violence and war) weight the outcome in favor of the party with the most leverage, status and resources, but this may be costly on the relationships involved and may result in failure to vindicate rights."[1]

I. INTRODUCTION

In the wake of the global financial crisis, 2009 was a bad year for the International Centre for the Settlement of Investment Disputes (ICSID). In May of that year, the president of Ecuador, Raphael Correa, denounced the ICSID. He proclaimed that his country's withdrawal from the ICSID was necessary for "the liberation of our countries

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[1] U.N. CONFERENCE ON TRADE & DEV., UNCTAD SERIES ON INT'L INV. POLICIES FOR DEV.: INVESTOR–STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION, at xvi, U.N. Sales No. E.10.II.D.11 (2009). *See also* O. Thomas Johnson, Jr. & Jonathan Gimblett, *From Gunboats to BITs: The Evolution of Modern International Investment Law*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2010–2011 (Karl P. Sauvant ed., 2012).

because [it] signifies colonialism, slavery with respect to transnationals, with respect to Washington, with respect to the World Bank."[2] This public representation was followed by a challenge to the ICSID by the presidents of Bolivia and Ecuador at a UN conference in June 2009 where they declared that the ICSID should be disbanded.[3] Although those events occurred over three years ago, the debate has continued with Venezuela recently withdrawing from the ICSID Convention.[4]

These withdrawals from the ICSID raise some challenging questions. Is the ICSID ideologically, structurally, procedurally, or functionally deficient? Are those deficiencies ascribed to the ICSID by President Hugo Chavez Frias of Venezuela and President Raphael Correa of Ecuador justified, and if so, why? Are these concerns confined to several Latin American countries? Are there cogent reasons to the contrary? Is the alternative to have resort to another international investment alternative, or to rely on domestic courts to resolve investment disputes previously submitted to the ICSID, as Australia announced in 2011? Why have major economies and destinations for foreign investment in Asia, varying from Vietnam to India, never acceded to the ICSID?[5] Why has Brazil declined to sign the ICSID Convention? These questions are economically, politically, and socially important. If neither country to an investment treaty is a party to the ICSID Convention, or if their investment treaty provides for investor–state ad hoc arbitration under the rules of another organization, such as the United Nations Commission on International Trade Law (UNCITRAL Rules), domestic courts can review the award if the investor seeks enforcement in a host state. However, if domestic courts have the final word on state–investment arbitration, domestic laws and interests are likely to further dilute international investment law and practice.

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[2] *See ICSID in Crisis*: *Straight-Jacket or Investment Protection?*, Bretton Woods Project (July 10, 2009), http://www.brettonwoodsproject.org/art-564878 (alterations in original); *see generally* Antonios Tzanakopoulos, *Denunciation of the ICSID Convention under the General International Law of Treaties*, *in* International Investment Law and General International Law: From Clinical Isolation to Systemic Integration? (Rainer Hofmann & Christian J. Tams eds., 2011); Michael Waibel et al., The Backlash against Investment Arbitration (2010); Karsten Nowrot, *International Investment Law and the Republic of Ecuador: From Arbitral Bilateralism to Judicial Regionalism*, 96 Beitrage Zum Transnationalem Wirtschafsrecht 5–52 (May 2010); Tor Krever, *The Legal Turn in Late Development Theory: The Rule of Law and the World Bank's Development Model,* 52 Harv. Int'l L.J. 287 (2011); Ignacio A. Vincentelli, *The Uncertain Future of ICSID in Latin America*, 16 Law & Bus. Rev. Am. 409 (2010); UNCTAD, *Denunciation of the ICSID Convention and BITs: Impact on Investor–State Claims*, IIA Issues Note No. 2 (Dec. 2010), http://www.unctad.org/diae.

[3] *See ICSID in Crisis*, *supra* note 2.

[4] *See*, *e.g.*, *Venezuela Submits a Notice under Article 71 of the ICSID Convention*, ICSID (Jan. 26, 2012), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement100. *See also* Luis Britta Garcia, *We Have to Get Out of the ICSID*, *available at* http://venezuelanalysis.com/analysis/6766 (in which Hugo Chavez Frias, president of Venezuela, stated on January 24, 2012, "'We have to get out of ICSID").

[5] *See*, *e.g.*, *List of Contracting States and Other Signatories of the Convention* (as of April 18, 2012), ICSID, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English (last visited June 17, 2012).

This chapter evaluates the criticisms leveled at the ICSID in five particular respects. First, it considers the perceived bias of the ICSID toward wealthy Western states and their investors as an ideological and normative proposition. Second, it evaluates the extent to which the processes of the ICSID incorporate this perceived bias into its institutional mechanisms. Third, it considers whether ICSID arbitration is a viable alternative to domestic courts resolving investment disputes between states and foreign investors. Fourth, it proposes ways in which the ICSID can become more transparent as a mechanism for resolving investment disputes in the face of criticism that it suffers from ideological, structural, and functional myopia. Fifth, it reflects on dispute avoidance alternatives to both arbitration and national courts in resolving investment disputes.[6]

A contrite and diffident defense of the ICSID is that its problems can be ascribed to the complexity of the multiple layers of investment law, that many of these layers are outside of its control, and that the ICSID has attempted to redress those complexities that are within its control.[7] The purpose of this chapter is not to identify the heroes and villains in investment law and practice, but to resolve real conflicts with real human, social, and political potency. In this respect, ICSID arbitration is one among other means of resolving such conflicts. It is not an end in itself, nor should it be so construed.

II. CHALLENGES TO THE ICSID

Whether international arbitration jurisprudence in general can evolve into commonly accepted principles of international investment law is open to debate.[8] Arguably, the failure of the global community of states to reach a multilateral investment accord in the past demonstrates the difficulty for states in finding common ground on the treatment of foreign investment, including institutions and processes for dispute resolution.[9] In dispute is whether investment rights ought to be determined by general

[6] For general information on the ICSID and investment treaties, see generally Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law (2008) (investment treaties); Rudolf Dolzer & Margrete Stevens, Bilateral Investment Treaties (1995); Christoph H. Schreuer, The ICSID Convention: A Commentary 89–91 (2001) (ICSID).

[7] *See, e.g.*, Waibel et al., *supra* note 2 (defending ICSID). *See also* Evolution in Investment Treaty Law and Arbitration (Chester Brown & Kate Miles eds., 2011); Lucy Reed et al., Guide to ICSID Arbitration, at ix (2004); Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts (Pieter Bekker, Rudolf Dolzer & Michael Waibel eds., 2010).

[8] *See generally* Stephan W. Schill, The Multilateralization of International Investment Law, at VI–VII (2009) (discussing non-ICSID methods of multilateralization and investment jurisprudence); Steffen Hindelang, *Bilateral Investment Treaties, Custom and a Healthy Investment Climate—The Question of Whether BITs Influence Customary International Law Revisited*, 5 J. World Inv. & Trade 789 (2004); Jeswald W. Salacuse, *The Treatification of International Investment Law*, 13 Law & Bus. Rev. Am. 155 (2007).

[9] *See* Organisation for Economic Co-operation and Development, *The Multilateral Agreement on Investment Negotiating Text* (Apr. 24, 1998), *available at* http://italaw.com/documents/MAIDraftText.pdf;

principles of investment law, or more truly by geopolitical and economic interests that circumscribe those principles.[10] Also in contention is whether arbitration processes that are ad hoc in nature and sometimes closed to public scrutiny are sufficiently transparent to transcend the political context in which ICSID awards are reached.[11]

A. IDEOLOGY

An underlying concern among some developing states, most vividly expressed in 2009 by President Raphael Correa of Ecuador, is that the ICSID was established by, and arguably in the interest of, wealthy countries and their investors abroad.[12] A related concern is that ICSID arbitration has done more to protect capital exporter states and the "equitable" interests of their investors than address the fledgling economies and social plight of capital importer states in Africa, Asia, and Latin America that historically were economically exploited by colonial powers and their investors.[13] These concerns of developing states are reflected in their collective attempts to protect "their" New International Economic Order through the General Assembly of the United States, a Charter of Economic Rights and Duties of States, and a Declaration on the Permanent Sovereignty of States over Natural Resources.[14]

Human rights challenges to international investment law and investor–state arbitration in particular also reflect the attacks by developing states on economic exploitation imputed to investors from wealthy developed states. The accusation of developing states is that principles of investment law are espoused through selective privileging under a rule-of-law regime devised by Old World powers at the expense of the new developing world order.[15] Proponents of this view argue that, whereas international

Katia Tieleman, *The Failure of the Multilateral Agreement on Investment (MAI) and the Absence of a Global Public Policy Network*, Global Public Policy Institute 17–20 (2000), *available at* http://www.gppi.net/fileadmin/gppi/Tieleman_MAI_GPP_Network.pdf (last visited June 17, 2012).

[10] By far the most dominant view is that investment law is based on determinative principles. *See, e.g.*, Dolzer & Schreuer, *supra* note 6, ch. 1; *see also* M. Sornarajah, Chapter 16 of the current book (providing a critique of this "principled" approach).

[11] *See generally* Jason W. Yackee & Jarrod Wong, *The 2006 Procedural and Transparency-Related Amendments to the ICSID Arbitration Rules: Model Intentions, Moderate Proposals, and Modest Returns*, *in* The Yearbook on International Investment Law & Policy 2009–2010 (Karl P. Sauvant ed., 2010) (discussing transparency in international investment arbitration); Cornel Marian, *Balancing Transparency: The Value of Administrative Law and Mathews-Balancing to Investment Treaty Arbitrations,* 10 Pepp. Disp. Resol. L.J. 275 (2010) (discussing transparency in international investment arbitration).

[12] *See generally ICSID in Crisis, supra* note 2.

[13] *See* M. Sornarajah, The International Law on Foreign Investment 142–45 (2d ed. 2004) (outlinines the history of this division between capital exporter and importer states).

[14] *See* G.A. Res. 3281(xxix), U.N. GAOR, 29th Sess., Supp. No. 3150, UN Doc. A/9631 (Dec. 12, 1974) (Charter of Economic Rights and Duties of States); G.A. Res. 3201 (S-VI), U.N. Doc. A/res/S-6/3201 (May 1, 1974) (New International Economic Order). *See also* Nico Schrijver, Sovereignty over Natural Resources: Balancing Rights and Duties (1997); Leon E. Trakman, *Foreign Direct Investment: Hazard or Opportunity?*, 41 Geo. Wash. Int'l. L. Rev. 1, 15–16, 20 (2010).

[15] *See* Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA, in* Investing with Confidence: Understanding Political Risk Management in the

human rights are based on universal norms of fair treatment, the "fair and equitable" treatment of foreign investors is grounded in self-serving norms directed at the market efficiency of capital flows.[16] Underpinning this rationale is the insinuation that the de-politicization of international investment is code for economic rationalism by which wealthy transnational corporations pontificate profit-maximizing outcomes that ultimately favor them over developing states and their citizenry.[17] The alleged enemy is a superpower such as the United States with an Alien Tort Claims process by which non-U.S. citizens can be held liable in any U.S. civil court for transforming the United States into a universal international law jurisdiction. The limit on this power is perceived as minimal at best, as the defendant must merely be in the United States in order to be subject to a subpoena,[18] although the Alien Act is ordinarily only applied in cases involving the allegation of serious crimes.

Developing states sometimes also decry the shift in the "regime theory" by which powerful countries in the West have invoked customary law and treaty defenses, such as the defense of necessity to foreign investors from developing states,[19] even though those same Western states denounced those defenses when they were capital

21st Century 2–35 (Kevin W. Lu et al. eds., 2009) (discussing risk management from the perspective of established developed countries); Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law* 19 Pac. McGeorge Global Bus. & Dev. L. J. 337 (2007) (analyzing different views of the rule of law).

[16] *See* Moshe Hirsch, *The Interaction between International Investment Law and Human Rights Treaties: A Sociological Perspective*, *in* Multi-Sourced Equivalent Norms in International Law 211–14 (Tomer Broude & Yuval Shany eds., 2011); Sara L. Seck, *Conceptualizing the Home State Duty to Protect Human Rights, in* Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives 34 (Karin Buhmann et al. eds., 2011).

[17] *See* U.N. Secretary-General, *Protect, Respect, and Remedy: A Framework for Business and Human Rights:* Special Rep. of the Sec'y Gen., U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by Professor John Ruggie) (discussing alleged human rights abuses by transnational corporations). *See generally* Rachel J. Anderson, *Reimagining Human Rights Law: Toward Global Regulation of Transnational Corporations,* 88 Denv. U. L. Rev. 183 (2010); Lorenzo Cotula, Human Rights, Natural Resource and Investment Law in a Globalised World: Shades of Grey in the Shadow of the Law (2011).

[18] *See* U.S. Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 76 (1988) ("[T]he subpoena power of a court cannot be more extensive than its jurisdiction."). *But see* Fred L. Morrison, *The Protection of Foreign Investment in the United States of America,* 58 Am. J. Comp. L. 437 (2010). *See generally,* The Kiobel Symposium, *available at* Scotusblog.com. http://www.scotusblog.com/category/special-features/kiobel-symposium/.

[19] *See generally* Andrea K. Bjorklund, *Emergency Exceptions: State of Necessity and* Force Majeure, *in* The Oxford Handbook of International Investment Law 474–99 (Peter Muchlinski et al. eds., 2008) (discussing the necessity defense); Alberto Alvarez-Jiménez, *Foreign Investment Protection and Regulatory Failures as States' Contribution to the State of Necessity under Customary International Law*, 27 J. Int'l Arb. 141 (2010) (discussing the necessity defense in investment arbitration, including under customary investment law); Nicholas Song, *Between Scylla and Charydbis: Can a Plea of Necessity Offer Safe Passage to States in Responding to an Economic Crisis without Incurring Liability to Foreign Investors?*, 19 Am. Rev. Int'l Arb. 235 (2008) (discussing the necessity defense as a solution to the "conundrum" caused when a country faces an economic crisis but still must satisfy its BIT obligations); *Panel Discussion: Is There a Need for the Necessity Defense for Investment Law?, in* Investment Treaty Arbitration and International Law 189 (T.J. Grierson Weiler ed., 2008); *see also infra* notes 34, 57 and 58. *See generally* Santiago Montt, State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation (2009).

exporters.[20] Coupled with these concerns is disquiet about developed states crafting reservations and exceptions in investment treaties to service their national security, public health, labor, and environmental safety interests.[21] Furthermore, a countervailing concern is that developing states such as South Africa are more willing to conclude bilateral investment agreements providing for investor–state arbitration with capital-exporting than capital-importing countries.[22] The signing of bilateral investment agreements incorporating investor–state arbitration is therefore not simply about developed states imposing their will on developing states. Rather, these agreements are strategically important, and states elect among them in a calculated manner according to the perceived benefits arising from prospective investment flows.[23]

The fact that the choice of bilateral investment agreements and investor–state arbitration is strategic still does not contradict the argument by some developing states that they lack the array of strategic options that are available to powerful developed states. From this perspective, the ICSID is a vehicle by which wealthy developed states have manicured investment law, and through it investor–state arbitration, into a self-serving *ius cogens* to suit themselves and their investors abroad.[24] Here, the inference is not that ICSID arbitrators have acquiesced formally to the power of developed states and their investors, or that ICSID arbitrators happily do their bidding. Instead, it is supposed that, if a bilateral investment treaty is devised by a capital exporter, ICSID arbitrators who are trained predominantly as civil and common lawyers are likely to construe that already one-sided treaty textually in favor of that capital exporter.[25] Added to this is the concern that ICSID arbitrators, who are usually commercial and not public lawyers, will pay less attention to the public policy ,"environmental and public health" consequences of their awards for developing states than to the plain words of treaties devised by dominant treaty parties.[26]

Over its forty-year history, the ICSID has acquired many more signatories than the original elite twenty. New members emanate from Africa, Latin America, Eastern Europe, and Asia among others.[27] However, the perception is that, in interpreting

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[20] *See generally* Regime Theory and International Relations (Volker Rittburger ed., 1993) (discussing international regime theory).

[21] On such criticism, see Sornarajah, *supra* note 13, at chs. 7–8.

[22] *See* Luke Eric Peterson, South Africa Pushes Phase-Out of Early Bilateral Investment Treaties after at Least Two Separate Brushes with Investor–State Arbitration, Inv. Arb. Reporter, Sept. 23, 2012. *See generally,* David A. Gantz, *Investor–State Arbitration under ICSID, the ICSID Additional Facility and the UNCTAD Arbitral Rules* (U.S.-Vietnam Trade Council Education Forum, Aug. 17, 2004), http://www.usvtc.org/trade/other/Gantz/Gantz_ICSID.pdf, at 1: "Presumably, the explosion of BITs means that many developing nations believe that the existence of BITs with capital exporting countries is a factor in encouraging foreign investment."

[23] *See* Gantz, *supra* note 22.

[24] *See* M. Sornarajah, Chapter 16 of the current book.

[25] *See, e.g.*, Jeswald W. Salacuse, The Law of Investment Treaties 111–137 (2010)

[26] *See* International Investment Law and Comparative Public Law (Stephan W. Schill ed., 2010); Gus Van Harten, Investment Treaty Arbitration and Public Law, 122–51 (2007).

[27] *See generally* Lorenzo Cotula, Law and Power in Foreign Investment in Africa—Shades of Grey in the Shadow of the Law (2011); A.A. Agyemang, *African States and ICSID Arbitration*, 21

investment treaties literally, ICSID arbitrators have continued to service developed states by applying regulatory defenses crafted by developed states in the interests of those states.[28] This concern gives rise to the inference that investment arbitrators have devised a self-serving *ius cogens* through interpretative practices that perpetuate the status quo.[29] In particular, they have recognized international investment laws, not limited to investment treaties, that protect the property of transnational corporations from expropriation by developing states.[30] Furthermore, investment arbitrators allegedly have failed adequately to address the tension between protecting private property and promoting international investment on the uneven investor–state platform of multistate relations.[31]

A related dilemma is that, with new super–economic powers such as China extending the scope of dispute resolution by treaty beyond expropriation, ICSID arbitrators are likely to construe those treaties purposively, consistent with China's treaty purpose of protecting its national interests such as in its rural areas from foreign investors while also defending the interests of its investors abroad.[32] China is also likely to follow the direction of the Supreme People's Court, which commentators perceive, correctly or otherwise, to be protectionist.[33] The feared result of these trends is another New International Economic Order, following the recession of 2008, in which economically powerful states, now including China and possibly India, replicate the empowerment previously limited to the United States and Western European states. There is worry about increases in investment awards in favor of states, not limited to developed states that invoke the defense of necessity, couched as the national interest in a recession, to defend against investor claims of unjust expropriation.[34] The related concern is that

CILSA 177 (1988) (discussing the African signatories, particularly their consent to jurisdiction, their position in the ICSID, and the appointment of African arbitrators); Alec R. Johnson, *Comment: Rethinking Bilateral Investment Treaties in Sub-Saharan Africa,* 59 Emory L.J. 919 (2010) (discussing BITs in relation to African countries).

[28] *See, e.g.*, Stephen Schwebel, *The Influence of Bilateral Investment Treaties on Customary International Law*, Transnat'l Disp. Mgmt, 1, 28 (Nov. 2005) (discussing the allegedly customary roots of international law). For a rejection of the proposition that BITs represent customary law, see Patrick Dumberry, *Are BITs Representing "the New" Customary International Law in International Investment Law?,* 28 Penn. St. Int'l L. Rev. 675, 681–82, 684 (2010) ("BITs are missing the two necessary elements of Custom.").

[29] *See* Campbell McLachlan, *Investment Treaties and General International Law*, 57 Int'l & Comp. L.Q. 361, 361 (2008); *see generally* Margrete Stevens, *The ICSID Convention and the Origins of Investment Treaty Arbitration*, *in* 50 Years of the New York Convention (Albert Van Den Berg ed., 2009) (describing international investment law as a coherent system since the inception of the ICSID Convention).

[30] *See* McLachlan, *supra* note 29, at 394.

[31] *See*, *e.g.*, Dolzer & Schreuer, *supra* note 6, chs. 1–2 (discussing the alleged foundations of investment law in contract and property).

[32] *See, e.g.*, Lutz-Christian Wolff, *Pathological Foreign Investment Projects in China: Patchwork or Trendsetting by the Supreme People's Court?* 44 Int'l Law. 1001, 1003 (2010) (noting China's protectionism)

[33] *See, e.g.*, *id*. at 1003, 1010–11; *see also* Wei Shen, Case Note, *Beyond the Scope of "Investor" and "Investment": Who Can Make an Arbitration Claim under a Chinese BIT?—Some Implications from a Recent ICSID Case,* 6 Asian Int'l Arb. J. 164, 183–85 (2010) (discussing limits placed on complainants under bilateral investment agreements with China).

[34] *See* Joseph Stiglitz, Freefall: America, Free Markets, and the Sinking of the World Economy (2010) (providing an account of these recessionary forces and their global consequences). On

these defenses will assume ever-newer forms. An example of these newer forms is the bilateral investment agreements of some Asian countries that limit investment protection to investments "approved in writing"[35] or made in "accordance with the laws and regulations from time to time in being."[36] These stipulations empower signatory countries to deny foreign investor rights by withholding written approval to such investments, or by changing laws and regulations that deny protection previously granted to foreign investors.[37]

To these concerns, supporters of investor–state arbitration and the ICSID in particular respond that, whatever the ills of arbitration may be, the ICSID is not to blame. Rather, the ICSID merely facilitates the resolution of investment disputes through the ICSID Convention and Rules. Furthermore, independent arbitration panels decide those disputes.[38] In effect, the ICSID "provides the institutional and procedural framework for independent conciliation commissions and arbitral tribunals constituted in each case to resolve the dispute."[39] In fulfilling this facilitative function, the ICSID operates comparably to private arbitration associations such as the International Center for Dispute Resolution of the American Arbitration Association (ICDR) and the International Chamber of Commerce (ICC).[40] It provides rules of operation to govern the appointment of arbitrators, the conduct of arbitral proceedings, and the rendering of awards, but It does not decide, or influence, substantive awards in particular cases.[41]

A further defense of ICSID arbitration is that attacks by countries such as Ecuador upon an ICSID process or award reflect an individual net cost–benefit analysis for that

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the necessity defense, *see* José E. Alvarez & Tegan Brink, *Revisiting the Necessity Defense: Continental Casualty v. Argentina*, *in* Yearbook on International Investment Law & Policy 2010–2011 (Karl P. Sauvant ed., 2012); Alberto Alvarez-Jiménez, *The Interpretation of Necessity Clauses in Bilateral Investment Treaties after the Recent ICSID Annulment Decisions*, *in* Yearbook on International Investment Law & Policy 2010–2011 (Karl P. Sauvant ed., 2012).

35 On such clauses in BITs, *see, e.g.*, Philippe Gruslin v. Malaysia, ICSID Case No. ARB/94/1 (Apr. 24, 1996), 5 ICSID Rep. 483 (2000); Yaung Chi Oo Trading Pte Ltd. v. Gov't of the Union of Myan., 42 I.L.M. 540, 551 (2003).

36 *See* Fraport AG Frankfurt Airport Serv. Worldwide v. Rep. of the Phil., ICSID Case No. ARB/03/25 (Aug. 16, 2007) (providing such phraseology in an investment agreement with the Philippines).

37 *See supra* notes 33 and 35.

38 *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States § 14(1), International Centre for Settlement of Investment Disputes, *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Rules_Home.

39 *See ICSID Dispute Settlement Facilities*, International Centre for Settlement of Investment Disputes, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=RightFrame&FromPage=Dispute Settlement Facilities&pageName=Disp_settl_facilities (last visited June 17, 2012).

40 *See* ICDR, http://www.adr.org/icdr (last visited June 17, 2012); ICC, http://www.iccwbo.org (last visited June 17, 2012); Leon E. Trakman, *Legal Traditions and International Commercial Arbitration*, 17 Am. Rev. Int'l. Arb. 1, 19–20, 26–28 (2006) (discussing private international commercial arbitration associations).

41 *See ICSID Dispute Settlement Facilities*, *supra* note 39.

state.[42] They do not reflect a systemic bias in ICSID proceedings or awards against developing states and their investors in general. Furthermore, the loss of an ICSID investor–state dispute by one developing state does not translate into a net loss for developing countries as a class.[43]

These defenses do not respond to the underlying assault on the ICSID, based on the perception that institutionalized arbitration, exemplified by the ICSID, protects the interests of developed states and their investors systemically, structurally, and, ultimately, functionally.

B. IMPACT OF IDEOLOGY ON ICSID ARBITRATION

The perception that ICSID arbitration empowers both old and new wealthy countries at the expense of poorer countries is supported by the criticism that the ICSID is a witting or unwitting party to a world order dominated by institutions and processes that are directed at wealth enhancement, not wealth sharing. Typifying this criticism is the fact that the ICSID is part of the World Bank Group. As such, it allegedly acts as a proxy for affluent investors from the United States and prosperous Western European countries and, in the long term, wealthy countries in general that can afford its services.[44] Although the ICSID's homepage presents the ICSID as an "autonomous international institution,"[45] member countries are members of the World Bank.[46] The governor of the Bank is an ex officio member of the ICSID's governing body, the Administrative

[42] On how different investment policies can influence investment law, see generally Andreas von Staden, *Towards Greater Doctrinal Clarity in Investor–State Arbitration: The CMS, Enron, and Sempra Annulment Decisions*, 2 Czech Y.B. Int'l L. 207 (2011).

[43] *See* Susan D. Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards* (2011) 51 Va. J. Int'l L. 977 (2011). Franck undertakes a quantative analysis of awards with Latin American countries as parties, and finds that "on the whole, . . . ICSID arbitration awards were not statistically different from other arbitral processes, which is preliminary evidence that ICSID arbitration was not necessarily biased or that investment arbitration operated in reasonably equivalent ways across forums." *See also id.* at 898 onward.

[44] *Cf. id. But see* http://www.ase.tufts.edu/gdae/Pubs/wp/11-01TreatyArbitrationReappraisal.pdf. *See also ICSID—International Centre for Settlement of Investment Disputes* (July 14, 2009), *available at* http://www.brettonwoodsproject.org/item.shtml?x=537853. "Reasons for the vocal and mounting critiques against ICSID peg around its governance, its biasness in favour of rich countries and its role in crisis."

[45] This self-description appears on the ICSID's home page, *available at* http://icsid.worldbank.org/ICSID/Index.jsp (last visited June 17, 2012).

[46] *Compare List of Contracting States and Other Signatories to the Convention*, International Centre for Settlement of Investment Disputes, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main (last visited June 17, 2012), *with Member Countries*, World Bank, http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,contentMDK:22427666~menuPK:8336899~pagePK:51123644~piPK:329829~theSitePK:29708,00.html (last visited June 17, 2012).

Council.[47] The chair of the Administrative Council is the president of the World Bank.[48] The annual meeting of the World Bank and its Fund coincides with the annual meeting of the Administrative Council of the ICSID.[49] Not insignificantly, the World Bank funds the ICSID Secretariat.[50] The Secretary General of the ICSID has the authority to appoint arbitrators to resolve investment disputes, and, given the limited number of qualified candidates, the balance of the appointment process allegedly favors developed countries.[51] ICSID hearings are often held in Washington, D.C., but also in expensive cities such as London and Paris; these locations are convenient for and affordable to wealthy investors, but not for more distant and poorer developing states, their investors, and civic groups in their countries.[52]

A further contention against investor–state arbitration under the ICSID is that international principles of investment law that require developing states to pay "prompt, fair and effective" compensation for expropriation bypass the fact that many developing states lack the resources to compensate foreign investors according to such an international "fair and equitable" standard.[53] As a result, "prompt, fair and effective" compensation for a foreign investor from a developed state may "unfairly" cripple a developing country by perpetuating a history of dominant foreign states and their investors dispossessing it of its natural resources.[54] Conversely, new investment

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[47] *See Organizational Structure of ICSID*, International Centre for Settlement of Investment Disputes, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=RightFrame&FromPage=Organization%20and%20Structure&pageName=Organization (last visited June 17, 2012).

[48] *See id.*

[49] *See id.*

[50] *See id.*

[51] This challenge to the authority of the Secretary General arose in arbitration against Gambia in which the Tribunal upheld his authority. *See Co-Arbitrators in Mining Dispute Rule That ICSID Acted within Its Authority When It Nominated an Arbitrator after Gambia Failed to Do so within Prescribed Time Limit*, Investment Reporter, May 20, 2011, *available at* http://www.iareporter.com; *see also Effort to Disqualify Arbitrator in Venezuelan Oil Case Unsuccessful; Adjudicators Acknowledge That Multiple Arbitral Appointments Can Be a Concern*, Investment Reporter, May 20, 2011, *available at* http://www.iareporter.com/articles/20110520.

[52] For more on the ICSID's organizational structure and the role of the World Bank, Administrative Council, and Secretariat, see *Organizational Structure*, *supra* note 47.

[53] On the dominance of developed states over trade and investment and challenges by developing states, see generally D.K. Fieldhouse, The Theory of Capitalist Imperialism (1967) (discussing imperialism); Free Trade and Other Fundamental Doctrines of the Manchester School (Francis W. Hirst ed., 1968) (providing a collection of speeches from the nineteenth century considering the development of free trade); P.J. Cain, *J.A. Hobson, Cobdenism, and the Radical Theory of Economic Imperialism, 1898–1914,* 31 Econ. Hist. Rev. 565, 576–80 (1978); Michael Freeden, *J. A. Hobson as a New Liberal Theorist: Some Aspects of His Social Thought until 1914,* 34 J. Hist. Ideas 421 (1973); James Oliver Gump, *The West and the Third World: Trade, Colonialism, Dependence, and Development,* 11 J. World Hist. 396 (2000) (book review). On the choice between compensation or restitution, *see* Borzu Sabahi, Compensation and Restitution in Investor–State Arbitration: Principles and Practice (2011).

[54] On the "fair and equitable" treatment standard in investment treaties, see, for example, Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. World Inv. & Trade 357 (2005). *See generally* Roland Kläger, Fair and Equitable Treatment in International Investment Law

treaties devised by developed states that are now capital importers may artfully invoke such defenses as necessity, national security, health, safety, and the protection of the environment to deny "fair and equitable" treatment to investors from developed and developing countries alike.[55] Here, the inference is that successful arbitration awards favoring wealthy investors sometimes undermine the reasonable expectations, not of investors, but of developing states seeking to protect their fledgling economies from a litany of exploitative foreign investors.[56]

A related criticism is that in ICSID investor-state arbitration in particular, host state defenses such as necessity may trump the claims to "fair and equitable" treatment by foreign investors. Although expansive defenses of necessity were upheld in *LG&E v. Argentine Republic*[57] and *Continental Casualty Company v. Argentine Republic*,[58] this is not necessarily so. In contrast, the arbitral panel in the NAFTA case of *Pope and Talbot v. Government of Canada* administered by the UNCITRAL concluded that it was not limited under NAFTA Article 1005 to the "international minimum standard of treatment," even though Canada won the case.[59] However, minimalist standards of treatment are

(2011); Hussein Haeri, *A Tale of Two Standards: "Fair and Equitable Treatment" and the Minimum Standard in International Law,* 27 Arb. Int'l 27 (2011); Andrew P. Tuck, *The "Fair and Equitable Treatment" Standard Pursuant to the Investment Provisions of the U.S. Free Trade Agreements with Peru, Colombia and Panama,* 16 Law & Bus. Rev. Am. 385 (2010); Kenneth J. Vandevelde, *A Unified Theory of Fair and Equitable Treatment,* 43 N.Y.U. J. Int'l L. & Pol. 43 (2010).

[55] *See Trade and Investment for Growth,* Dep't for Bus. Skills & Growth, http://www.bis.gov.uk/assets/biscore/international-trade-investment-and-development/docs/t/11-717-trade-investment-for-growth.pdf (last visited June 19, 2012) (discussing the UK's defense of its international trade and investment after the 2008 recession in a White Paper presented to the Parliament in February 2011). *But see* P.P. Craig, Administrative Law 639–56 (5th ed. 2005); Francisco Orrego-Vicuña, *Foreign Investment Law: How Customary Is Custom?*, 99 Proceedings of the Annual Meeting (Am. Soc'y of Int'l L.) 98, 99 (2005) ("[F]air and equitable treatment is not really different from the legitimate expectations doctrine as developed, for example by the English courts and also recently by the World Bank Administrative Tribunal.").

[56] *See* Kyla Tienhaara, The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy 152–57 (2009); *see also Submission of Phillip Morris International in Response to the Request for Comments Concerning the Proposed Trans-Pacific Partnership Trade Agreement*, *available at* http://www.regulations.gov/#!documentDetail;D=USTR-2009-0041-0016;oldLink=false (last visited June 19, 2012).

[57] *See* ICSID Case No. ARB/02/1, ¶¶ 2–3 (July 25, 2007), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC786_En&caseId=C208.

[58] ICSID Case No. ARB/03/9, ¶ 28 (Sept. 5, 2008). *See also* Eric David Kasenetz, *Desperate Times Call for Desperate Measures: The Aftermath of Argentina's State of Necessity and the Current Fight in the ICSID,* 41 Geo. Wash. Int'l L. Rev. 709, 721–23 (2010); Antoine Martin, *International Investment Disputes, Nationality and Corporate Veil: Some Insights from Tokios Tokelés and TSA Spectrum De Argentina*, 8 Transnat'l Disp. Mgmt 1 (2011); José E. Alvarez & Tegan Brink, *Revisiting the Necessity Defense: Continental Casualty v. Argentina* 6–11 (Int'l Law & Justice Working Paper No. 2010/3, 2010), *available at* http://www.iilj.org/publications/documents/2010-3.Alvarez-Brink.pdf; Tarcisio Gazzini, *Necessity in International Investment Law: Some Critical Remarks on* CMS v. Argentina, 26 J. Energy & Nat. Resources L. 450, 452–53 (2008); José Rosell, *The CMS Case: A Lesson for the Future?*, 25 J. Int'l Arb. 493 (2008).

[59] *See* Pope & Talbot Inc. v. Can., Award, Part III. (Apr. 10, 2001) (UNCITRAL AWARD). *See also* Pope & Talbot Inc. v. Gov't of Canada, Foreign Affairs & Int'l Trade Canada, http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/pope.aspx?lang=en (last visited June 19, 2012).

applied to a variety of specific defenses in the U.S. and Canadian Model Investment Treaties.[60]

A further criticism leveled against investor–state arbitration is that substantive defenses invoked by developed states in foreign investor claims have grown exponentially. This is typified in the NAFTA case, *Methanex v. United States of America*,[61] the U.S. and Canadian Model Treaties,[62] and the India–Singapore Economic Cooperation Agreement.[63] In particular, each treaty includes defenses to investor claims on such grounds as health, public morality, social welfare, and sustainable development.[64] ICSID tribunals have accommodated these defenses.[65] They have also rejected investor claims that such defenses deny foreign investors "fair and equitable treatment," or that a signatory state has exceeded the limits of the "margin of appreciation" doctrine in protecting its public interests over the investment interests of foreign investors.[66]

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[60] *See* Patrick Dumberry, *The Quest to Define "Fair and Equitable Treatment" for Investors under International Law: The Case of the NAFTA Chapter 11 Pope & Talbot Awards,* 3 J. World Inv. 657, 663 (2002). *See also* Directorate for Financial and Enterprise Affairs, *Fair and Equitable Treatment Standard in International Investment Law* 11–12 (Organisation for Economic Co-operation and Development, Working Paper No. 2004/3, 2004), *available at* http://www.oecd.org/dataoecd/22/53/33776498.pdf.

[61] *See* Methanex Co. v. US, Final Award, (Aug. 7, 2005), http://www.state.gov/documents/organization/51052.pdf, (2005) (Rowley, Reisman, & Vedeer, Arbs.); *see also Methanex Corporation and the United States of America*, NAFTA Claims, http://www.naftaclaims.com/disputes_us_6.htm (last visited June 19, 2012); Courtney Kirkman, *Fair and Equitable Treatment:* Methanex v. United States *and the Narrowing Scope of NAFTA Article 1105,* 34 Law & Pol'y Int'l Bus. 343 (2002).

[62] *See* Treaty between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, http://www.state.gov/documents/organization/117601.pdf (American 2004 Model Bilateral Investment Treaty); *see also* Andrew Newcombe, *Canada's New Model Foreign Investment Protection Agreement,* Investment Treaty Arbitration (2004), *available at* http://ita.law.uvic.ca/documents/CanadianFIPA.pdf (Canadian Model Bilateral Investment Treaty). *But see* United States Trade Representative, 2012 U.S. Model Bilateral Investment Agreement, *available at* http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.

[63] *See* Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore, *available at* http://commerce.nic.in/ceca/toc.htm.

[64] *See* Andrew Newcombe, *General Exceptions in International Investment Agreements* at 4 (BIICL Eighth Annual WTO Conference Draft Discussion Paper, May 13 and 14, 2008), *available at* http://www.biicl.org/files/3866_andrew_newcombe.pdf.

[65] A series of cases illustrate these variable conceptions of "fair and equitable" treatment. *See* Maffezini.v Kingdom of Spain, ICSID Case No. ARB/97/7, Award on the Merits, ¶ 64 (Nov. 13, 2000), http://italaw.com/documents/Maffezini-Award-English.pdf; MTD Equity Sdn Bhd & MTD Chile SA v. Chile, ICSID Case No. ARB/01/7, ¶ 178 (May 25, 2004), http://italaw.com/documents/MTD-Award.pdf; Ian A Laird, *MTD Equity Sdn Bhd and MTD Chile SA v. Republic of Chile—Recent Developments in the Fair and Equitable Treatment Standard,* Transnat'l Disp. Mgmt (Oct. 2004).

[66] *See generally* R. St. J. Macdonald, *The Margin of Appreciation*, *in* The European System for the Protection of Human Rights 83 (R. St. J. Macdonald et al. eds., 1993); Onder Bakircioglu, *The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases*, 8 German L. J. 711 (2007); Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?,* 16 Eur. J. Int'l L. 907 (2005); Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards* 31 N.Y.U. J. Int'l L. & Pol. 843 (1999).

These objections are directed at more than treaty exceptions to standards of treatment accorded to investors from wealthy countries.[67] More accurately, the objection is that wealthy countries are able to impose their model codes and treaties on developing states, along with self-serving substantive intellectual property and other laws.[68] The further objection is that investment arbitrators, in construing those treaties literally, are likely to perpetuate an unequal playing field for investors from poor and lower middle-income states. The result is the protection of the "legitimate expectations" of investors from wealthy states at the expense of the even more legitimate needs of developing states and their subjects.[69]

c. complexity and cost

A functional challenge to ICSID arbitration is the sheer cost and complexity of ICSID proceedings.[70] In addition, arbitration proceedings are also perceived to be dilatory, difficult to manage, disruptive, unpredictable, and not subject to appeal.[71] Coupled with these challenges is the observation that low-income countries lack the resources to bear the legal fees and related costs of defending against well-resourced transnational corporations.[72] Moreover, these countries lack the econometric data

[67] *See generally* M. Sornarajah, The Norman Paterson School of International Affairs Simon Reisman Lecture in International Trade Policy: The Clash of Globalizations and the International Law on Foreign Investment (Sept. 12, 2002), *as reprinted in* 10 Canadian Foreign Pol'y 1 (2003) (discussing limitations associated with traditional "international" principles of compensation for expropriation, particularly in relation to developing countries).

[68] *See* Susan Sell, Private Power, Public Law: The Globalization of Intellectual Property Rights, ch. 5 (2008).

[69] *See, e.g.,* Saluka Inv. BV (Neth) v. Czech, Partial Award, ¶ 304 (Mar. 17, 2006), http://italaw.com/documents/Saluka-PartialawardFinal.pdf (arbitration under the UNCITRAL rules) (noting the "legitimate expectations"); Waste Mgmt, Inc. v. The United Mexican States, ICSID Case No. ARB(AF)/00/3, Final Award, ¶ 98 (NAFTA) (Apr. 30, 2004), http://italaw.com/documents/laudo_ingles.pdf; Int'l Thunderbird Gaming Corp, v. Mex., Award, ¶ 147 (Jan. 26, 2006), http://italaw.com/documents/ThunderbirdAward.pdf (arbitration under the UNCITRAL rules); GAMI Inv. Inc. v. Gov't of the United Mexican States, Final Award, ¶ 100 (Nov. 15, 2004), http://www.state.gov/documents/organization/38789.pdf (Arbitration under the UNCITRAL Rules). *See also* G. C. Christie, *What Constitutes a Taking of Property under International Law?* 38 Brit Y.B. Int'l L 307, 321–23 (1962); John Herz, *Expropriation of Foreign Property,* 35 Am. J. Int'l L. 243, 251 (1941) (discussing the history of expropriation in international law); Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 Am J. Int'l L. 474, 493 (1991) (discussing also the history of expropriation in international law).

[70] *See Schedule of Fees*, International Centre for Settlement of Investment Disputes (Jan. 1, 2012), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=scheduledFees&reqFrom=Main (indicating the cost of ICSID arbitration).

[71] On the absence of an appeal in ICSID arbitration, see Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Art. 53(1), Apr. 2006, ICSID/15 ("The award . . . shall not be subject to any appeal or to any other remedy except those provided for in this Convention."). The most significant remedy under the ICSID is the annulment of an award under Article 53.

[72] See *Schedule of Fees*, *supra* note 70. *See also Memorandum on the Fees and Expenses of ICSID Arbitrators*, International Centre for Settlement of Investment Disputes (July 6, 2005), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=Memorandum.

to verify the adverse impact of foreign investment upon their local economies, such as upon the environment.[73]

What developing countries require is the capacity to identify, explore, and verify complex socioeconomic data to defend against the claims of investors from wealthy states. They need to be able to assess dispassionately the net cost and benefit to them of investor–state arbitration, as well as to discrete sectors of their economies. They also need to ascribe costs and benefits to normative values, such as to the political value of adapting their legal systems to the rule-of-law expectations of developed states and their investors. However, trying to generate such complex economic data places developing countries at a comparative disadvantage to developed countries and their investors that have ready access to such data, including from private sector sources. Developing countries are further disadvantaged in utilizing incomplete econometric measures to weigh competing policies in regulating direct foreign investment and in order to defend against foreign investor claims. Finally, yet another disadvantage is that investors from developed countries use precisely such deficiencies in considering whether to mount investor–state arbitration against targeted developing countries.[74]

Concerns about the high costs of investor–state arbitration are not entirely partisan or isolated. The cost hurdles of arbitration are also not limited to developing states and their investors. In fact, studies on conflict resolution in international investor–state arbitration, including by the United Nations Conference on Trade and Development (UNCTAD), level criticism at both investor–state arbitration and litigation on economic grounds, including the high cost of managing disputes generally:

> . . . [T]he financial amounts at stake in investor–State disputes are often very high. Resulting from these unique attributes, the disadvantages of international trade and investment arbitration are found to be the large costs involved, the increase in the time frame for claims to be settled, the fact that ISDS cases are increasingly difficult to manage, the fears about frivolous and vexatious claims,

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[73] *See, e.g.*, Hillary French, *Capital Flows and the Environment*, 3(22) Foreign Policy in Focus (Aug. 1998): "As investors search the globe for the highest returns, they are often drawn to places endowed with bountiful natural resources but are handicapped by weak or ineffective environmental laws. Many people and communities are harmed as the environment that sustains them is damaged or destroyed—villages are displaced by the large construction projects, for example, and indigenous people watch their homelands disappear as timber companies level old-growth forests. Foreign investment-fed growth also promotes western-style consumerism, boosting car ownership, paper use, and Big Mac consumption rates towards the untenable levels found in the United States—with grave potential consequences for the health of the natural world, and the stability of the earth's climate, and the security of food supplies." *See also* Economic Watch, *Disadvantages of Foreign Direct Investment* (June 30, 2010), *available at* http://www.economywatch.com/foreign-direct-investment/disadvantages.html.

[74] *See also* Andreas von Staden, *Towards Greater Doctrinal Clarity in Investor–State Arbitration: The CMS, Enron and Sempra Annulment Decisions,* 2 Czech Y.B. Int'l L. 207 (2011) (discussing how different investment policies can influence investment law); Susan D. Franck, *Rationalizing Costs in Investment Treaty Arbitration*, 88 Wash. U. L. Rev. 769, 789, 815–16 (2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1781844 (providing an economic rationalization of the costs of arbitration under investment treaties).

> the general concerns about the legitimacy of the system of investment arbitration as it affects measures of a sovereign State, and the fact that arbitration is focused entirely on the payment of compensation and not on maintaining a working relationship between the parties.[75]

However plausible these concerns may be, the actual cost of an ICSID arbitration is sometimes hard to fathom with accuracy. Some costs are known. For example, the ICSID's memorandum of the fees and expenses of ICSID arbitrators are specified, as of July 6, 2005, on the ICSID Web site. The new Schedule of ICSID Fees came into effect on January 1, 2012.[76] However, the length and complexity of ICSID hearings that have cost implications are usually not known in advance, other than as macro statistics.[77] Similarly the fees of party representatives, primarily lawyers, that may include contingency fees, are often not known.[78] In addition, losing parties, including losing states, sometimes resist publicizing both the costs and results of ICSID awards for fear of diminishing their stature in the global community.[79] Added to this is the tendency of some poorer countries that depend on foreign investment to deflect concerns about the social costs of adverse foreign investments on their domestic economies as they wish to be perceived as being economically and politically stable.[80] Although civic groups from such countries can help to demonstrate the social cost of adverse

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[75] Investor–State Disputes: Prevention and Alternatives to Arbitration, *supra* note 1, at xxiii; *see also* U.N. Conference on Trade & Dev., *Latest Developments in Investor–State Dispute Settlement,* UNCTAD/WEB/DIAE/IA/2010/3 (Mar. 2011), *available at* http://www.unctad.org/en/docs/webdiaeia20113_en.pdf.

[76] *See supra* note 72 (providing further information on costs and fees).

[77] *See, e.g.*, Anthony Sinclair et al., *ICSID Arbitration: How Long Does It Take?* in 4(5) Global Arb. Rev., *available at* http://www.goldreserveinc.com/documents/ICSID%20arbitration%20%20How%20long%20does%20it%20take.pdf.

[78] *See, e.g.*, Hugo Perezcano, *ICSID Arbitrator Fees: Some Pratical Considerations*, *in* Transnat'l Disp. Mgmt., *available at* http://www.transnational-dispute-management.com/article.asp?key=674.

[79] In some respects, this is the dilemma of El Salvador in the ongoing case Pacific Rim Cayman LLC v. Republic of El Salvador (ICSID Case No. ARB/09/12). On the one hand, El Salvador seeks to demonstrate a strong interest in denying mining rights to Pacific Rim, notably on grounds of health hazards from mining operations. On the other hand, El Salvador has an interest in presenting itself as a self-determining state that is capable of protecting and sustaining its own public interests. The result is strong public interventions in support of El Salvador, including entreaties to states such as the United States, to pressurize Pacific Rim to withdraw its Claim. This reaction is tempered by caution by El Salvador not to compromise its position as Respondent in the case, and not to undermine its status as a self-determining state. *See, e.g.*, *Voices from El Salvador, available at* http://voiceselsalvador.wordpress.com/2010/05/31/summary-of-day-1-in-the-pacific-rim-v-el-salvador-preliminary-hearings-at-icsid/; *El Salvador Mining Case Could Affect Business in Central America*, Inside Counsel, Sept. 1, 2011, *available at* http://www.insidecounsel.com/2011/09/01/el-salvador-mining-case-could-affect-business-in-c; *World Bank Tribunal Ruling in El Salvador Mining Case Undermines Democracy*, Network for Justice in Global Investment, June 2, 2012, *available at* http://justinvestment.org/2012/06/world-bank-tribunal-ruling-in-el-salvador-mining-case-undermines-democracy/.

[80] *See, e.g.*, Torbjörn Fredriksson, *Forty Years of UNCTAD research on FDI,* 12(3) Transnat'l Corps. 2003, *available at* http://biblioteca.hegoa.ehu.es/system/ebooks/14053/original/Forty_Years_of_Unctad_Research_on_FDI.pdf.

determinations against their countries, those groups can do so only if they are privy to cost data, only if they can afford to petition to be heard, and only if their petitions are granted.[81]

What are available are rough empirical assertions about the wealth of state parties to ICSID arbitration and foreign investors, albeit with inadequately defined terms and the lack of a detailed and explanatory methodology. For example, 2007 data supposedly evinces that 1.4 percent of all arbitration cases were filed against G8 countries. However, U.S. investors reportedly filed each of those cases. According to the data, investors brought 74 percent of all ICSID cases against so-called middle-income states, while low-income states accounted for 17 percent of ICSID cases.

Evidencing the extent to which large corporations invoked the ICSID was the statement that 20 percent of investors that brought ICSID cases were Fortune 500 companies globally. Seven of these corporate investors were reported as having revenues exceeding the gross national production of the country against which they proceeded, while 48 percent of ICSID/ICSID Additional Facility decisions favored foreign investors.[82]

One can draw equally broad, albeit not necessarily reliable, inferences from this macro data. For example, one inference is that middle-income and, relative to their economic wealth, poorer countries bear the brunt of ICSID arbitration. Furthermore, investors mounting successful claims include a disproportionate number of wealthy transnational corporations. However, that data does not take into account developing countries that settle disputes in advance of investor–state arbitration because they cannot afford the cost or publicity of fending off investor attacks.

The perception of developing countries capitulating to investor demands is not peculiar to investor–state arbitration. For instance, developing countries may also succumb to foreign investor demands because of the cost and reputational damage arising from such arbitration.[83] What is distinctive about investor–state arbitration is that such capitulation can occur in many different ways in investment practice, much of which is difficult to detect in the absence of a public claim or other publicity. All this

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[81] *See infra* Section IV(iii) (discussing the plight of civic groups seeking status to file amicus curiae briefs); Stavros Brekoulakis, Third Parties in International Commercial Arbitration (2011) (discussing third parties in international commercial arbitration).

[82] *See, e.g.*, ICSID, Bretton Woods Project (July 14, 2009), *available at* http://www.brettonwoodsproject.org/item.shtml?x=537853. On ICSID's figures, including that investors won 48% of ICSID/Additional Facility cases, see Chart 9 on p. 13 of The ICSID Caseload – Statistics (Issue 2012-2), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics. Based on Chart 12 in the same document, ICSID appears to have issued 150 awards in the aggregate. For an empirical analysis of the costs of ISA arbitration, see Susan D. Franck, *Rationalizing Costs in Investment Treaty Arbitration*, *supra* note 74, 769, 789, 815–16 (2011).

[83] *See, e.g.*, Borzu Sabahi, Compensation and Restitution in Investor–State Arbitration: Principles and Practice 143 (2011), discussing arbitration in which Turkey alleged damage to its international reputation as a result of the "jurisdictionally baseless claim asserted in bad faith." http://books.google.com.au/books?id=IP5yMH3IquQC&pg=PA137&lpg=PA137&dq=damage+from+reputation+from+investor+state+arbitration&source=bl&ots=SUXy-r6Hr6&sig=oCK92HXKh5lFFFTC5n-3Xr2CBZw&hl=pt&sa=X&ei=MtT1T4juJ4mroQXcqciqBw&ved=0CEIQ6AEwAA#v=onepage&q=damage%20fr.

makes it more difficult to determine the actual extent of costs, including the social costs of dispute settlement.

In addition, there is no suitable macro data that satisfactorily identifies when and to what extent third parties are involved in investment arbitration proceedings. What is needed, at the outset, is comprehensive information on: the nature of petitions by third parties to participate in ICSID proceedings, when these parties constitute public interest groups in developing countries, the success or failure of their petitions, the reasons provided for that success or failure, and the transparency of the proceedings in which those determinations are reached. Such information could further assist in allaying concerns about biases in arbitration proceedings against developing countries and public interests being represented in those countries.

In contrast, the statistics provided by ICSID on caseload leads to more value-neutral inferences about the nature and significance of its caseload.[84] For example, the ICSID Web site shows the growth of bilateral investment agreements, from the 1959 agreement between West Germany and Pakistan to over 3,000 anticipated by the end of 2012. Foreign direct investment, in turn, has grown geometrically since 1970, exceeding US$1,400 billion in 2009. Developing countries account for a disproportionate share of that growth. The ICSID statistics also demonstrate that ICSID cases arising from the consent of the parties include 63 percent brought under bilateral investment agreements, with 20 percent arising from investor–state agreements.[85]

The ICSID caseload has also grown geometrically, from a single case in 1972 to approximately ten cases in 1990, to thirty-eight new cases filed so far in 2012 alone. However, despite the growth in ICSID cases, the absolute number of ICSID cases is limited compared to international commercial arbitration cases, such as 1,435 claims filed with the China International Economic and Trade Arbitration Commission (CIETAC), 994 cases filed with the International Center for Dispute Resolution (ICDR) of the American Arbitration Centre (AAA), and 795 cases filed with the International Chamber of Commerce (ICC).[86]

Regarding winners and losers in investor–state disputes, the ICSID statistics reveal that 61 percent of cases filed with the ICSID are decided by arbitration tribunal, while 39 percent are settled or otherwise discontinued. In addition, states win ICSID investor–state disputes approximately half of the time. ICSID tribunals dismiss 53 percent of the cases, primarily on jurisdictional grounds. They uphold 46 percent of investor claims in whole or part.[87]

These statistics do not clarify the number of investor claims cases brought by foreign investors from developed countries against less-developed or developing states. Nor do the ICSID statistics establish the extent to which claims for compensation are

[84] *See The ICSID Caseload*, available at http://icsid.worldbank.org/IC SID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics.

[85] *Id. See also* Andrea M. Steingruber, Consent in International Arbitration (2012).

[86] *Id.*

[87] *Id.*

successful or not. However, it is not reasonable to expect the ICSID to provide such information, given the somewhat arbitrary classification among the wealth of investors on the one hand, and the distinction among developed, developing, and less-developed states on the other hand.

D. THE PUBLIC-PRIVATE NATURE OF ICSID ARBITRATION

A further critique is specific to investor–state arbitration in particular. Investment arbitration, not limited to ICSID, is modeled somewhat on "private" commercial arbitration.[88] Investment arbitrators are ad hoc appointees, not domestic judges holding permanent office.[89] ICSID hearings are often conducted privately.[90] Third parties including civic interest groups are permitted to participate in proceedings only if the disputing parties consent.[91] Arbitration awards are published, again only if the parties agree, or if the applicable investment treaty so provides, such as in U.S. BITs after 2002. However, the ICSID Arbitration Rules do state that "the Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal."[92] A review committee with limited authority, which includes no right to overturn an ICSID award on the merits, may review ICSID decisions.[93] A less-than-heartening observation is that annulment proceedings are "not designed to bring about consistency in the interpretation and application of international investment law."[94]

One consequence of private hearings and ad hoc awards is that there is only limited public understanding of the processes through which arbitration institutions such as the ICSID function.[95] There is uncertainty over the limits of investor rights and state

[88] *See Rules*, International Centre for Settlement of Investment Disputes, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Rules_Home (last visited June 19, 2012).

[89] *See id*. at Art. 5(3).

[90] *See id*. at Art. 63(a).

[91] *See id*. at Art. 34(2).

[92] *Compare Rules*, *supra* note 38, Art. 48(4), *with ICSID Additional Facility Arbitration Rules*, Art. 53(3), *available at* http://icsid.worldbank.org/ICSID/ICSID/AdditionalFacilityRules.jsp (last visited June 19, 2012) (almost identical text). *See also* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions,* 73 Fordham L. Rev. 1521, 1616 (2004–05); Julie A. Maupin, *MFN-Based Jurisdiction in Investor–State Arbitration: Is There Any Hope for a Consistent Approach?,* 14 J. Int'l Econ. L. 157, 162 (2011).

[93] *See, e.g.,* K.V.S.K. Nathan, The Law of the International Centre for Settlement of Investment Disputes 94 (2000).

[94] *See* M.C.I. Power Grp. L.C. & New Turbine, Inc. v. Ecuador, ICSID Case No. ARB/03/6, Annulment Decision, ¶ 24 (Oct. 19, 2009); *see also* Hochtief AG v. Arg., ICSID Case No. ARB/07/31 (Oct. 7, 2011) (providing in the dissent of Christopher Thomas, Q.C., different interpretations of a treaty in the same case). *See generally* Sergio Puig & Meg Kinnear, *NAFTA Chapter Eleven at Fifteen: Contributions to a Systemic Approach in Investment Arbitration*, 25 ICSID L. Rev. 225 (2010) (providing a systematic approach toward investment arbitration through the prism of Chapter 11 of the NAFTA).

[95] For a general discussion, see Lucy Reed et al. Guide to ICSID Arbitration (2004). Preview: http://books.google.pt/books?id=p5KY-Y7jwr4C&printsec=frontcover&hl=pt-PT&source=gbs_ge_summary_r&cad=0#v=onepage&q=understanding&f=false.

powers, and significant variations in the compensation and other remedies that ICSID tribunals award for an expropriation,[96] coupled with uncertain enforcement mechanisms.[97] A related consequence is that ad hoc arbitration processes, deliberations, and determinations are unlikely to lead to uniform investment jurisprudence. It also follows that, absent full access to the records of investment arbitration case documentation and testimony, it is sometimes difficult to draw conclusions about the issues, how they are presented, or how arbitrators construe them. Nor do the ICSID's internal procedures adequately address these issues. ICSID procedures require the Secretary General "to make public, information on the registration of all requests for conciliation or arbitration and to indicate in due course the date and method of the termination of each proceeding."[98] However, the procedures only require the Secretary General to publish reports of conciliation commissions or awards rendered by arbitral tribunals in ICSID proceedings "with the consent of both disputing parties."[99] Similarly, the ICSID procedural rules provide for the manner in which third parties may apply to file amicus curiae briefs, but whether they are permitted to file them in the first place again rests with the disputing parties.[100]

Concern over the uncertain public access to ICSID deliberations is typified in the 2002 ICSID arbitration of *Aguas del Tunari, S.A. v. Republic of Bolivia*.[101] In that case, 300 representatives of social organizations across and beyond Bolivia sought the right to file amicus curiae briefs, as well as to secure access to prosecution and defense statements.[102] They argued that ICSID hearings should be public, and that the arbitrators should visit Cochabamba, Bolivia, where the alleged impact of the investment in dis-

[96] See Patrick Dumberry, *Satisfaction as a Form of Reparation for Moral Damages Suffered by Investors and Respondent States in Investor–State Arbitration Disputes*, J. Int'l Disp. Settlement 1 (2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1996500; Patrick Dunaud & Maria Kostytska, *Declaratory Relief in International Arbitration*, 29(1) J. Int'l Arb. 18 (2012); Yaraslau Kryvoi, *Counterclaims in Investor–State Arbitration* 21 Minn. J. Int'l L. (2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1993116.

[97] The lack of enforcement mechanisms under the ICSID has given rise to a renewed interest in diplomatic intervention following ICSID awards. *See, e.g.*, Victorino J. Tejera Pérez, *Diplomatic Protection Revival for Failure to Comply with Investment Arbitration Awards*, 10 J. Int'l Disp. Resolution 1093 (2012).

[98] *See ICSID Cases*, International Centre for Settlement of Investment Disputes, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases_Home. *See also infra* note 197 (ICSID's procedural Order of Feb. 2, 2011, inviting third parties to apply to submit *amici curiae* briefs under ICSID Arbitration Rule 37(2)).

[99] *See* ICSID Rule 27, ICSID Convention, Regulation and Rules, *available at* http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf. On the application of this rule by the ICSID to various awards, see http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases_Home

[100] *See infra* notes 105–06.

[101] *See* Aguas del Tunari, S.A. v. Bol., ICSID Case No. ARB/02/3 (Oct. 21, 2005), *available at* http://ita.law.uvic.ca/documents/AguasdelTunari-jurisdiction-eng_000.pdf.

[102] *See id*.

pute was most profound.[103] Six months later, the ICSID Tribunal responded that it lacked authority to decide such matters, which rested with the parties.[104]

A comparable result occurred in 2005 when a coalition of organizations from Argentina sought information about, and the right to participate in, the ICSID arbitration in *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Republic of Argentina*.[105] In responding to that petition, the Tribunal acknowledged that the case "potentially involved matters of public interest and human rights" and that the public access "would have the additional desirable consequence of increasing the transparency of investor–state arbitration."[106] However, the petition was denied because the corporate complainant refused access, although the government of Argentina clearly would have allowed it.[107]

One result of the public–private nature of ICSID awards is that, despite an increase in the number of published ICSID awards, the right to deny public access to them still rests significantly with the parties, not with the ICSID or the presiding arbitrators.[108] ICSID parties may have good reason to deny public access to awards[109] and whether those reasons are in the public interest is open to debate in discrete cases. The winds of change are nevertheless blowing. In October 2003, the NAFTA Free Trade Commission issued an Interpretative Statement saying "no provision of the North American Free Trade Agreement limits a Tribunal's discretion to accept written submissions from a person or entity that is not a disputing party."[110] Given that investor–state arbitration under the

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[103] *See id*.

[104] *See generally* Alexandre de Gramont, *After the Water War: The Battle for Jurisdiction in* Aguas Del Tunari, S.A. v. Republic of Bolivia, Transnat'l Disp. Mgmt. (Dec. 2006); Kenneth J. Vandevelde, *Aguas del Tunari, S.A. v. Republic of Bolivia*, 101 Am J. Int'l. L. 179 (2007).

[105] *See* Suez v. Arg., ICSID Case No. ARB/03/19, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an Amicus Curiae Submission (Feb. 12, 2007). The petition challenged the decision by the government of Argentina to accede to the ICSID treaty, on grounds that it violates the constitutional guarantees of citizens of Argentina to participate in proceedings. Although the government of Argentina was willing to hear the petition, the complainant company was not. However, the attorney general of Argentina published on the Internet the information in his possession on the related cases. *See generally* Carlos E. Alfaro & Pedro M. Lorenti, *The Growing Opposition of Argentina to ICSID Arbitral Tribunals: A Conflict between International and Domestic Law?*, 6 J. World Inv. & Trade 417 (2005)

[106] *See* Suez v. Arg., ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, ¶¶ 19, 22 (May 19, 2005).

[107] *See* Suez v. Arg., ICSID Case No ARB/03/19, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an Amicus Curiae Submission (Feb. 12, 2007).

[108] *See, e.g.*, *supra* note 91.

[109] *See infra* Part IV(ii).

[110] *See Statement of the Free Trade Commission on Non-Disputing Party Participation,* NAFTA Free Trade Commission (Oct. 7, 2003), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf. For different reactions to "requests" by civic interest groups to submit public interest briefs, see, e.g., GEA Grp. Aktiengesellschaft v. Ukr., ICSID Case No. ARB/08/16, Award (Mar. 31, 2011), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2131_En&caseId=C440; Talsud, S.A. v. Mex., ICSID Case No. ARB(AF)/04/4, Award (June 16, 2010), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2112_En&caseId=C41; Gemplus, S.A. v. Mex., ICSID Case No. ARB(AF)/04/3, Award (June 16, 2010), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2112_En&caseId=C41.

NAFTA is sometimes conducted under the ICSID's auspices, this development is of some significance. Furthermore, in 2006, the ICSID adopted a new Rule 37 that provides tribunals with at least some discretion to admit third party submissions.[111] In addition, the admission of amicus curiae briefs is increasingly endorsed within new bilateral investment agreements.[112] These developments will be discussed in Sections IV and V below.

E. LOOKING AHEAD

It may be observed that wealthy developed countries are conceivably less directly interested in the transparency of ICSID proceedings and the publicity of awards than poorer countries because wealthy countries are less frequently the defending parties in ICSID proceedings.[113] An opposing observation is that wealthy countries have credible reasons to support transparent ICSID proceedings, if only to avoid the criticism that they have sought to perpetuate the ICSID in their own image.[114] A mediated proposition is that wealthy countries are likely to adopt double standards in regard to ICSID arbitration. On the one hand, they favor arbitration to restrain "interference" by foreign governments with private investment. On the other hand, they disfavor ICSID arbitration filed against them.[115] A sobering observation is that academic and NGO speculation about the positions taken by various types of states on transparency issues is often greatly at odds with actual positions publicly taken by states, casting doubt on some of the arguments above.[116]

The view of the ICSID as an instrument of prosperous nations of the North exploiting the poorer nations of the South is offset by at least two related developments in the global economic order. First, investors from some developing countries, such as China and India as growing capital exporters, have increasing economic incentives to mount ICSID claims including against developed countries that are now capital importers. This developed is evident in the recent ICSID claim filed by China's second largest life insurance company, Ping An, against Belgium for US$2.2 billion arising from Ping An's investment in the failed Belgo-Dutch bank, Fortis.[117] The result is that wealthy

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[111] *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Rules of Procedure for Arbitration Proceedings (Arbitration Rules), Rule 37, Apr. 2006, ICSID/15, *available at* http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (Visits and Inquiries; Submissions of Non-Disputing Parties).

[112] *See infra* Section VI.

[113] See *ICSID—International Centre for Settlement of Investment Disputes* (July 14, 2009), *available at* http://www.brettonwoodsproject.org/item.shtml?x=537853.

[114] *See* Sornarajah, *supra* note 13, ch. 2 (arguing that the primary interests of wealthy developed states are economic and less about perception of bullying).

[115] *See* Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 Yale J. Int'l L. 365, 368–69 (2003) (discussing the U.S. alleged double standard in favoring resorting to arbitration to restrain interference by foreign governments with private investment while disfavoring arbitration filed against the U.S. government).

[116] See Mark Kantor, *The Transparency Agenda for UNCITRAL Investment Arbitrations: Looking in All the Wrong Places*, *available at* http://www.iilj.org/research/documents/IF2010-11.Kantor.pdf.

[117] See Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium (ICSID Case No. ARB/12/29). China is a clear example of a capital

developed countries that are more dependent on imported capital investments are increasingly likely to be the subject of ICSID claims.[118] Second, investors from developing countries are ever more likely to file investment claims against other developing countries, given the divergence in their economic, political, and social stature and the prospect of adversarial investor–state relationships. Such changes in the new global economic order are likely to evolve slowly. However, it is notable that the first such ICSID arbitration was filed by a Malaysian construction company against China in May 2011,[119] but suspended on July 22, 2011, pursuant to an agreement between the parties.[120] This case is further evidence that foreign investors from developing countries are willing to mount investor–state claims against economically powerful countries such as China. However, the strong reaction of China to that claim and the circumstances surrounding its withdrawal suggest that claims against states such as China are likely to encounter strenuous resistance.[121]

A further challenge for the ICSID is that investor–state disputes that are submitted to it will decline due to the consolidation of bilateral investment treaties, possibly leading to a reduction in the number of ICSID disputes. This challenge could result from a recent recommendation by the Commission of the European Union that only the EU, and not individual EU Member States, can conclude bilateral treaties with non-EU countries.[122] Given that the EU itself cannot submit disputes to the ICSID because the EU is not a Member State, claims against the EU brought by foreign investors cannot be submitted to the ICSID. Given the further fact that Germany, Switzerland, and France have concluded more bilateral investment treaties individually with non-EU states than

importer that is increasingly a capital exporter. *See, e.g.*, Ted Planfker, *Doing Business in China: How to Profit in the World's Fastest Growing Market* (2008), *available at* http://www.amazon.com/s/?url=search-alias=stripbooks&field-keywords=044669696X&tag=technicalibra-0&link_code=wql&camp=212361&creative=380601&_encoding=UTF-8; Li Yong & Jonathan Reuvid, *Doing Business with China* (GMB Pub., 2006), *available at* http://www.amazon.com/Doing-Business-China-Lord-Brittan/dp/1905050089/ref=sr_1_1?s=books&ie=UTF8&qid=1341704036&sr=1-1&keywords=1905050089#reader_B0015T65F4.

[118] For example, the United States and the European Union, once predominantly capital exporters, are increasingly capital importers. China, once a significant capital importer, is now a significant capital exporter as well. *See* QingJiang Kong, *U.S.-China Bilateral Investment Treaty Negotiations: Context, Focus, and Implications,* 7 Asian J. WTO & Int'l Health L. & Pol'y 18 (2012). *See generally* Lauge N. Skovgaard Poulsen, *Investment Treaties and the Globalisation of State Capitalism: Opportunities and Constraints for Host States*, *in* Prospects in International Investment Law and Policy (R. Echandi & P. Sauvé, eds. 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2050919.

[119] *See* Ekran Berhad v. People's Republic of China, ICSID Case No. ARB/11/15 (May 24, 2011), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C1600&actionVal=viewCase.

[120] *See* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C1600&actionVal=viewCase.

[121] *See further* Leon E. Trakman, *China and State-Investor Arbitration, available at* SSRN, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2157387

[122] On these recent developments, see European Commission, *Proposal for a Regulation of the European Parliament and of the Council*, *Establishing a Framework for Managing Financial Responsibility Linked to Investor–State Dispute Settlement Tribunals Established by International Agreements to which the European Union Is Party* (Brussels, Belgium, 21/06/2012), *available at* http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149567.pdfBrussels, 21.6.2012.

any other country, except for China, and that the EU may prohibit such treaties in the future, this could cause a decline in investor–state claims against individual EU members submitted to the ICSID. A presumed incidental beneficiary of this decline in ICSID cases is likely to be the UNCITRAL because it does not require that the respondent in investor–state disputes be states.[123] It is too early to predict with conviction that these results will eventuate in fact. In particular, the EU Commission's report is a recommendation to the EU Council, which consists of all the members of the EU; it is apparent that a number of EU Members are opposed to the EU having exclusive authority to negotiate investment treaties with non-EU members. It is also possible that the EU will reach a compromise in which the EU and individual countries jointly conclude investment treaties with non-EU countries. Finally, these developments do not ordinarily preclude a foreign investor from making a claim against a state party to an enforceable investment treaty, including between a EU Member State and a non-EU state.

III. A FUNCTIONAL DEFENSE OF THE ICSID

A defense of investor–state arbitration under the ICSID is that, although not giving rise to judicial precedent, ICSID jurisprudence is nevertheless more certain and more stable than a myriad of national courts applying divergent domestic laws to investor–state disputes. Importantly, investor–state arbitration can help to produce a body of international investment law that is more coherent than the judicial endorsement of investment laws that diverge from one national legal system to the next.[124]

A further defense is that the ICSID is not the archetype villain that surreptitiously protects investors from wealthy countries at the expense of poorer developing countries with impoverished populations. Developing countries presumably enter into investment agreements that include arbitration by taking the calculated risk that the economic and social benefits of such agreements outweigh their costs. In doing so, they weigh the competing options, such as not entering into investment agreements, or entering into such agreements with dispute prevention and avoidance options and/or resorting to domestic courts to resolve investor–state disputes.[125] However, whether

[123] On the distinctive attributes of the investment arbitration under the UNCITRAL Rules, including that member states need not be parties to UNCITRAL proceedings, *see* 2010 UNCITRAL Rules on Arbitration, *available at* http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2010Arbitration_rules.html. *See also* Claudia M. Gross, *Current Work of UNCITRAL on Transparency in Treaty-Based Investor–State Arbitration*, *available at* http://www.oecd.org/dataoecd/14/5/46770295.pdf.

[124] Kenneth Vandevelde writes that in 1969 there were only seventy-five BITs. During the 1970s, nine BITs were negotiated each year; that rate doubled in the 1980s and increased significantly in the 1990s. However, it has slowed in the last five years, but with noticeable growth in 2012. *See* Kenneth Vandevelde, *A Brief History of International Investment Agreements,* 12 U.C. DAVIS J. INT'L L & POL'Y 157, 172 (2005). *See also* U.N. Conference on Trade & Dev. *Recent Developments in International Investment Agreements*, U.N. Doc. UNCTAD/WEB/ITE/IIT/2005/1 (Aug. 30, 2005).

[125] *See infra* Section VI (discussing dispute prevention and avoidance options, propagated by the UNCTAD).

developing countries, unlike developed countries such as Australia,[126] have the political and economic influence to negotiate agreements in which domestic courts resolve investor–state disputes is not self-evident. Indeed, for some developing countries, concluding bilateral investment treaties is a means of economic survival, not a dispensable luxury.[127]

A countervailing macro argument is that developing states have contributed to their own economic disadvantages. According to this argument, they have concluded bilateral investment treaties ill-advisedly, on terms that privilege their investment partners.[128] They have also failed to protect themselves en masse against the institutional and structural biases that inhere in bilateral investment agreements that incorporate investor–state arbitration. Moreover, they have acted unilaterally when they should have devised a multilateral strategy to thwart these structural biases. These criticisms are harsh. A willingness to enter into bilateral investment agreements is not in itself cogent evidence of complicity by developing states in perpetuating their or their investors' economic disadvantages. Rather, for many developing countries, succumbing to the demands of a dominant treaty partner is preferable, on balance, to concluding no treaty at all.

Further, it must be acknowledged that an ever-growing number of ICSID members are from developing countries.[129] ICSID members also conclude second- and third-generation bilateral investment agreements in which newly prosperous developing countries, such as China, not only include ICSID arbitration in their bilateral investment agreements, but also affirm their commitment to the rule of law in relation to the

[126] The Australian government is the first developed state to openly declare that it will no longer agree to the adoption of arbitration within its bilateral trade and investment treaties, and that, henceforth, it will negotiate that investment disputes with foreign investors be heard by domestic courts of law. *See* Dept. of Foreign Affairs and Trade, Austl. Gov't, *Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity*, 14 (Apr. 12, 2011), *available at* http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf#investor-state [hereinafter Policy]. *See also* Luke Peterson, *Australia Rejects Investor–State Arbitration Provision in Trade Agreements,* Don't Trade Our Lives Away (Apr. 19, 2011), *available at* http://donttradeourlivesaway.wordpress.com/2011/04/19/australia-rejects-investor-state-arbitration-provision-in-trade-agreements/ (providing an incisive commentary on the Australian government's Policy announced in April 2011); Leon E. Trakman, *Investor State Arbitration or Local Courts: Will Australia Set a New Trend?*, 46 J. World Trade 83 (2012).

[127] Such dependence includes the need to attract foreign investment to sustain economic growth in, among other sectors, essential social services and programs. *See* Leon E. Trakman, *Foreign Direct Investment: Hazard or Opportunity?*, 41 Geo. Wash. Int'l. L. Rev. 1 (2010).

[128] *See, e.g.*, http://www.downtoearth.org.in/content/secretive-tribunals-hidden-damages. Here, Van Harten observes that developing countries sometimes are the target of treaties directed at enhancing opportunities for foreign investors from other states, on occasion leading to significant losses for those target countries.

[129] *See* U.N. Conference on Trade & Dev, World Investment Report 2010, at xxv, U.N. Doc. UNCTAD/WIR/2010, U.N. Sales No. E.10.II.D.2 (2010) [hereinafter World Investment Report 2010]; *see also* Stanimir A. Alexandrov, *The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction* Ratione Temporis, 4 Law & Prac. Int'l Courts & Tribunals 19, 19–20, 58 (2005).

rights of foreign traders and investors.[130] Developing countries are also increasingly parties to bilateral investment treaties: the total number of international investment agreements has grown to more than 3,000 today.[131] In addition, ICSID has expanded geometrically from 20 members in 1966 to 158 members today that, again, now include most developing countries.[132] Furthermore, ICSID annual revenues arising in part from disputes between member states and investors have increased from $2,270,000 in 2000 to over $25 million in 2010;[133] two-thirds of these revenues derive from investment arbitration disputes that, again, include developing countries.[134]

The problem with these arguments is that the political impetus for entering into bilateral free trade and investment agreements still lies significantly more with developed than developing states. Dissatisfaction among developed states with multilateral trade and investment initiatives, notably expressed in the World Trade Organization (WTO), somewhat fuel that impetus. Developed countries discernibly conclude bilateral trade and investment agreements outside the WTO fabric to avoid a multilateral trade and investment regime in which developing states have the numerical superiority, the will, and sometimes the capacity, to exercise their power collectively.[135]

It is not fitting to blame the ICSID for the development of bilateral investment treaties between state parties that include both developed and developing countries, as the ICSID is not itself a party to such treaties. It is also not entirely reasonable to accuse foreign investors that proceed against "home" states of unbridled opportunism when they rely on treaties between "home" and developing "host" states in conducting their trade and investment abroad. For one thing, foreign investors from developed countries are not uniformly prosperous any more than investors from developing states are uniformly underprivileged. In addition, home states do not ordinarily collude with their small and medium scale investors abroad in order to secure a political or economic advantage for those investors in host states. Home states often have both a political and an economic incentive not to become unduly embroiled in individual investor claims against host states. The political incentive is for states, both developed and developing, to avoid alienating host states by supporting claims by home state

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[130] *See* Randall Peerenboom, China's Long March toward Rule of Law 450 (2002) (arguing that "[o]ne of the main motivating forces behind China's turn toward rule of law has been the belief that legal reforms are necessary for economic development.").

[131] *See* World Investment Report 2010, *supra* note 129, at xxv.

[132] *See Member States*, International Centre for Settlement of Investment Disputes, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=MemberStates_Home (last visited June 19, 2012) (current membership).

[133] *See ICSID Annual Report*, International Centre for Settlement of Investment Disputes, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnualReports (last visited June 19, 2012).

[134] *See The ICSID Caseload—Statistics,* International Centre for Settlement of Investment Disputes, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics (last visited June 19, 2011) (illustrating the proportion of arbitration disputes that include developing countries).

[135] *See* Leon E. Trakman, *The Proliferation of Free Trade Agreements: Bane or Beauty?* 42 J. World Trade 367, 378, 385–86 (2008).

investors. The economic incentive for host states to avoid intervening on behalf of its foreign investors is to limit the political risks as well as the administrative costs of such intervention.[136]

It is also not reasonable to blame the ICSID for all the ills imputed to the operation of investment arbitration generally. This is because the ICSID's formal function is to provide a process by which to resolve investment disputes between signatory states to the ICSID Convention and foreign investors from other signatory states. The result is that the ICSID operates within the radar of its administrative council, and it does not impose itself on those members.[137]

The law of the ICSID, arguably, is also not profoundly out of step with the law applied to investment disputes generally. Notwithstanding variations among investment treaties and differences in investment jurisprudence itself, the ICSID has contributed to a body of investment law that includes established standards of treatment that are applied to foreign investors.[138] However, although these standards are sometimes fragmented and it is difficult to derive cohesive principles from ad hoc and unpublished ICSID awards, an international investment jurisprudence does exist.[139] Even though the ICSID has had to deal with a plethora of bilateral investment agreements, it has helped to resolve complex investor–state disputes arising from investment treaties.[140] Nor should the ICSID Secretariat be blamed when ICSID proceedings are not transparent and awards are not published.[141] After all, ICSID members that are and represent nation states approve the rules governing ICSID procedures. It is also unfair to accuse the ICSID of inconsistencies in reasoning and determinations reached by ICSID arbitrators who, although assisted by the ICSID, reach decisions independently of it.[142]

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[136] *But see* Pérez, *supra* note 97 on the probable increase in diplomatic intervention by home states on behalf of their foreign investors in dealing with host states.

[137] *See* Structure of the ICSID Administrative Council, ICSID Web site, *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=RightFrame&FromPage=Organization%20and%20Structure&pageName=Organization.

[138] This contribution of the ICSID to international investment law is apparent from the ICSID Review—Foreign Investment Law Journal, available on the ICSID Web site at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDBibliographyRH&actionVal=IcsidReview.

[139] *See, e.g.*, Trakman & Ranieri, *supra* note 2; Sornarajah, *supra* note 13; Schill, *supra* note 8, at VII. *See generally* Dolzer & Schreuer, *supra* note 6; Wenhua Shan & Sheng Zhang, *The Treaty of Lisbon: Half Way toward a Common Investment Policy,* 21 Eur. J. Int. L. 1049 (2010).

[140] *See, e.g.*, Aurélia Antonietti, *The 2006 Amendments of the ICSID Rules and Regulations and the Additional Facility Rules*, 21 ICSID Rev.— For. Inv. L.J. 427 (2006) (discussing how various arbitration tribunals have resolved complex issues).

[141] *See generally* James Harrison, *Recent Developments to Promote Transparency and Public Participation in Investment Treaty Arbitration* (University of Edinburgh Law School Working Paper No. 2011/01, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1739181 (providing a balanced defense of transparency in ICSID proceedings).

[142] On consistency in international investment arbitration, see International Investment Law and General International Law: From Clinical Isolation to Systemic Integration? (Rainer Hofmann & Christian Tams eds., 2011); Jan Paulsson, *International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law*, *in* International Arbitration 2006: Back to Basics? (International Council for Commercial Arbitration Congress Series No. 13) 879 (Albert Jan van den Berg ed., 2007). On the critique of allegedly inconsistent ICSID decisions in a series of

This is not to suggest that ICSID operations are beyond reproach. Specifically, although not a party to bilateral investment agreements, the ICSID may nevertheless be an instrument that dominant treaty parties try to utilize to perpetuate their control over investment markets.[143] However, railing against the ICSID as a prop for capitalist excesses makes it harder to repair those parts of it that are in need of repair while leaving intact those parts that work fairly and well.

Further, potential divisions among developing states in treaty making and the interpretation of these treaties by ICSID tribunals are not issues to be ignored. A challenge ahead for ICSID tribunals is in reconciling the traditional liberty of states to conclude treaties with their obligation to protect private property in the face of emerging global powers such as China whose full endorsement of those liberties is sometimes questioned. However much China has embarked along the road to the rule of law, investment tribunals may still diverge over the significanceof that passage in particular cases. In addition, it is harder to categorize China as a typical developing state in light of its enormous economic resources and global political power. Further, China's defense of social programs, such as protecting its rural sectors from foreign investment, is not wholly distinct from American and European protection of sectors that those countries regard as vulnerable.[144] Comparable issues may well arise in relation to India as it shifts from being a capital importer to a global capital exporter.[145]

IV. REFORMING THE ICSID FROM WITHIN

Concerns about the ICSID's operations are sporadic, uneven in gravity, and lack a unified voice. Governments are understandably cautious about taking critical positions against institutions such as the ICSID, in part because they cannot be sure when they may become embroiled, directly or indirectly, in an investment dispute before the ICSID. Moreover, developed and developing governments, ICSID Administrative Council members, and ICSID officials do not ordinarily retain office sufficiently long to both initiate and effectuate ICSID reform. The nature of reforming the ICSID is also subject to debate including whether the ICSID has the moral authority and collective will to produce those changes.

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investment claims against Argentina, commencing with the *CMS, Enron,* and *Sempra* cases, see *infra* notes 216–218.

[143] *See supra* Part II(i).

[144] *See* Karl P. Sauvant, Lisa Sachs, Ken Davies & Ruben Zandvliet Vale, *FDI Perspectives: Issues in International Investment,* Part 2 (Vale Columbia Center on Sustainable International Investment, Jan. 2011), *available at* http://www.vcc.columbia.edu/files/vale/content/PerspectivesEbook.pdf; Olivier De Schutter & Peter Rosenblum, *Large-Scale Investments in Farmland: The Regulatory Challenge*, *in* Yearbook on International Investment Law & Policy 2010–2011 (Karl P. Sauvant ed., 2012).

[145] *See generally* Peerenboom, *supra* note 130, chs. 6, 10 (discussing China's progression toward the rule of law).

A. ICSID SECRETARIAT DISCUSSION PAPER

Internally generated reforms of the ICSID began in October 2004 with a discussion paper prepared by the ICSID Secretariat, entitled *Possible Improvements of the Framework for ICSID Arbitration*.[146] The Secretariat then presented its paper for response to the Administrative Council of the ICSID, to investment arbitrators, selected investors, and an undefined number of groups within civil society.[147]

The rationale behind the discussion paper was that the ICSID Secretariat, an expert body, should assume a leadership role in reforming the structure and operation of the ICSID and in rendering it more transparent, consultative, and effective.[148]

The paper identified two overriding issues: a lack of transparency in ICSID proceedings and a lack of public participation in and access to ICSID awards. It also dealt with disclosure requirements for arbitrators and with arbitrators' fees.[149] The paper's key proposals included: encouraging the endorsement of amicus curiae briefs being admitted into arbitral proceedings and promoting the publication of arbitral awards.[150] These proposals implicitly addressed the lack of transparency and publicity in prior cases such as *Aguas del Tunari S.A. v. Republic of Bolivia* in which the Tribunal denied third party participation in ICSID proceedings, primarily on public interest grounds.[151]

The responses to the proposals at the time were uneven at best. Neither developed or developing countries, nor investor constituencies adopted unified positions to address them.[152]

Notwithstanding the expectation that key developed states might oppose the Report, the United States and Canada supported it, although few other developed states did so as well. Of note, a think tank on trade and investment in Canada, the International Institute for Sustainable Development (IISD), supported it.[153] IISD favored wider public participation in ICSID proceedings through the admission of amicus briefs and

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[146] *See* International Centre for Settlement of Investment Disputes, *Suggested Changes to the ICSID Rules and Regulations* (ICSID Secretariat Working Paper, 2005), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=22_1.pdf [hereinafter Working Paper].

[147] *See id.* at 3.

[148] For critical but also supportive reflections on how the ICSID Secretariat's framed its proposals, notably in relation to sustainable development, see Howard Mann, Aaron Cosbey, Luke Peterson & Konrad von Moltke, Comments on ICSID Discussion Paper *Possible Improvements of the Framework for ICSID Arbitration, International Institute for Sustainable Development* (Dec. 2004), *available at* http://www.iisd.org/pdf/2004/investment_icsid_response.pdf. The ICSID Working Paper nevertheless uses fairness neutrally without reference to the systemic disadvantage of developing state parties. It provides for participation of third parties if the Tribunal is satisfied that the "non-disputing party has a significant interest in the dispute and that this would not disrupt the proceeding or unfairly burden either party." *See* Working Paper at 11.

[149] *See id.* at 10–11 (Access to Third Parties), 12–13 (Publication of Awards).

[150] *See id.* at 9, 11.

[151] *See* Aguas del Tunari, S.A. v. Bol., ICSID Case No. ARB/02/3, *supra* notes 101–104.

[152] *See* text immediately below. For criticism of the Report, *see infra* notes 157-161.

[153] *See* Mann et al., *supra* note 148 (generally supporting the suggestions).

argued that doing so would benefit disputing parties in general, and would not be cost prohibitive for civic groups of member states.[154] It further proposed that the ICSID would benefit from public participation arising from amicus briefs, and that this would promote transparent and cost-effective proceedings.[155] It also noted that public participation in WTO proceedings had not led to any significant increase in the costs or administrative superstructure of the WTO.[156]

Furthermore, despite the prospect that developing states would support the Secretariat's proposals favoring more transparent proceedings, the South Centre, an intergovernmental organization of developing states in Geneva, initially argued that the ICSID Secretariat lacked the authority to reach such determinations.[157] It observed that transparent ICSID proceedings would advantage developed states and their investors who had more resources to participate in proceedings than developing states and their investors.[158] The South Centre also suggested that some developing states would prefer private to public arbitration proceedings, presumably for varied and not necessarily consistent reasons.[159] Interestingly, the South Centre did not persist with its objections, but the sting of its initial onslaught on the proposed reform of the ICSID remained.[160] One inference from these reactions to the ICSID Secretariat's proposals is that it is difficult to please everyone all the time. A more troubling reaction is that the resistance to public interest interventions are not limited to foreign investors that wish to exclude third parties for commercial "in confidence" reasons. Despite strong public interest grounds favoring amicus curiae briefs in support of respondent developing states, those states sometimes have countervailing interests to exclude third party testimony that bolsters the claims of foreign investor claimants.[161]

However seemingly irreconcilable some of these reactions are to the ICSID proposals, they underlie a deeper problem. Specifically, the ICSID Secretariat lacks the legal authority to initiate substantial reform.[162] First, it cannot promise authoritative time-

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[154] *See id.* at 8–10.

[155] *See id.* at 8.

[156] *See id.* at 9.

[157] *See* South Centre, *South Centre Analytical Note: Developments on Discussions for the Improvement of the Framework for ICSID Arbitration and the Participation of Developing Countries* 5–7 (Feb. 2005), *available at* http://www.southcentre.org/index.php?option=com_content&view=article&id=387%3Adevelopments-on-discussions-for-the-improvement-of-the-framework-for-icsid-arbitration-and-the-participation-of-developing-countries&catid=68%3Ainternational-taxation-investment-a-financing-for&Itemid=67&lang=es.

[158] *Id.* at 11–12.

[159] *Id.* at 13.

[160] *See, e.g.*, Mark Kantor, *Criticism of ICSID Reform Proposals by South Centre*, Transnational 3 Dispute Management (2005), *available at* http://www.transnational-dispute-management.com/article.asp?key=439.

[161] This objection to third-party interventions is reflected in the initial attack by the South Centre, representing developing countries, to the reforms proposed by the ICSID, including in support of third-party interventions. *See supra* note 157.

[162] *See* functions of the ICSID Secretariat: http://icsid.worldbank.org/ICSID/FrontServlet. There is no indication of any such legal authority inhering in the ICSID. Its role is supportive and facultative. *See further* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=Right

lines and procedures for the implementation of reforms, let alone promise reform.[163] Second, a practical limitation is that ICSID officials who championed the proposals were not in office sufficiently long to shepherd them to fruition.[164] A debatable inference perhaps is that the Secretariat did not adequately cultivate the ICSID Council's support or distribute its report sufficiently widely to public interest groups.[165]

However, the recommendations of the ICSID Secretariat did not go entirely unheeded. In 2006, the ICSID added a new Rule 37 to its Rules of Procedure.[166] That Rule provided that a tribunal may admit the brief of a non-disputing party (after consulting the direct parties) that addresses "a matter within the scope of the dispute."[167]

Nevertheless, the discretion the ICSID accorded to a tribunal is decidedly limited. In considering whether to admit the brief of a non-disputing party, Rule 37(2) stipulates that the Tribunal must consider, among other factors, the extent to which:

(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding.[168] As a further qualification, Rule 37 requires that the Tribunal "shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission."[169]

This 2006 Rule 37(2) on the Submissions of Non-Disputing Parties is limited in key respects. First, tribunals are likely to construe the need for a non-disputing party to have a "sufficient interest" as requiring it to demonstrate that it has a "public interest." The alternative that a non-disputing party need only have a "sufficient" interest to participate in ICSID proceedings could lead to a floodgate of interpleader claims by private parties asserting that an investor–state dispute has or will have a direct impact

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Frame&FromPage=Organization%20and%20Structure&pageName=Organization. *But cf* the authority of the Secretary General of the ICSID to decline to register a request for arbitration. *See* Sergio Puig & Chester W. Brown, The Secretary-General's Power to Refuse to Register a Request for Arbitration under the ICSID Convention, ICSID Rev.—For. Inv. L.J. (2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2045645.

[163] At the level of policy, such responsibilities rest with the Administrative Council of the ICSID. Applying such policy rests with ICSID arbitration tribunals. See *Organizational Structure of ICSID*, International Centre for Settlement of Investment Disputes, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=RightFrame&FromPage=Organization%20and%20Structure&pageName=Organization.

[164] Of note, a particularly vocal supporter of reform of the ICSID, Antonio Parra, vacated his office as Deputy Secretary-General of the ICSID shortly after the Secretariat proposed the reforms.

[165] *See* Kantor, *supra* note 160. *See also supra* note 47 (ICSID's organizational chart).

[166] *See ICSID Rules of Procedure for Arbitration Proceedings*, at 117, ICSID/15 (Apr. 2006), *available at* http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

[167] *See id.* Rule 37(2)(a)(c).

[168] *See id.*

[169] *See id.*

upon their particular commercial or other interests. However, requiring that a non-disputing party to investor–state arbitration have a "public interest" poses its own difficulties. In particular, investor–state arbitration often involves significantly private interests, not unlike international commercial arbitration. The fact that one party is a state does not necessarily render that dispute pervasively "public." Indeed, states are frequently parties to private commercial litigation. Nor are ICSID tribunals likely to conclude that public interests are sufficiently "public" to justify admitting non-disputing parties, unless those interests are both predominant and the non-disputing party can establish them at the outset in order to gain admission to proceedings.[170]

Second, the requirement that a third party must bring "a perspective, particular knowledge[,] or insight that is different from that of the disputing parties" is also likely to discourage tribunals from admitting third parties to proceedings. After all, employees, suppliers, debtors, creditors, and insurers, among others, are often materially affected by investor–state arbitration. That impact does not constitute a principled basis for arbitral tribunals to admit them into proceedings, as this would often be perceived as violating the autonomy of the disputing parties.[171]

Even if an ICSID tribunal allows third parties to participate in proceedings under Rule 37, that still does not render those proceedings "public" in the sense of being transparent. Specifically, a tribunal may limit both the kind and extent of third party participation, varying from participating at a particular stage during proceedings, to having a limited function such as presenting a brief, stipulating arguments, and responding to questions. In addition, a tribunal may admit evidence by a third party, but decline to provide it with the full record of proceedings. For example, it may deny requested information on grounds that the third party has failed to justify why it should receive that information, that it is already publicly available, or that it is privileged.[172] Furthermore, even if a tribunal provides a third party with requested information, it may still place a gag on that party, prohibiting it through a confidentiality order from making public disclosures. The result is that, despite third parties participating in ICSID proceedings, the proceedings may still be shrouded from public gaze.[173]

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[170] *See, e.g.*, Methanex Corp. v. U.S., Decision of the Tribunal on Petitions from Third Persons to Intervene as *Amici Curiae*, ¶ 49 (Jan.15, 2001), *available at* http://naftaclaims.com/Disputes/USA/Methanex/MethanexDecisionReAuthorityAmicus.pdf. (Arbitration under Chapter 11 of the NAFTA and the UNCITRAL Arbitration Rules) ("[T]here are of course disputes involving States which are of no greater general public importance than a dispute between private persons."); *see also* Suez v. Arg., ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, ¶ 19 (May 19, 2005).

[171] *See* Leon E. Trakman, *The Twenty-First Century Law Merchant,* 48 Am. Bus. L. J. 775, 800–03 (2011).

[172] *See* Glamis Gold, Ltd. v. U.S., Award, 106, 121 (June 8, 2009) *available at* http://www.state.gov/s/l/c10986.htm (Arbitration under the UNCITRAL Arbitration Rules). *See also* Suez v. Arg., ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, ¶ 24 (May 19, 2005) (denying third party access to documentation); Biwater Gauff (Tanz.) Ltd. v. Tanz., ICSID Case No. ARB/05/22, Procedural Order concerning a petition for *Amicus Curiae* Status, at 30 (Feb. 2, 2007).

[173] This is implicit in the fact that tribunals, with the consent of the direct parties to the dispute, may grant third parties intervener status for only limited purposes, and insofar as those parties have

Finally, and most lethally, Rule 37's requirement that a third party not "disrupt the proceeding" or "unduly burden or unfairly prejudice either party" is an understandable reason for a tribunal not to admit third parties to proceedings. There are reasonable grounds for a tribunal not to admit such parties, not least of all to avoid a subsequent annulment procedure. Among other concerns, permitting third party intervention will inevitably "burden" or "prejudice" at least one of the disputing parties. Requiring a tribunal to decide at the outset whether admitting that third party will cause "undue" prejudice or unfairness to a disputing party may itself be hazardous as this is something that is often difficult to determine confidently at that early stage. Whether admitting a third party will disrupt ensuing proceedings is equally speculative.

Given these risks, an investment tribunal has a number of reasons not to admit a third party to proceedings under Rule 37 of the ICSID Rules, if not in the interests of the disputing parties, then in its own interests. The core problem lies in Rule 37 itself. Specifically, in granting qualified arbitral discretion, it exposes the tribunal to subsequent attack for failing to comply with those qualifications. Adding to this concern is Rule 37's description of third parties as "non-disputing parties."[174] A practical inference for a tribunal to draw from this is that, if third parties are not "disputing parties," they should not participate in proceedings.

An alternative is for the ICSID to grant intervener standing to third parties based on whether they can demonstrate a material public interest in the proceedings. Particularly, third parties may better inform the tribunal and the parties about the investment issues in dispute, they may facilitate greater transparency in proceedings, they may add to rather than disrupt hearings, and they may assist tribunals to reach determinations with greater confidence and erudition. Nevertheless, this claim for intervener status should not be overstated. First, amicus curiae briefs are peculiar to common law systems; they are virtually unknown in civil law. Second, common law courts generally do not grant intervener status on such expansive "public interest" grounds as are proposed for investor–state arbitration proceedings. Third, if NGOs are granted the right to intervene, arguably they may also be forced by direct parties to participate in arbitration proceedings.[175]

Certainly investment tribunals could avoid these problems by excluding third parties in general from participating in proceedings, something they could not do in respect of disputing parties. Should tribunals admit third parties into proceedings, they would also need to consider the fairness of doing so, particularly given that most third parties seek intervention, not on neutral grounds, but in support of one party, usually the state party to an investor–state dispute. Such decisions further complicate the ultimate question of whether the public interest in allowing non-disputing parties

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access to confidential information, require them to maintain confidentiality. *See* ICSID Rule 37, ICSID Convention, Regulation and Rules, *available at* http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

[174] *See* The ICSID Convention, Regulation and Rules, *available at* http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf, at 22.

[175] *See* Kantor, *supra* note 116, at p. 18.

to participate in proceedings outweighs the procedural efficiency attained by excluding them. It also does not answer the question why "public interest" NGOs should get better treatment in investor–state arbitration than before their own national courts.

B. SECRECY IN ICSID PROCEEDINGS

Redressing the secrecy of ICSID proceedings poses its own challenges. International commercial arbitration, to which investor–state arbitration is related, was traditionally conceived as a confidential process between disputing parties and distinct from a public hearing.[176] A further attribute of commercial arbitration is that it reflects the autonomy of the disputing parties. Any change in proceedings, such as the admission of public interpleading, traditionally required the parties' consent, which is now subject to ICSID Rule 37 permitting tribunals to admit third parties to proceedings within confined limits.[177] Even though investor–state arbitration takes place between states and private parties under the ICSID, rather than between private parties, it is arguably arbitration all the same. As such, like commercial arbitration, ICSID arbitration is likely to be praised for preserving confidentiality, however much it is condemned for being secretive.[178]

This is not to claim that investor–state arbitration is inevitably or totally secret. In fact, the conduct of investor–state arbitration proceedings is often public and awards are published, as under Chapter 11 on investment under the North American Free Trade Agreement.[179] All that is asserted is that the private attributes of investor–state arbitration are derived somewhat from international commercial arbitration and that the drafters of the ICSID Convention ought not to be condemned for having adapted that institutional and functional heritage at the outset. What the ICSID Convention did, in part, was take cognizance of different models of arbitration, including international commercial arbitration in the latter half of the twentieth century, in formulating dispute resolution in the ICSID Rules.[180] Principal among its similarities to commercial

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[176] *See* Leon E. Trakman, *Confidentiality in International Commercial Arbitration*, 18 ARB. INT'L 1–18 (2002).

[177] ICSID tribunals began to allow third-party interventions in 2007, after the ICSID's new rules came into force. See, e.g., Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22 (Feb. 2, 2007); Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. The Argentine Republic, ICSID Case No. ARB/03/19 (Feb. 12, 2007). On Rule 37, *see supra* note 173.

[178] *See* Trakman, *supra* note 176 (discussing confidentiality in international commercial arbitration and its relationship to investment arbitration).

[179] *See* Settlement of Disputes between a Party and an Investor of Another Party: Transparency, NAFTA Chapter 11—Investment, NAFTA Secretatiat, Canada, *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta-transparency-alena-transparence.aspx?lang=en&view=d.

[180] *See generally* VAN HARTEN, *supra* note 26, at 121 (noting the influence of commercial law, as distinct from public international law, on the development of investment law); Leon E. Trakman, *Arbitrating Investment Disputes under Chapter 11 of the NAFTA*, 18 J. INT'L. ARB. 385 (2001) (discussing investment arbitration under Chapter 11 of the NAFTA).

arbitration is the right of investor–state parties to require proceedings and awards to be private in a manner that judicial proceedings ordinarily are not.[181]

Nevertheless, investor–state arbitration under the ICSID is distinct from private arbitration in key respects. First, it derives from an agreement between or among states, beyond any contractual or other relationship between a signatory state and an investor from another state.[182] As such, investor–state disputes are subject to the accord of state parties that conclude regional and bilateral investment agreements to which foreign investors are not parties.[183]

Second, ICSID arbitration often involves public interest considerations that transcend the ordinary commercial interests of private parties, such as the public interests of economically fragile developing countries and vulnerable sectors of their economies.[184] This is not to assert that private arbitration outside the ICSID, including between states and foreign investors, cannot have similar public interest ramifications, such as claims by developing countries in Latin America that they were economically exploited by transnational corporations. The difference is that modern bilateral investment agreements increasingly imbed these social and economic consequences in the structure of investor–state arbitration provisions, rather than treat them as a coincidental by-product of such arbitration.[185]

Third, if one accepts that public participation in ICSID arbitrations is desirable, there are both institutional and practical objections to achieving that result. The institutional objection is the arbitral preference for requiring that disputing parties consent to public participation insofar as protected information may arise during proceedings, notwithstanding the authority of tribunals to admit third party evidence under Rule 37 after consulting with the disputing parties.[186] However, this concern over the limits of party consent is endemic to investor–state arbitration in general, not to public interest participation in it in particular. Arbitrators can impose restrictions on access

[181] *See generally* Kyriaki Noussia, Confidentiality in International Commercial Arbitration 37–41 (2010) (discussing confidentiality requirements); Trakman, *supra* note 176 (discussing confidentiality requirements).

[182] *See* Dolzer & Schreuer, *supra* note 6, chs. 1.2–1.3.

[183] On the tension between the law governing treaties and investor-state disputes, *see* Dolzer & Schreuer, *supra* note 6, at chs.1.2-1.3; SCHREUER, *supra* note 6, at 346-48; Schill, *supra* note 6, at VI.

[184] *See supra* text following note 156.

[185] *See, e.g.*, Franck, *supra* note 92.

[186] It is potentially difficult for an investment tribunal to determine, when admitting third party briefs or testimony, whether, when and how confidential information may arise subsequently during the course of deliberations. This factor is a significant reason for tribunals to constrain the participation of third parties a priori, or to exclude such participation *ex posteriori* if and when confidentiality is raised by direct parties to the dispute. *See* Katia Fach Gómez, *Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest,* 35 Fordham Int'l L.J. 510 (2012).

to and disclosure of such information upon public interest participants, as they do upon investor–state parties.[187]

Fourth, significant practical obstacles to public interest participation in ICSID arbitration are the prohibitive costs, not least of all the costs of travelling from afar to participate at venues such as Washington D.C., Paris, and London, all of which are high-cost cities.[188] In addition, there are further costs to the ICSID and World Bank in institutionalizing such participation in arbitration proceedings. These costs vary from accommodating third party participants at arbitration venues to managing the submission of amicus curiae briefs and ensuring hearings in which civic interest groups participate.[189] Finally, there are also the management and publicity costs associated with third party representation in ICSID proceedings.[190]

C. THE BOUNDARIES OF PARTY AUTONOMY

The prospect of ICSID parties disagreeing over the nature and extent of public participation in arbitration, which has often been the case historically, may also lead to burdensome consequences for investor–state parties, tribunals, and the ICSID. For example, investment arbitrators advised by the ICSID Secretariat may be expected to resolve differences between the parties in determining when to admit evidence from third parties in proceedings and, conceivably, when to permit an award to be published in whole or part.[191]

More controversial still is whether and how arbitrators, acting independently or in consultation with the ICSID Secretariat, should rule on the nature of public participation in particular cases.[192] One issue is whether the exercise of that discretion explicitly or implicitly violates the autonomy ascribed to parties to arbitration in general, as distinct from protected information in particular.[193] Another issue is whether admitting third-party briefs and testimony will lead to annulment proceedings.[194] Yet another

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[187] On the tension between private and public interests in investor–state arbitration in regard to the publication of awards, see Joshua D. H. Karton, *A Conflict of Interests: Seeking a Way Forward on Publication of International Arbitral Awards*, 28 ARB. INT'L (2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2030948. On the public interest rationale for amicus curiae interventions, see Eric De Brabandere, *NGOs and the "Public Interest": The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes,* 12(1) CHIC. J. INT'L L. 85 (2011).

[188] The precise extent to which these costs inhibit participation by public interest groups is speculative, except that they seldom have deep pockets comparable to many international corporate parties to investor–state disputes. *See* Aguas del Tunari, S.A. v. Bol., ICSID Case No. ARB/02/3, *supra* notes 101–04.

[189] *See supra* note 187. On the time and costs associated with international commercial arbitration, *see* Antonio Hierro, *Reducing Time and Costs in ICC International Arbitration Excess Time and Costs of Arbitration: An Incurable Disease?*, 12–13 SPAIN ARB. REV. 37 (2012);

[190] *See supra* note 72 (discussing such costs).

[191] *See generally* Harrison, *supra* note 141 (discussing transparency in arbitration).

[192] *See generally* on this issue, De Brabandere, *supra* note 187; *See* Trakman, *supra* note 171 (discussing autonomy of medieval and modern law merchants, including arbitration); Gómez, *supra* note 186.

[193] *See* Gómez *supra* note 186.

[194] *Id.*

issue is whether admitting civic interest groups in principle will prejudice those third parties that cannot afford the direct or indirect costs of such participation.[195]

Robust challenges to investment arbitrators' appointment or continuance, not least of all arising from a conflict of interest, further complicates the thorny issue of whether investment arbitrators ought to have some latitude in deciding whether and how to admit third parties.[196]

The historical response to third-party participation in investor–state arbitration is not altogether comforting. If ICSID proceedings are to involve greater public participation, ICSID members ought to agree to such a process collectively or through individual bilateral investment agreements. Fortunately, the ICSID Rules already include a foundation for such collective agreement. A tribunal can invoke ICSID Arbitration Rule 37 to invite any person or entity that is not a Disputing Party in arbitration proceedings to make a written application to the Tribunal for permission to submit an amicus curiae brief.[197] Moreover, a Procedural Order of the ICSID of February 2, 2011, also provides a process by which non-disputing parties can file such briefs.[198] This practice of inviting third parties to file amicus briefs is also replicated in arbitration clauses in various free trade agreements, such as under Article 10.20.3 of the Dominican Republic–Central America–United States Free Trade Agreement, which was applied in a recent case involving third-party participation in investment proceedings.[199] Consequently, it is arguable that the ICSID has done enough to facilitate public participation in its proceedings.

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[195] *Id.*

[196] *See* Lise Johnson, *Annulment of ICSID Awards: Recent Developments* (Fourth Annual Forum for Developing Country Investment Negotiators, New Delhi, Background Papers, Oct. 27–29, 2010), *available at* http://www.iisd.org/publications/pub.aspx?id=1423 (providing recent decisions on parties' applications for and grounds of annulment of ICSID awards). *See also* Universal Compression Int'l Holdings, S.L.U. v. Ven., ICSID Case No. ARB/10/9 (May 20, 2011), *available at* http://italaw.com/documents/UniversalCompressionDecisiononDisqualification.pdf (challenges to ICSID arbitrators). *See generally* Robin Hansen, *Parallel Proceedings in Investor–State Treaty Arbitration: Responses for Treaty-Drafters, Arbitrators and Parties,* 73 Modern L. Rev. 523 (2010); Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 Cornell L. Rev. 47 (2010); William W. Park, *Arbitrator Integrity: The Transient and the Permanent,* 46 San Diego L. Rev. 629, 657–61 (2009); Jan Paulsson, *Moral Hazard in International Dispute Resolution,* 25 ICSID L. Rev 339 (2010); Leon E. Trakman, *The IBA Guidelines on Conflict of Interest in International Commercial Arbitration*, 10 Int'l Arb. L. Rev. 124 (2007).

[197] *See Chapter IV: Written and Oral Procedures*, International Centre for the Settlement of Investment Disputes, *available at* http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partF-chap04.htm#r37 (last visited June 19, 2012) (providing the language for Rule 37).

[198] *See Procedural Order Regarding* Amici Curiae, International Centre for Settlement of Investment Disputes (Feb. 2, 2011), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement81 (noting developments in relation to the ICSID).

[199] On March 2, 2011, a coalition of community organizations, research institutes, and environmental, human rights, and faith-based nonprofit organizations filed an application to submit an amicus brief in the ongoing ICSID dispute between Pac Rim Cayman LLC and the Republic of El Salvador. *See* Pac. Rim. LLC v. El. Sal., ICSID Case No. ARB/09/12, Registered (June 15, 2009). *Cf* Glamis Gold, Ltd. v. U.S., Award (June 8, 2009), *available at* http://www.state.gov/s/l/c10986.htm (arbitration under the UNCITRAL Arbitration Rules).

The cost of public participation in investor–state proceedings is a further concern. In effect, the benefit of encouraging public participation in ICSID proceedings, including by civic groups from developing countries, is counterbalanced by the risk of third parties with identifiable public interests not being able to fund that participation adequately.[200] If such groups are to have a voice that is heard, the case for funding their participation is greater.[201] However, if public participation is to be subsidized, it ought to be based on evenhanded policies such as to redress systemic disadvantage, not unlike defense or aid funds for needy litigants. Moreover, subsidization ought also to be based on verifiable data, such as confirmation of limited funding to participate in proceedings.[202]

The question of determining when to admit or deny third–party participation in ICSID proceedings is difficult to answer in principle. A complicating factor is that ICSID arbitration is essentially ad hoc.[203] As such, principles governing the conduct of international investment law are the product not only of an evolving consensus "among states" but also of dissension over the nature and application of those principles to specific cases.[204] Should ICSID arbitrators have discretion in principle to admit third-party briefs or oral testimony, the difficult question is in determining the authoritative source of that discretion. The most authoritative source is for ICSID to stipulate that arbitrators are so empowered as a condition of their appointment to which the ICSID Administrative Council, consisting of member states, is unlikely to agree.[205] Alternatively, a more cautious approach is for the ICSID to endorse the arbitration provisions contained in the applicable bilateral investment agreement, conceivably based on the model bilateral investment agreements adopted by the United States and Canada.[206] The problem here is that despite the fact that bilateral

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[200] *Id.*

[201] *Id.* The rationale is that public interest groups may have a voice, but lack the resources to be heard. That lack of resources may vary from the prohibitive costs of securing qualified counsel to represent them at ICSID hearings to being unable to fund ongoing public interest participation at lengthy hearings.

[202] *See* Nigel Blackaby, *Public Interest and Investment Treaty Arbitration*, *in* International Commercial Arbitration: Important Contemporary Questions 355 (Albert Jan van den Berg ed., 2003) (discussing public interest in investment arbitration); *see generally* Maciej Zachariasiewicz, *Amicus Curiae in International Investment Arbitration: Can It Enhance the Transparency of Investment Dispute Resolution?*, 29(2) J. Int'l Arb. 205 (2012).

[203] Investor–state arbitration is ad hoc in that each decision binds the parties, but does not serve as an arbitral precedent, as common lawyers conceive of precedent. *See generally* Tony Cole, *Non-Binding Documents and Literature, in International Investment Law: Sources of Rights and Obligations* (Tarcisio Gazzini & Eric De Brabandere, eds., 2012).

[204] On variable principles of international investment law, see Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law (2d ed. 2012); Surya P. Subedi, International Investment Law: Reconciling Policy and Principle (2d ed. 2012).

[205] In the author's view, the Council is unlikely to so agree due to concerns among member states over the negative impact the exercise of arbitral discretion could have over the public interest of respondent states in subsequent ICSID proceedings.

[206] *See, e.g.*, Central American Free Trade Agreement, Dispute Resolution, signed Aug. 5, 2004 (entered into force Aug. 2, 2005 (United States), Mar. 1, 2006, (El Salvador), Apr. 1, 2006, (Honduras and Nicaragua), July 1, 2006 (Guatemala), Mar. 1, 2007 (Dominican Republic), Jan. 1, 2009 (Costa Rica)) especially

investment agreements increasingly define complex concepts, such an expropriation, and the nature of "most favored nation treatment" and "national treatment," the specific nature and scope of such agreements remain distinctly variable.[207]

None of this addresses resistance that investor–state arbitrators face when deciding in practice whether to allow third parties to participate in proceedings. A principled objection is the perceived ingrained right of disputing parties to deny consent to third-party participation.[208] The practical difficulty is in arbitrators ameliorating public and private tensions within investor–state arbitration. This includes: providing public access to the expropriation practices of states while avoiding the public disclosure of sensitive state or investor information, requiring that a state demonstrate that its expropriation is for a public purpose without publicly victimizing the state; and complying with the rules of the ICSID and the applicable investment treaty in reaching such determinations.[209]

Arbitrators need not make these determinations in a vacuum. Indeed, investment arbitration may entail consultative expectations, such as arbitrators conferring with the ICSID Secretariat and the investor–state parties in determining whether and how to admit third-party briefs or testimony. In answering these questions, the ICSID and its arbitrators can also draw from experience in commercial arbitration, such as the practices used in ICC and ICDR arbitration.[210]

What is evident, too, is that these formal and informal methods of redressing public–private tensions are already in use in investor–state arbitration, such as the NAFTA, and in more recent regional and bilateral investment agreements such as the

Article 21-22 [hereinafter CAFTA]. *See also* Model United States BIT (2004) art. 29, "Transparency of Arbitral Proceedings," *available at* http://www.state.gov/documents/organization/117601.pdf; Peru Trade Promotion Agreement, U.S.–Peru, signed Apr. 12, 2006 (entered into force Feb. 1, 2009) art. 10.21; Free Trade Agreement, U.S.–Colombia, signed Nov. 22, 2006 (anticipated entry into force, 2012) art. 10.21, Free Trade Agreement, Korea–U.S., signed June 30, 2007 (Approved by Congress Oct. 12, 2011) art. 11.21 [hereinafter Korea–U.S. FTA]. *See also* Model Canadian Foreign Investment Promotion and Protection Agreement (2003) art. 38(1) (providing for "open hearings" but also stating that "the Tribunal may hold portions of hearings *in camera*"). *See also* 2012 Model United States Bilateral Investment Treaty, *available at* http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf; Kenneth J. Vandevelde, *Model Bilateral Investment Treaties: The Way Forward,* 18 Sw. J. Int'l L. 307 (2011).

[207] *See e.g.*, Clint Peinhardt & Todd Allee, *Devil in the Details? The Investment Effects of Dispute Settlement Variation in BITs*, *in* Yearbook on International Investment Law & Policy 2010–2011 (Karl P. Sauvant ed., 2012).

[208] This right is preserved in the ICSID Convention, Regulations and Rules, including in Rules 27, 35–37, *available at* http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

[209] On this public–private tension, see generally Alvarez & Park, *supra* note 115; Franck, *supra* note 92; Alex Mills, *The Public–Private Dualities of International Investment Law and Arbitration*, *in* Evolution in Investment Treaty Law and Arbitration 97–116 (Chester Brown & Kate Miles eds., 2011); Catherine A. Rogers, *International Arbitration's Public Realm, in* Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2010).

[210] *See generally* Martin F. Gusy et al., A Guide to the ICDR International Arbitration Rules (2011); Tony Cole & Anuj Kumar Vaksha, *Power-Conferring Treaties: The Meaning of "Investment" in the ICSID Convention,* 24 Leiden J. Int'l L. 305 (2011); *supra* note 39.

Central American Free Trade Agreement (CAFTA).[211] The telling issue is in how the ICSID investor–state arbitrators can open the door to public participation in otherwise protected arbitration proceedings in a fluid and sometimes unstable investment climate.

D. INCONSISTENT DECISIONS

A particular critique of international investment arbitration generally is that arbitrators will reach different determinations in otherwise comparable cases. This criticism can be directed against any form of decision making involving discretion, where decision makers do not treat like cases alike.[212] However, ICSID arbitrators have the additional burden of having to interpret differently worded treaties and applying variable conceptions such as direct and indirect expropriation, as well as fair and equitable treatment, to distinct cases.[213] Added to these interpretative and substantive difficulties facing investment arbitrators are dissimilar practices among arbitral tribunals on how to hear a case, how to address past decisions that are not formally precedents but nevertheless influential, and how to write arbitral awards.[214]

Illustrating inconsistent methods of construing international investment law are six investor claims against the Republic of Argentina. All of the cases dealt with the defense of necessity against an expropriation arising from the alleged severity of Argentina's economic crisis primarily in late 2001 and early 2002, and its rescue package that foreign investors alleged was unfair to them.[215] Three of the cases, *CMS, Enron,* and *Sempra*, were all decided by tribunals with the same president, they each employed different methods of interpretation, and they reached different conclusions.[216] Specifically, *CMS* and *Sempra* rejected Argentina's pleas under both treaty and customary law and found

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[211] *See, e.g.,* CAFTA, signed Aug. 5, 2004 (entered into force Aug. 2, 2005 (United States), Mar. 1, 2006 (El Salvador), Apr. 1, 2006 (Honduras and Nicaragua), July 1, 2006 (Guatemala), Mar. 1, 2007 (Dominican Republic), Jan. 1, 2009 (Costa Rica)) art. 10.21 (Transparency of Arbitral Proceedings).

[212] This is the case in civil law systems generally in which courts are not bound by judicial precedent, but whose decisions collectively constitute part of an *opinio juris*, or opinion of jurists. *See, e.g.*, the Web site, Opinio Juris, http://opiniojuris.org/tag/ats/.

[213] On differently worded bilateral investment treaties giving rise to different interpretations, see Peinhardt & Allee, *supra* note 207; J. Romesh Weeramantry, Treaty Interpretation in Investment Arbitration (2012).

[214] *See* Jurgen Kurtz, *Adjudging the Exceptional at International Investment Law: Security, Public Order, and Financial Crisis,* 59 Int'l. Comp. L.Q. 325, 329 (2010) (noting such differences in interpretation and identifying three methodologies of interpretation).

[215] *See infra* cases cited in notes 216–218.

[216] CMS Gas Transmission Co. v. Arg., ICSID Case No. ARB/01/8, Award May 12, 2005); Enron Corp. Ponderosa Assets, L.P. v. Argentine, ICSID Case No. ARB/01/3, Award (May 22, 2007); Sempra Energy Int'l v. Arg., ICSID Case No. ARB/02/16, Award (Sept. 28, 2007). *See generally* August Reinisch, *Necessity in International Investment Arbitration—An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on* CMS v. Argentina *and* LG&E v. Argentina, 8 J. World Inv. & Trade 191 (2007); Stephan W. Schill, *International Investment Law and the Host State's Power to Handle Economic Crises: Comment on the ICSID Decision in* LG&E v. Argentina, 24 J. Int'l Arb. 265 (2007); Michael Waibel, *Two Worlds of Necessity in ICSID Arbitration*: CMS and LG&E, 20 Leiden J. Int'l L. 637 (2007).

Argentina responsible for causing damage to foreign investors that required compensation.[217] In comparison, the tribunals in *Continental Casualty, LG&E,* and *Metalpar* decided in favor of the Republic of Argentina, absolving it from the responsibility to compensate foreign investors for any damage suffered.[218] An Annulment Tribunal following *CMS* held that the investment tribunal had interpreted the Treaty incorrectly because it construed its provision for necessity in the same manner as customary investment law as stated in Article 25 of the International Law Commission (ILC) Code on State Responsibility.[219] *Enron* and *Sempra* were also annulled.

The problem of arbitrators reaching inconsistent decisions in seemingly similar cases is not entirely one that investor–state arbitrators can resolve. Furthermore, the problem of inconsistency is not limited to investor–state arbitration. Indeed, judicial precedent is a common law, not a civil law concept. Similarly, international law, including the International Court of Justice, does not adhere to case precedent.[220] Further limiting the potential ambit of precedent in investor–state arbitration is the observation that awards are case-specific and bind only the disputing parties.[221] In addition, the uniform interpretation of investment treaties is also likely to be elusive when the wording of treaties differ and when customary investment laws and practices diverge.[222] Further undermining the prospects of investment arbitrators reaching

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[217] *See* CMS Gas Transmission Co. v. Arg., ICSID Case No. ARB/01/8, Award (May 12, 2005); Enron Corp. Ponderosa Assets, L.P. v. Arg., ICSID Case No. ARB/01/3, Award (May 22, 2007); Sempra Energy Int'l v. Arg., ICSID Case No. ARB/02/16, Award (Sept. 28, 2007).

[218] *See* Cont'l Cas. Co. v. Arg., ICSID Case No. ARB/03/9, Award (Sept. 5, 2008); LG&E Energy Corp. v. Arg., ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006; Award, July 25, 2007); Metalpar S.A. v. Arg., ICSID Case No. ARB/03/5, Award, ¶¶ 208–13 (June 6, 2008).

[219] *See* International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, U.N. GAOR, 56th Sess., at ch. 4, U.N. Doc. A/56/10 (2001). *See also* Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. Doc. A/56/49(Vol. I)/Corr.4 (Dec. 12, 2001) Article 25 provides:

> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity.

But see Matthew Parish, *On Necessity*, 11 J. World Inv. & Trade 169, 173 (2010).

[220] Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2(1) J. Int'l Disp. Dispute Settlement 5–13 (2011), available at http://intl-jids.oxfordjournals.org/content/2/1/5.full.

[221] The binding force of arbitral awards, including investor–state arbitration, is a contentious topic. *See, e.g.*, Christoph Schreuer & Matthew Weiniger, *A Doctrine of Precedent?*, *in* The Oxford Handbook of International Investment Law 1188 (Peter Muchlinski et al. eds., 2008) (discussing the absence of binding precedents, at least in principle, in international investment law); Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as* Jurisprudence Constante, *in* International Economic Law: The State and Future of the Discipline 265 (Colin Picker et al. eds., 2008).

[222] *See* Kurtz, *supra* note 214, at 392 (noting three different methods of interpreting investment treaties); William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The*

uniform awards is the realization that international investment law focuses on the expropriation of property. This is significant because the law of property varies from jurisdiction to jurisdiction and there is no truly pervasive body of international law of property governing investment.[223] Not only are investment arbitrators under the ICSID called upon to interpret complex property concepts, they also must reach decisions based on divergent conceptions of property in otherwise similar cases.[224] Against such a background, investment arbitrators understandably struggle to reach decisions that, with the benefit of hindsight, appear confusing or at worst wrong in subsequent annulment proceedings.[225]

E. GREASING THE SQUEAKY WHEEL

The ICSID Secretariat's recommendations relating to public participation in proceedings and the publication of awards are not as intensely under the public microscope today as they were when the Secretariat proposed them. That is partly the consequence of the new Rule 37, which goes some of the way to accommodate the Secretariat's recommendations. Nevertheless, the recommendations have had an incremental political and jurisprudential influence in providing greater transparency and publicity to arbitration hearings, including a shift in political will favoring public proceedings and published results as well as the formal adoption of new Rule 37 evidencing that shift. This shift toward greater transparency is also attributable in part to the growth of informed investment reporter services on ICSID developments including arbitration awards. Particularly, ever readier and cheaper access to information makes it difficult to shroud ICSID hearings or awards in secrecy.[226] In addition, the Internet provides

Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties, 48 Va. J. Int'l L. 307, 340 (2008) (discussing "nuances of state intent").

[223] On different conceptions of property rights, see Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967); J.E. Penner, The Idea of Property in Law (1997); Felix Cohen, *Dialogue on Private Property*, 9 Rutgers L. Rev., 357 (1954). On different conceptions of property rights in international investment law, see, for example, Salini Costruttori SpA v. Morocco, Decision on Jurisdiction (July 23, 2001); 42 I.L.M. 609 (2003). *See also* Monique Sasson, Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International and Municipal Law, *see especially* ch. 4 (2010). On the requisites that must be met to invoke the ICSID's jurisdiction, *see* Schreuer, *supra* note B, at 89-91 and Omar E. García-Bolívar, *Protected Investments and Protected Investors: The Outer Limits of ICSID's Reach*, 2 Trade L. & Dev. 145, 147 (2010) (discussing requisites that must be met to invoke the ICSID's jurisdiction).

[224] *See generally* Luzius Wildhaber & Isabelle Wildhaber, *Recent Case Law on the Protection of Property in the European Convention on Human Rights, in* International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer 657 (Christina Binder et al. eds., 2009) (discussing the European Convention of Human Rights).

[225] *See supra* Section IV(iv) (articulating this interpretative confusion in the trilogy of investment claims against the government of Argentina).

[226] Online reporting services that are easily accessible through conventional search engines illustrate this ready access to information on developments in international investment law. See further note 227 immediately below.

foreign investors with ready access to databases of arbitration cases and commentaries that demystify complex property concepts, among others, in particular cases.[227] Furthermore, there are, of course, information leaks.[228]

Indeed, in the Argentine case of *Aguas Argentinas S.A., Suez Sociedad General de Aguas de Barcelona S.A., Vivendi Universal S.A. v. Republic of Argentina*, the attorney general of the Republic of Argentina published the relevant arbitration proceedings along with the reasons the Tribunal denied the petition of civic groups in Argentina.[229] In contrast, the 2006 ICSID case of *Biwater Gauff (Tanzania) Ltd v. Tanzania* saw lukewarm support for the publication of investment arbitration awards.[230]

However, attitudes, including among ICSID members and foreign investors, have changed to accept that greater openness, or at least the appearance of it in ICSID proceedings, is often appropriate.[231] In particular, a debatable but nevertheless identifiable attitudinal change is the 2006 ICSID Rule 37 providing for submissions of non-disputing parties subject to limiting guidelines.[232] Added to this change is the wider availability of investor–state awards on the ICSID Web site, along with references to academic and professional commentaries on ICSID cases.[233] These attitudinal changes do not in themselves simplify the complexity of international investment law and investor–state arbitration in particular. In fact, notwithstanding Arbitration Rules 35 and 36 providing for expert witnesses,[234] expert testimony on the significance of conflicting conceptions of contract and property law can complicate as much as it clarifies such differences.[235] Moreover investor–state parties have uneven access to such evidence, and it is difficult to ensure that such evidence is heard and understood.[236]

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[227] *See generally* The Investment Reporter, http://www.investmentreporter.com/ (last visited June 19, 2012); *World Investment Report*, United Nations Conference on Trade and Development, http://www.unctad.org/Templates/Page.asp?intItemID=1465 (last visited June 19, 2012).

[228] For a classical ICSID case involving such "leaks," see the text immediately below and *infra* note 233.

[229] ICSID Case No ARB/03/19. *See further supra* note 105 and the accompanying text.

[230] ICSID Case No ARB/05/22, Procedural Order No. 3 (Sept. 29, 2006). The tribunal permitted a disputing party to "engage in general discussion about the case in public, provided that any such public discussion is restricted to what is necessary, and is not used as an instrument to antagonise the parties, exacerbate their differences, unduly pressure one of them, or render the resolution of the dispute potentially more difficult." *See id.*; *see also* Schreuer, *supra* note 6, at 822 (contending that a party to an ICSID arbitration can publish the award).

[231] It is a virtual certainty that the reasons as to why investors and sometimes states sought to avoid third party interventions, public hearings and the publication of awards, remain. What has changed is the fact that these aspirations are more difficult to justify in the face of growing transparency requirements, and public expectations.

[232] *See supra* Section IV(i) (discussing amended Rule 37 of the ICSID Arbitration Rules). *See also supra* notes 165.

[233] *See ICSID Cases*, International Centre for Settlement of Investment Disputes, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases_Home (last visited June 19, 2012).

[234] *See ICSID Arbitration Rules*, *supra* note 33.

[235] On the difficulties arising in interpreting different conceptions of property, *see supra* note 118–124.

[236] *See supra* Section II(iii).

The status of investor–state awards is also changing, albeit incrementally. Regional and bilateral agreements sometimes entitle disputing parties to make arbitration awards public, such as Annex 1137.4 of the NAFTA, which stipulates that, where the United States or Canada is the disputing party, either party to the arbitration may make the award public.[237] This practice has been affirmed by the NAFTA Free Trade Commission; and by individual statements by the U.S. and Canada in 2003 and ultimately by Mexico in 2004 issuing individual statements consenting to open hearings for all of their own cases under Chapter 11 of the NAFTA.[238]

Regional and bilateral treaties also reflect these changes, notably in the CAFTA, which requires public access to arbitration proceedings and which does not allow a disputing party to object.[239] Further illustrating the publicity of investor–state proceedings and awards is the CAFTA arbitration, *Commerce Group Corporation and San Sebastian Gold Mines v. Republic of El Salvador*, decided by the ICSID.[240] The *Commerce Group* proceedings were broadcast live on the World Wide Web, and both the proceedings and award are available on the ICSID Web site.[241]

What does all this mean for the operation of the ICSID? From a systemic perspective, comprehensive institutional reforms of the ICSID are realistic only if signatory states to the ICSID Convention so agree. It also anticipates signatory states agreeing upon criteria on how the ICSID Secretariat and investment arbitrators ought to direct or guide such participation, including the protection of sensitive information from public disclosure. In the absence of such support, and even with it, much depends on how individual states provide for public participation in bilateral or investor–state agreements, the substantive laws states invoke to govern such participation, and the

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[237] NAFTA Article 1137 and its Annex 1137.4, provides that either party may publish the award, which includes not only the final award but also preliminary awards. On the text of this Article and Annex, *see* SICE, Foreign Trade and Information Service, available at http://www.sice.oas.org/trade/nafta/chap-112.asp.

[238] On public access to Chapter 11 proceedings under the NAFTA, *see* NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (July 31, 2001), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta-interpr.aspx?lang=en&view=d. On public statements by the NAFTA parties on open hearings, see NAFTA—Chapter 11—Investment Settlement of Disputes between a Party and an Investor of Another Party, Transparency, http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta-transparency-alena-transparence.aspx?lang=en&view=d. This commitment to open hearings is further reflected in the interpretation of Chapter 11 by the Free Trade Commission, confirming the decision in *Metalclad v. Mexico* that "Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration": *id*.

[239] *See* CAFTA, arts.i 10.21(2) & (5) (Transparency of Arbitral Proceedings). The CAFTA-DR extends beyond the NAFTA by requiring explicitly that proceedings take place in public.

[240] See Commerce Grp, Corp. v. El Sal., ICSID Case No. ARB/09/17, Award (Mar. 14, 2011) (available on the ICSID Web site at Commerce Group, Corp. v. El Sal., ICSID Case No. ARB/09/17, Award (Mar. 14, 2011); Commerce Grp, Corp. v. El Sal. Public Hearing, Nov. 15, 2010, International Center for Settlement of Investment Disputes (Nov. 17, 2010), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement71.

[241] *Id*.

prospect of investor–state arbitration being subject to inconsistent constitutional laws of state parties.

From the perspective of risks, the ICSID like any other international organization faces the risk that disenchanted member states will desert it if its structure is not reformed, while others will leave if its structure is reformed. If member states contemplate changes to the transparency and publicity of ICSID arbitration, the World Bank conceivably may establish block grants to subsidize developing countries and particularly civic groups that qualify for subsidization, subject to prescribed terms of reference. On the other hand, levies on wealthier countries may also be needed to subsidize the costs of public participation by civic groups, which are not necessarily limited to poorer countries. It is unlikely that wealthier countries would agree to such a grant scheme in the absence of constrained terms of reference governing both the availability and quantum of those grants. However they may agree to subsidize such participation in order to diffuse the hostility of some developing countries toward investment arbitration and the ICSID.

Another prickly issue in the process of ICSID reform is in signatory parties agreeing on a threshold at which parties to ICSID disputes ought not unreasonably to resist third-party participation and the publication of investment awards. Agreement by ICSID members on these issues is unlikely unless and until there is a persistent groundswell of support arising from crises of confidence in the delivery of investor–state arbitration, not limited to the ICSID. However, if such a groundswell does not eventuate, the tendency will be to grease the squeaky wheel, not change it.

A more invasive approach is for the ICSID to consider the practice adopted by the NAFTA Free Trade Commission. In October 2003, that Commission issued an interpretative statement specifying that "[n]o provision of the North American Free Trade Agreement [] limits a tribunal's discretion to accept written submissions from a person or entity that is not a disputing party."[242] The Trade Commission's interpretation is distinctive in two respects. First, the NAFTA is silent on amicus curiae briefs. Second, its interpretation establishes a procedure to which a non-disputing party must adhere in applying for leave to file a submission in arbitration.[243] The Trade Commission's interpretative statement is also not isolated. Indeed, the U.S. Trade Act of 2002 already required that trade negotiators establish "a mechanism for acceptance of amicus curiae submissions from businesses, unions, and nongovernmental organizations."[244] Similarly, these developments under the NAFTA and the CAFTA are not isolation. This is evident in more recent investment agreements, such as the Korea–U.S. Free

[242] *See Statement of the Free Trade Commission on Non-Disputing Party Participation*, NAFTA Free Trade Comm'n (Oct. 7, 2003), available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf.

[243] *Id. See also* Nathalie Bernasconi-Osterwalder & Lise Johnson, Int'l Inst. for Sustainable Dev., *Transparency in the Dispute Settlement Process: Country Best* Practices 9 (Best Practices Series, Bulletin No. 2, Feb. 2011), *available at* http://www.iisd.org/pdf/2011/transparency_dispute_settlement_processes.pdf.

[244] *See* Trade Act 2002, Pub. L. No. 107-210, 116 Stat 933, 995 (2002) § 2102(b)(3)(H)(iii).

Trade Agreement and some model bilateral investment agreements that provide for the admission of amicus briefs. These agreements highlight three criteria: "(a) the appropriateness of the subject matter of the case, (b) the suitability of a given non[-] party to act as amicus curiae in that case, and (c) the procedure by which the amicus submission is made and considered." [245] These criteria, in the main, provide a reasonable basis upon which investor–state arbitrators can choose whether and how to admit "non-parties" to assume amicus curiae roles. If anything, each of these developments provides some fortitude to the ICSID in deciding how it wishes to proceed on the issue of transparency of proceedings, such as under Rule 37.

V. DOMESTIC COURTS OR ICSID ARBITRATORS?

An alternative to investor–state arbitration, not limited to the ICSID, is that foreign investors, like domestic investors, ought to be subject to the territorial sovereignty of the state in which they invest, including to the jurisdiction of domestic courts.[246] Arguably, domestic courts, not ICSID tribunals, are the appropriate bodies to resolve investment disputes between domestic states and foreign investors, in the same manner as domestic courts decide "other" domestic disputes.[247] Here, the inference is that domestic courts can ensure that foreign and domestic investors receive comparable rights and are subject to comparable duties.[248] As the Australian Government contended in its Policy Statement in April 2011, "dispute settlement processes should not afford foreign investors in Australia with access to litigation options not normally afforded to local investors."[249] The intention is to ensure that investor–state parties

[245] *See* Free Trade Agreement, Korea–U.S., art. 11.20, signed June 30, 2007 (Approved by Congress Oct. 12, 2011) (Korea–U.S. FTA). *See also* Free Trade Agreement, Canada–Colombia, art. 831, signed Nov. 11, 2008 (entered into force Aug. 15, 2011); Model Canadian Foreign Investment Promotion and Protection Agreement (2003) art. 39.

[246] *See, e.g.*, Redefining Sovereignty in International Economic Law, Part Four (Wenhua Shan et al. eds., 2008) (providing commentary on the complexity of sovereignty in international investment law); Robert Stumberg, *Sovereignty by Subtraction: The Multilateral Agreement on Investment*, 31 Cornell Int'l L. J. 491, 503–04, 523–25 (1998) (discussing sovereignty). *See also* International Economic Law and National Autonomy (Meredith Kolsky Lewis & Susy Frankel eds., 2010); Robert H. Jackson, Quasi-States: Sovereignty, International Relations and the Third World (1990); John H. Jackson, The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations, ch. 18 (2000); Michael Reisman, *International Arbitration and Sovereignty,* 18 Arb. Int'l (LCIA) 231 (2002); Oppenheim's International Law 927 (Sir Robert Jennings & Sir Arthur Watts eds., 1992).

[247] *See generally* Leon E. Trakman, *Investor State Arbitration or Local Courts: Will Australia Set a New Trend?*, 46 J. World Trade 83 (2012); Leon E. Trakman, *Foreign Direct Investment: An Australian Perspective*, 13 Int'l Trade & Bus L. Rev. 31, 48–53 (2010).

[248] *See* Trakman, *Foreign Direct Investment, supra* note 247, at 48–49 (discussing these arguments buttressing the dispute resolution mechanisms adopted under the Australia–United States Free Trade Agreements).

[249] *See* Productivity Commission, *Bilateral and Regional Trade Agreements* (Draft Research Report, July 16, 2010) [hereinafter Productivity Commission]; *see also* Patricia Ranald & Harvey Purse, *Supplementary*

resolve their investment disputes in a transparent, public, and cost-effective manner before duly appointed domestic courts that also consider domestic public policies. Included among the rights of foreign investors is their right to natural justice or due process before domestic courts, offset by the power of that state to restrict private investor rights on public policy grounds, such as to ensure that foreign investors do not receive advantages not availed to local investors, and to protect public health, welfare, and the environment.[250]

This development in Australia is not entirely novel. Specifically, the *Calvo Doctrine* that was enunciated in Latin America decades before had a comparable focus, albeit reflecting the perspective of developing, not developed, countries.[251] Under the Australian approach, national law should govern the rights of foreign investors, particularly foreign investors filing claims against the Australian government, and the authority of domestic courts should prevail over other options, including resort to diplomatic channels.[252] The jurisdictional rationale for this proposition is that investment disputes ought to be decided by the domestic courts of host states, not international tribunals.[253] The substantive rationale is that domestic courts ought to confer only national treatment on foreign investors, there being no better treatment than is accorded to local investors.[254] The equitable inference from these rationales is that, were investor–state arbitration to privilege foreign investors, it would not serve the national interest, and if it fails to service the national interest, domestic courts ought to replace it.

A. THE CASE FOR AND AGAINST DOMESTIC COURTS

There are several related arguments in support of domestic courts deciding investment disputes. First, domestic courts decide cases according to domestic laws that include the interpretation of bilateral investment treaties between host and home states.[255] Second, domestic courts are subject to established procedural and evidential

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Submission on behalf of the Australian Fair Trade and Investment Network (AFTINET) to the Productivity Commission Review into Bilateral and Regional Trade Agreements, *available at* http://www.pc.gov.au/__data/assets/pdf_file/0015/102525/subdr068.pdf (last visited June 20, 2012) (making a supplementary submission to the Productivity Commission in response to the Commission's request for comments); Australian Government's Trade Policy, *supra* note 126, 4–15 (emphasizing the importance of investment for Australia's economy); Trakman, *Foreign Direct Investment*, *supra* note 247, at 31.

[250] *See* DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE, chs. 2, 6 (2008).

[251] *See id*. at 59–60.

[252] *See generally* Wenhua Shan, *From "North-South Divide" to "Private–Public Debate": Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law*, 27 NW. J. INT'L. L. & BUS. 631 (2007); Bernardo Cremades, *Resurgence of the Calvo Doctrine in Latin America*, 7 BUS. L. INT'L 53 (2006).

[253] *See, e.g.*, SCHNEIDERMAN, *supra* note 250, at 59; Cremades, *supra* note 252, at 59.

[254] *See* SCHNEIDERMAN, supra note 250, at 59.

[255] On the jurisdiction of domestic state courts over international investment disputes under Chapter 11 of the NAFTA, see Mondev Int'l Ltd. v. U.S., ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002); The Loewen Grp., Inc. v. U.S., ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003).

constraints in deciding cases. Third, domestic courts are required to protect the rights of foreign investors while also taking into account the applicable public policy of the forum.[256] Finally, decisions by domestic courts are subject to appeal.

In addition, based on several indices, many domestic judicial systems are not reliable in resolving investor–state disputes based. Approximately 76 percent of the cases in which investment treaty awards were rendered up to June 2006 involved states that fell at or below Number 50 on the Transparency International's 2008 Corruption Perception Index. That number increased to 84 percent when cases involving the United States and Canada were excluded. Over 69 percent involved states that fell at or below Number 70 on that Corruption Index.[257] The World Bank's Worldwide Governance Indicators produced similar results. Its Indicator demonstrated that 68 percent of those states were in the bottom 60 percent of the World Bank's WGI index for the "rule of law."[258]

In further support of domestic courts deciding investor–state disputes, ICSID arbitration is subject to ICSID Rules that are broadly framed and less contestable than domestic law. For example, ICSID awards are subject to annulment procedures that are limited predominantly to jurisdictional grounds.[259] Either party can request an annulment, in which case an annulment committee is set up for that purpose, with the power to modify or nullify an award on restrictive grounds under Article 75 of the ICSID Convention.[260] These grounds include: (1) that the ICSID tribunal was not properly constituted; (2) that the tribunal manifestly exceeded its powers; (3) that there was corruption on the part of a tribunal member; (4) that there was a serious departure from a fundamental rule of procedure; or (5) that the award failed to state the reasons on which it was based.[261] ICSID Annulment Committees historically have interpreted these grounds expansively. However, resort to a domestic court is not considered an option under the ICSID Rules.[262]

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[256] *See* Loewen Group, *supra* note 255, at 436.

[257] *See* Kantor, *supra* note 116, at p. 10. Kantor based this information on the list of states in Annex 1 to Susan Franck, *Empirically Ealuating Claims about Investment Treaty Arbitration*, 86 N.C. L.Rev, 1 (2007) [information provided to the author by Mark Kantor on July 3, 2012].

[258] *Available at* http://info.worldbank.org/governance/wgi/index.asp,

[259] *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, ICSID/15, Art. 52 (Apr. 2006), *available at* http://www.icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (last visited June 13, 2012). *See generally* http://www.worldbank.org/icsid (last visited June 13, 2012) (ISCID documents); James Crawford & Karen Lee, 6 ICSID Reports 192 (2004) (analyzing the *Mondev International* award); http://icsid.worldbank.org/ICSID/ICSID/AdditionalFacilityRules.jsp (last visited June 13, 2012) (ISCID additional facility rules).

[260] *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *supra* note 259, Art. 52(1) and (3).

[261] *See id.*, Art. 52(1).

[262] *See supra* note 71. *See also* Art. 53(1), *supra* note 259 (stating that an ICSID award is binding and shall not be subject to an appeal or any other remedy except those provided in the convention). Remedies under the convention consist of Art. 51 (revision by the Secretary-General) or Art. 52 (annulment); Andrea K. Bjorklund, *The Continuing Appeal of Annulment: Lessons from* Amco Asia *and* CME, *in* International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law 471, 479 (Todd Weiler ed., 2005).

Support for domestic courts over arbitrators deciding investor–state disputes is also grounded in economic efficiency. For example, Australia's Productivity Commission expressed concern that investor–state arbitration exposes Australia to costly, fractious, and dysfunctional disputes with foreign investors, such as Philip Morris Australia, that have deep pockets.[263] In criticizing investor–state arbitration, the Commission contended: "At a minimum, the economic value of Australia's preferential BRTAs has been oversold."[264] Notwithstanding the contention that litigation is often more fractious and costly than other modes of dispute avoidance, the Commission asserted that Australian courts are more fitting bodies to preside over such investor–state disputes than arbitrators.[265] However, what was not adequately addressed is the often dilatory nature of judicial procedures, the unfamiliarity of foreign investors with domestic law, the cost and protraction of proceeding before some domestic courts, and the potential unfairness of applying that law to investor–state disputes.[266]

A possible motivation, albeit not comprehensively addressed in either the Productivity Commission's Research Report or the Australian government's Policy, is trepidation that foreign investors from other developed states might invoke investor–state arbitration to attack the social and economic policies of Australia. In particular, there is some concern that foreign investors from the United States could mount investment claims against the Australian government that would erode the autonomy of the Australian government in devising policies, such as regulating cigarette advertising, on public health, safety, and environmental grounds. Here, a probable inference is that Australian courts are more likely than investment arbitrators to identify the public health risks of cigarette advertising with violations of Australian public policy.

A further assumption in favor of litigation over investor–state arbitration is that a domestic appeals process is more likely to be robust than an ICSID annulment procedure. First, the grounds for an appeal are ordinarily not only jurisdictional, but also on the merits. Second, appeal courts are subject to prescribed rules of proce-

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[263] *See* Leon E. Trakman, *Investor State Arbitration or Local Courts: Will Australia Set a New Trend?* 46 J. World Trade 83 (2012); Luke R. Nottage, *Consumer Product Safety Regulation and Investor–State Arbitration Policy and Practice after* Philip Morris Asia v Australia, 22(1 & 2) Australian Prod. Liab. R. 154 (2011), also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2041680 (updated and expanded as ch 15 of this volume).

[264] *See* Productivity Commission, *supra* note 249 at XXVIII.

[265] *See* Trakman, *supra* note 263, at 86–89 (2012); *but see Tobacco Company Files Claim against Uruguay over Labeling Laws,* International Centre for Trade and Sustainable Development (Mar. 10, 2010), http://ictsd.org/i/news/bridgesweekly/71988/. *See also* Jurgen Kurtz, *The Australian Trade Policy Statement on Investor State Dispute Settlement*, 15(2) Insight (American Society of International Law Newsletter (Aug. 2, 2011) (noting that the Productivity Commission's Report, while offering a rigorous quantitative analysis of the net economic benefits of BITs, fails to take into account the dynamism of international law, as "critical barriers to foreign investment do not usually take the form of simple border measures whose effects are easily quantifiable").

[266] *See* Leon E.Trakman, *Investor State Arbitration or Local Courts: Will Australia Set a New Trend?*, 46 J. World Trade 83 (2012) (discussing these deficiencies in relying on domestic courts to resolve investor–state disputes).

dure on the record. Finally, both trial and appeal courts are bound by the applicable substantive law.

The choice of domestic litigation over investor–state arbitration nevertheless is not compelling, beyond the concern that investor–state arbitration is more likely than reliance on domestic courts to favor foreign investors over states.[267] The virtue of each is contingent on the value preferences its proponents ascribe to it. The proposition that domestic courts are subject to tried-and-tested domestic rules of evidence and procedure is offset by the fact that ICSID arbitration is guided by rules of procedure that seek to ensure that arbitration procedures are clear in nature and that an ICSID arbitrator's failure to apply them fairly can lead to annulment for noncompliance.[268] Further, the rationale that domestic courts ought to accord no more than national treatment to foreign investors is countered by the argument that investment arbitrators are equally capable of subscribing to comparable standards of national treatment , subject to the terms of an applicable investment treaty or agreement.[269] The supposed insularity of ICSID arbitration from domestic law and procedure is also disputable on the grounds that ICSID arbitrators cannot summarily disregard domestic law if a bilateral investment agreement that refers disputes to the ICSID chooses that law, or that law applied by investor–state agreement to disputes.[270]

Ultimately, parties must make a choice. An appeal to a domestic court is desirable if the party seeks a final determination on jurisdictional and substantive grounds. An annulment procedure on narrow jurisdictional grounds under Article 75 of the ICSID Convention is preferable if the claimant considers those grounds suitable. Beauty lies in the eyes of the beholder.

B. ADDRESSING THE DILEMMA

A formal way to resolve the dilemma between domestic courts and ICSID arbitration is to hold that domestic litigation ought to prevail over ICSID arbitration as a principle of state sovereignty. However, that principle alone is hardly supportable when states repeatedly surrender their sovereignty under both customary international and treaty law to international institutions. Nor is it credible to respond that a multilateral investment accord amounts at least to the sum total of sovereignty surrendered by signatory nation states. The contrary may be true: the result may be "sovereignty

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[267] For an open letter by prominent jurists objecting to the incorporation of investor–state arbitration into the Trans-Pacific Partnership Agreement, see Trans-Pacific Partnership Agreement Digest, *available at* http://tppdigest.org/index.php?option=com_content&view=article&id=303:news-1105-jurists-write-open-letter-objecting-to-lack-of-tpp-transparency-and-opposing-investor-state-clauses-chile-make-equivocal-noises-about-signing-final-agreement-anti-tpp-animated-video-hits-the-net-&catid=1:latest-news.

[268] *See supra* notes 6 and 45 (providing information on the ISCID).

[269] This proposition is complicated, particularly by the fact that different national legal systems have incorporated investment law differently. *See especially* Sornarajah, Chapter 16 of the current book.

[270] *See, e.g.*, Schreuer, *supra* note 54, at 357.

by subtraction,"[271] which arguably is one reason states failed to arrive at a multilateral investment accord in the first place. [272]

A notable argument in favor of choosing ICSID arbitration over domestic courts is that ICSID arbitrators are ordinarily experts in international investment law while domestic courts are not. At best, domestic judges sit as courts of general commercial jurisdiction and are not particularly experienced in international investment disputes.[273] However, this reasoning, holding that ICSID arbitrators are specialized tribunals as distinct from national judges that operate as courts of general jurisdiction, is contestable. Indeed, the ICSID does not ensure that arbitration is delivered expertly. Further, evidence of an expropriation calls for reasonable judgment about the nature and effect of that expropriation. Moreover, full-time national court judges arguably often have as much, if not more, experience in exercising reasonable judgment as part-time and disparately trained and experienced ICSID arbitrators. Finally, elected judges also sometimes have incentives to thoroughly consider applicable public policies governing expropriation, not least of all if judicious decision making is a credible basis for judicial reelection in jurisdictions in which judges are elected, not nominated.

In contrast, if a judgment about the virtue of ICSID arbitration depends on a study of ICSID jurisprudence, there are only a limited number of ICSID arbitration cases to review.[274] If a judgment about the virtue of ICSID arbitration is about effectiveness, decisions are likely to vary over the nature and extent of that effectiveness. If the inquiry about imperfections in ICSID arbitration is that its social costs exceed the costs of litigation, there is limited experience of investment treaties opting for domestic courts over investor–state arbitration. There is, therefore, limited evidence by which to assess the costs of investment litigation and even less evidence of the comparative social costs of resorting to domestic courts rather than investment arbitration. Only rarely do treaties refer investment disputes to domestic courts, such

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[271] *See* Stumberg, *supra* note 246. *See also* Kevin Kennedy, *A WTO Agreement on Investment: A Solution in Search of a Problem?* 24 U. Pa. J. Int'l Econ. L. 77, 87, 152–54, 179–80 (2003) (considering sovereignty concerns). On the prospective impact of the Doha round of multilateral negotiations on Chapter 11 of the NAFTA, *see* Bryan Schwartz, *The Doha Round and Investment: Lessons from Chapter 11 of NAFTA*, 3 Asper Rev. Int'l Bus. & Trade L. 1 (2003).

[272] *See* Katia Tieleman, *The Failure of the Multilateral Agreement on Investment [MAI] and the Absence of a Global Public Policy Network, Global Public Policy Network*, *available at* http://www.gppi.net/fileadmin/gppi/Tieleman_MAI_GPP_Network.pdf.

[273] On the case for investor–state arbitration, see generally Oxford Handbook on International Investment Law (Peter Muchlinski et al. eds., 2008); Campbell McLachlan et al., International Investment Arbitration: Substantive Principles (2007); New Aspects of International Investment Law (Philippe Kahn & Thomas W. Walde eds., 2007); Van Harten, *supra* note 26; R. Doak Bishop et al., Foreign Investment Disputes: Cases, Materials and Commentary (2005); International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law (Todd Weiler ed., 2005); Arbitrating Foreign Investment Disputes (Norbert Horn & Stefan Kroll eds., 2004).

[274] *See generally Concluded Cases*, International Centre for Settlement of Investment Disputes, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded (last visited June 20, 2012) (listing 238 concluded cases as of June 20, 2012).

as under the U.S.-Australia Free Trade Agreement.[275] The choice of investor–state arbitration by treaty is the pervasive norm, and ICSID jurisprudence also extends beyond investment treaties between states. A further issue is whether principles of international investment law applied by investment arbitrators, such as the "fair and equitable" standard, require that a foreign investor receive a minimum standard of treatment, or treatment according to the "reasonable expectations" of those investors. A further problem arises if the "reasonable expectations" of foreign investors are deemed to encompass rights not available to domestic investors and extending beyond "national treatment." A related concern is in ensuring, as far as possible, a conception of "fair and reasonable" treatment that is clear, consistent, and predictable, as well as effectively applied to investors and states.[276]

It may well be that the Australian government's choice of domestic courts over arbitration in its recent investment policy reflects its expectation that Australian investors abroad will secure their own protection against political and economic risks, such as through the Multilateral Investment Guarantee Agency (MIGA) and the Export Finance and *Insurance* Corporation (EFIC) for Australian investors abroad, the Overseas Private Investment Corporation (OPIC) available to U.S. investors, and the Export Credits Guarantee Department (ECGD) available to British investors. How investors choose among risk insurance options, if at all, is likely to reflect how they arrive at the best risk–reward ratio. The fact that Australian investors may rely on private insurance still does not preclude their residual reliance on the Australian government to provide de facto insurance against political risks, or to intervene diplomatically. Indeed, they may factor in government intervention in calculating the best risk–reward ratio.

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[275] *See generally* Trakman, *Foreign Direct Investment*, *supra* note 247, at 79–81; Westcott, *supra* note 244; *see generally* Drusilla K. Brown et al., *Computational Analysis of the US FTAs with Central America, Australia and Morocco*, 28 World Econ. 1441 (2005) (discussing the U.S.–Australia Free Trade Agreement); Philippa Dee, *The Australia–US Free Trade Agreement: An Assessment*, 345 Pac. Econ. Papers (2005) (Paper prepared for the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, June 2004); *Free Trade Agreements with Australia*, Office of the U.S. Trade Rep., http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta (last visited June 13, 2012).

[276] *See generally* Thomas Westcott, *Recent Practice on Fair and Equitable Treatmen*t, 8 J. World Inv. & Trade 409, 425 (2007); 35 ILA International Law on Foreign Investment Committee, International Law on Foreign Investment: *First Report of the International Law Association,* 16. 36 (2006); Catherine Yannaca-Small, *Fair and Equitable Treatment Standard in International Investment Law*, 26 (OECD Working Papers on International Investment, 2004) (referring to the state's duty to treat foreign investors reasonably and equitably including the obligation of vigilance and protection; due process including non-denial of justice and lack of arbitrariness, transparency, and good faith, which could cover transparency and lack of arbitrariness). *See also* Peter Behrens, *Towards the Constitutionalization of International Investment Protecti*on 45 Archiv Des Völkerrechts 153, 175 (2007) (listing good faith, nondiscrimination, lack of arbitrariness, due process, transparency, consistency, and proportionality as the key requirements of fair and equitable treatment); Michael Muse-Fisher, *CAFTA-DR and the Iterative Process of Bilateral Investment Treaty Making: Towards a United States Takings Framework for Analyzing International Expropriation Claims,* 19 Pac. McGeorge Global Bus. & Dev. L.J. 495, 518–19 (2007) (discussing the minimum standard of fair and equitable treatment).

c. limitations in political risk insurance

Political risk insurance (PRI) is far from a panacea. In particular, the foreign investor is seldom able to secure full PRI coverage against risks to a foreign investment. Some risks are not covered by PRI. In addition, the insured is often required to self-insure in respect of part of the risk.

In addition, PRI covers only expropriation, political violence, and foreign exchange (FX) payments/transfers restrictions and, in some specifically negotiated PRI policies, breach of contract or refusal to honor an arbitral award by a state entity. Conduct by a host state constituting a denial of justice, breach of international minimum standards of treatment, unfair and inequitable and improper discrimination under international law are not ordinarily covered, save for a substantial expropriation such as deprivation of the full value of an investment.

From the perspective of the host state, lodging a PRI claim does not eliminate an insurance claim: it merely transfers it from the investor to the insurer, who then pursues it in its own name.[277]

There are also significant limits on PRI. First, PRI ordinarily is subject to a ceiling above which the investor is self-insured. Second, the OECD rules for PRI insurance require public insurers to impose 15 percent risk sharing on the insured. As a result, the investor ordinarily is a self-insurer for at least 15 percent of the risk in addition to any excess above the PRI ceiling. Finally, most PRI pay only the accounting book value (i.e., the net invested capital). Any market value in excess of book value is not covered. Again, an investor in a successful venture is a self-insurer for the excess of market value over accounting book value.

Finally, it is important to differentiate PRI from access to a dispute resolution forum. PRI consists of a contractual undertaking by a third-party insurer to make a payment in the specified circumstances above to the foreign investor, in effect adding that protection to the credit of the primary obligor. In contrast, investor–state arbitration provides the foreign investors with an independent forum in which to proceed against a host state, and if that investor is successful, an award. Nor is an award to a foreign investor anything like an insurance payment. The foreign investor can ordinarily only enforce the arbitration award against a state by invoking national court proceedings. That investor is then subject to the defenses of sovereign immunity from execution against state assets. The investor also faces the practical problem arising from most states placing their commercial assets into separately incorporated state enterprises that are not parties to the arbitration and are therefore not subject to attachment in the enforcement of an award.

[277] On the example of the Patuha/Himpurna arbitration and OPIC insurance**,** see Mark Kantor, *Political Risk Insurance and Investment Arbitration*, TDM 3 (2005), *available at* http://www.transnational-dispute-management.com/article.asp?key=441,

D. ARRIVING AT A BALANCE

ICSID arbitration is not an elixir of perfection that ought to be perpetuated as of right. Like all institutions, it has its beauty spots and warts. What can be said is that a shift toward domestic courts resolving investment disputes is one alternative dispute resolution option, not limited to arbitration under the ICSID. Were that choice to be based solely on the perceived quality of decision making, one could attribute particular normative qualities to the effective and fair use of judicial or arbitral processes in discrete cases. However, ascribing normative values to decision-making processes is unavoidably subjective. Specifically, an assessment of the economic rationale favoring domestic litigation over ICSID arbitration reflects self-interested propositions, such as the perceived benefit of one's foreign investors succeeding before a foreign court compared to before an ICSID tribunal. Moreover, the political reality is that, in exercising preferences, countries are more likely to trust the domestic courts of other countries with which they share common social and economic traditions than those with which they do not.[278] Countries are also readier to endorse a "rule-of-law" culture with which they identify than a culture with which they do not.[279]

Given these imponderables, the result may be that the choice between ICSID or some other form of investor–state arbitration and litigation before domestic courts should be pragmatically determined on the basis of preexisting experience, including prior cases. However, it is too early to arrive at a pragmatic conclusion about domestic judges deciding investment cases, except to acknowledge a shift to domestic courts deciding investment disputes, which began decades ago in Latin America with the once-disavowed and now-resurrected *Calvo Doctrine*.[280] The reasons for this more recent shift toward domestic courts by a developed state such as Australia are complex and potentially contradictory, but that shift could gain momentum in responding to dissatisfaction with investor–state arbitration including under the ICSID. Whatever the institution adopted to resolve investor–state disputes, not limited to litigation or

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[278] These observations are exemplified in Chapter 11 jurisprudence under the NAFTA. *See, e.g.*, Mondev Int'l Ltd. v. U.S., ICSID Case No ARB(AF)/99/2, Award, ¶ 159 (Oct. 11, 2002); Loewen Grp., Inc. v. U.S., ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003); William Dodge, *Loewen v. United States: Trials and Errors under NAFTA Chapter 11*, 52 DePaul L. Rev. 563(2002); Bradford K. Gathright, *A Step in the Wrong Direction: The Loewen Finality Requirement and the Local Remedies Rule in NAFTA Chapter Eleven,* 54 Emory L.J. 1093 (2005) (discussing the judicial review of the Loewen Chapter 11 decision); Dana Krueger, *The Combat Zone:* Mondev International, Ltd v. United States *and the Backlash against NAFTA Chapter 11,* 21 B.U. Int'l L.J. 399 (2003) (arguing that, but for a technical time bar, two tribunal decisions—*Mondev* and *Loewen*—might have prevailed over U.S. judicial decisions). For a discussion on the judicial review of the *Loewen* Chapter 11 decision, see Trakman, *Foreign Direct Investment, supra* note 247, at 52.

[279] The United States–Australia Free Trade Agreement empowers domestic courts in each signatory state to resolve investor–state disputes, rather than rely on investor–state arbitration. One of the rationales for this position was that the United States and Australia share a common "rule of law" tradition. *See further* Leon E. Trakman, *Foreign Direct Investment: Hazard or Opportunity?*, 41 Geo. Wash. Int'l. L. Rev. 1 (2010).

[280] *See supra* note 252 (discussing the Calvo doctrine).

arbitration, the imponderable is in determining how the rule of law should be defined, applied, and enforced in relation to such disputes.[281] There are no fixed or infallible answers to these intertwined questions.

VI. DISPUTE PREVENTION AND AVOIDANCE

Neither litigation nor investor–state arbitration is an exclusive means of resolving investor–state disputes. For example, dispute prevention and avoidance options are potentially low-cost, informal, expeditious, party-friendly, private, and nondisruptive ways in which foreign investors and host states can resolve differences while continuing their relationships with minimal disruption. Indeed, the UNCTAD has proposed a series of dispute prevention and avoidance remedies as conceivable alternatives to investor–state arbitration and litigation, namely, conciliation, direct negotiation, and dispute prevention and avoidance.[282]

None of these "alternatives" to arbitration and litigation is startling in itself. Negotiation and conciliation are invariably options available to states and investors, regardless of whether they are provided for by treaty or contract. In addition, such measures do not preclude parties from resorting to either arbitration or litigation should negotiation or conciliation fail. In addition, bilateral investment agreements and investor–state contracts that provide for, or even mandate conflict-avoidance options, invite lip service to such options as much as the serious pursuit of them by one or both parties. Going through the motions of conflict avoidance, intent on arbitrating or litigating, is ultimately costly and dilatory for at least one party to such machinations.

Nevertheless, the institutional adoption of dispute prevention and avoidance mechanisms is a way in which investor–state parties can ameliorate their differences before they grow into conflicts. Should states endorse dispute avoidance measures by treaty, as the UNCTAD proposes, it could lead to the wider use of such measures, and it could promote innovation in reconciling differences between states and foreign investors. Such adoption could redress the effect of high cost and often complex arbitration and litigation proceedings, and it could also encourage local, regional, and global institutions to adopt innovative processes to prevent or avoid disputes. In particular, states could be relied on to incorporate negotiation or conciliation into their investment

[281] *See, e.g.*, Charles Brower & Lee Steven, *NAFTA Chapter 11: Who Then Should Judge? Developing the International Rule of Law under NAFTA Chapter 11,* 2 Chi. J. Int'l L. 193, 193–95 (2001); Jack J. Coe, Jr., *Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel within NAFTA and the Proposed FTAA*, 19 J. Int'l. Arb. 185 (2002); David A. Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor–State Disputes: Prospects and Challenges*, 39 Vand. J. Transnat'l L. 39, 43–44 (2006); Gary R. Saxonhouse, *Dispute Settlement at the WTO and the Dole Commission: USTR Resources and Success*, *in* Issues and Options for U.S.–Japan Trade Policies 363 (Robert M. Stern ed., 2002).

[282] *See generally* Investor–State Disputes, *supra* note 1.

treaties as requirements prior to investors initiating arbitration or litigation proceedings. Furthermore, states could also construct restrictive dispute resolution clauses in their investment agreements, including requiring mandatory mediation.[283]

Although it is preferable to avoid investor–state conflicts rather than resort to litigation or arbitration, there is no assurance that negotiation, conciliation, mediation, or some other variant of managed conflict prevention will avoid or resolve conflicts in investment disputes with states.[284] Indeed, a systemic problem is that investment disputes often arise in arms-length as distinct from informal investor–state relationships. Specifically, investors interact impersonally with government bureaucracies, and informal methods of dispute avoidance often are ill-suited to resolving disputes that are formally dealt with by legal departments within those bureaucracies. This absence of a preexisting culture of cooperation between states and foreign investors, especially when investors are ill-attuned to cultural dynamics within the forum, makes dispute avoidance measures harder to implement.[285]

Nevertheless, there may be distinct advantages in states endorsing mandatory conflict prevention measures that are reinforced by international protocols. For example, states may agree multilaterally or bilaterally to intergovernmental mechanisms by which to redress investor–state disputes. These mechanisms may vary from diplomatic measures, such as under reconstituted treaties of peace, friendship, commerce, and navigation, to formal mechanisms for intergovernmental consultations, such as under Chapter 20 of the NAFTA.[286]

Foreign investors may also benefit from established guidelines and processes governing foreign investment in host states including: clear and transparent licensing requirements, methods of securing such licenses, time lines within which to secure regulatory approval, facilitative meetings between investors and host states, contact persons to consult in complying with those regulations, warnings for noncompliance

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[283] *See* August Reinisch, *How Narrow Are Narrow Dispute Settlement Clauses in Investment Treaties*?, 2 J. Int'l Disp. Settlement 115 (2011) (discussing the restrictive construction of investment agreements). Such adoptions may be comparable to states acceding to international conventions, such as the UNCITRAL's Model Law on International Commercial Conciliation (2002) and its Model Law on International Commercial Arbitration (1985, as amended 2006). *See International Commercial Arbitration & Conciliation*, U.N. Comm'n on Int'l Trade Law, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html (last visited June 19, 2012). *See also* Leon E. Trakman, *International Investment Law*, *in* International Business Law 443–49 (arbitrating investment disputes), 427–36 (BITs, FTAs and multilateral agreements) (Bryan Mercurio et al. eds., 2010).

[284] *See* Mark Kantor, *Negotiated Settlement of Public Infrastructure Disputes*, *in* New Directions in International Economic Law: In Memoriam Thomas Wälde (Todd Weiler & Freya Baetens eds., 2011).

[285] *See generally* Colin B. Picker, *International Investment Law: Some Legal Cultural Insights*, *in* International Investment Law, *supra* note 2, ch.6 (discussing the influence of legal cultures and traditions on investment law); Trakman, *Legal Traditions and International Commercial Arbitration*, *supra* note 40 (noting the influence of legal traditions on international commercial arbitration).

[286] On governmental bureaucracies faced by foreign investors in Asia, in particular in China and Australia, *see* Vivienne Bath, *Foreign Investment, the National Interest and National Security—Foreign Direct Investment in Australia and China,* 34 Sydney L. Rev. 5 (2012), also *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2042318.

by investors, and procedures for curing such noncompliance. The guidelines may also provide for the appointment of conciliators or mediators, including applicable terms of reference, should investor–state disputes eventuate.

At their best, these dispute prevention and avoidance mechanisms may discourage parties from resorting to fractious, costly, and disruptive arbitration or litigation. At their worst, however, they may protract investor–state conflict, delay dispute resolution, and increase its costs. Institutionalized dispute resolution options that are incorporated into bilateral investment treaties may avert litigation or arbitration, or they may simply delay it. Conciliation may fail because one party objects to the appointment of a facilitator, or, on appointment, that facilitator may fail to secure investor–state cooperation in managing a conflict, such as by a party declining to allow consultation with nongovernmental agencies.

The inference is not that dispute prevention and avoidance measures are ill-fitting to international investment. Insofar as states and foreign investors have economic and political incentives to prevent and avoid disputes, these measures may well carry the day. Indeed, dispute prevention and avoidance mechanisms may both anticipate and resolve investor–state differences before they regress into costly and dilatory disputes. However, construing such measures as salutary cures to differences between investors and states amounts, at best, to wishful thinking.

VII. RECOMMENDATIONS

The recommendations below are made in light of positive and reinforcing developments in ICSID investor–state arbitration in recent years. In particular, investment treaties in their genesis and earlier development included scant detail about dispute resolution, including investor–state arbitration. More recent treaties, starting with Chapter 11 of the NAFTA, include reservations and exclusions. They define an "expropriation," "most favored nation," and "national treatment" that was largely undefined in earlier investment treaties. A greater proportion of investor–state disputes in recent years are also settled or otherwise discontinued. Dispute avoidance, arguably, is also being used, less as an instrument to secure pre-disclosure and increasingly in a genuine attempt by investor–state parties to resolve disputes. In addition, a body of international investment jurisprudence is developing around such concepts as "most favored nation" and "national treatment", a regulatory expropriation, "local content" requirements, and "fair and equitable" treatment.[287]

The following are recommendations for the amendment, directly or indirectly, of the ICSID rules and procedures based on the discussion in this chapter and in light of the positive developments above. Indirect measures for amending the ICSID Rules

[287] *See generally* UNCTAD, How to Prevent and Manage Investor–State Disputes: Lessons from Peru (UNCTAD, Feb. 3, 2012), *available at* http://archive.unctad.org/templates/Page.asp?intItemID=3666&lang=1.

include provision in BITs which regulate the manner in which investor–state arbitration is conducted, including but not limited to ICSID proceedings.

The first four recommendations below include measures that are more appropriately addressed in BITs and in most cases, are already reflected in BIT practice. The remaining recommendations are directed more specifically at the ICSID.

First, guidelines are needed to discourage premature, opportunistic, and pernicious claims from being brought by adventitious investors against vulnerable host states. Among others, and reflected in BIT practice, these guidelines should require that investors initiate mediation or conciliation proceedings in good faith and within specified time limits, without which investor–state arbitration should not be permitted.

Second, guidelines are needed to further delineate when host states have excluded their liability to foreign investor claimants on overbroad grounds such as in relation to natural resources, agriculture, and financial markets. Guidelines are also required to further determine when host states have discriminated unfairly against foreign investors on overextended grounds of essential security, national identity, public health, and environmental safety. These guidelines should take account of provisions in existing BITs and FTAs that address these issues.

Third, rules are needed that define an expropriation more clearly, including by distinguishing between a direct and an indirect expropriation, and by differentiating more clearly between a legitimate and an illegitimate government taking.

Fourth, procedural rules should require disputing parties to resort to negotiation or conciliation prior to initiating investor–state arbitration. This requirement, often adopted in BITs, reaffirms the importance in principle Fourth, procedural rules should require disputing parties to resort to negotiation or cooperation among investor–state parties, especially because investor–state arbitration is often costly and time-consuming, and such disputes sometimes have devastating economic consequences for investors and drastic social and economic impacts upon host states.

The further recommendations and proposed guidelines below are directed more specifically at the ICSID.

First, the ICSID needs standing panels to interpret ICSID rules as they apply to often complex investor–state arbitration cases.

Second, consistent with the development of ICSID Rule 34, rules are needed to ensure that arbitration proceedings are transparent, while still preserving confidential information in the public or commercial interests of one or both direct parties to an investor–state dispute. Efforts at greater transparency should encompass greater public access to arbitration proceedings. Provision should be made for the publication of tribunal reasons for admitting or denying admission to proceedings by third parties, whether in whole or part. *Amici curiae* briefs; social, economic, and environmental impact reports; and arbitration awards should be publicly available, subject to excluding confidential parts as recommended above. These recommendations are consistent with the public–private, as distinct from a wholly commercial, nature of investor–state arbitration. They distinguish investor–state arbitration appropriately from international commercial arbitration. They also reflect developments in BITs and

FTAs providing for public interest participation in arbitration proceedings and the publication of awards, notably under Chapter 11 of the NAFTA.

Third, ICSID needs further guidelines to govern conflicts of interest and duties of disclosure by arbitrators to redress the perception that a small number of arbitrators are repeatedly subject to challenges.[288]

Fourth, guidelines are needed that strike a balance between restricting the capacity of arbitrators to act as legal counsel and provide expert opinions in other investor–state arbitration disputes and enabling parties in such other cases to secure the most informed and expert advice. An issue for the ICSID is determining when arbitrators engaging in such multiple functions are in a position unduly to influence the functioning of investor–state arbitration on account of their standing, directly or otherwise, as ICSID arbitrators.

Fifth, ICSID needs more diverse sitting arbitrators who represent more developing member states and include more women.[289] The nomination of seventy-two arbitrators to the ICSID list in 2011 is limited in light of the growth in ICSID cases in recent years. Such action would also help to redress the impression that a small number of arbitrators preside over a growing number of panels.[290]

Sixth, more explicit provision is needed for interim measures to inhibit host states from initiating regulations that unreasonably interfere with investor claims. Such interim measures would be appropriate, for example, to inhibit the Australian government from implementing fast track tobacco legislation to sidetrack arbitration initiated against it by Philip Morris. Conversely, interim measures should discourage claimants, such as Philip Morris, from protracting investment arbitration in order to delay the implementation of such regulations.

Seventh, rules are needed to regulate how arbitral decisions are reached. In particular, arbitration tribunals should make awards by a majority on all issues, without the chair enjoying a casting vote.

Eighth, a challenge committee should be instituted to decide any challenges to an arbitrator. This challenge committee should also exclude arbitrators sitting on the same tribunal as the challenged arbitrator.

Ninth, guidelines are needed to regulate, and also reduce legal costs generally. Such measures should regulate the use of contingency fees, place ad valorem caps on the fees of the arbitrator; and regulate the allocation of costs among the parties. Arbitrators may be requested at the commencement of arbitration to provide the parties with a

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[288] *See also* Daphna Kapeliuk, *Collegial Games: Analyzing the Effect of Panel Composition on Outcome in Investment Arbitration,* 31 Rev. Litig. 267 (2012).

[289] *See also* Gus Van Harten, *The (Lack of) Women Arbitrators in Investment Treaty Arbitration.* FDI Perspectives (Feb. 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2005336. On the distributional inequality of women in corporations engaged in foreign direct investment more generally, *see* Rachel J. Anderson, *Promoting Distributional Equality for Women: Some Thoughts on Gender and Global Corporate Citizenship in Foreign Direct Investment,* 32 Women's Rights L.R. 1. (2010).

[290] *See* the ICSID Caseload, *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics.

nonbinding estimate of costs based on the anticipated nature, complexity, and length of proceedings.

Tenth, ICSID rules should require parties to register claims and counterclaims within prescribed time limits, to clarify their availability in advance of hearings, and to be available prior to and directly after hearings, such as a day before and remain a day after hearings.

Eleventh, guidelines are needed by which arbitrators can encourage investor–state parties to settle their disputes during the course of proceedings, without mandating such action.

Twelfth, the ICSID arguably needs an appellate body. An appellate body with a wider mandate than annulment could expand the grounds of an appeal and consider remedies beyond annulment. It could also help render ICSID jurisprudence more consistent in nature. It is noteworthy that, of the total number of ICSID awards in the 1990s (namely eighteen), there was only one annulment, while there were ninety-six awards in the 2000s and eight annulments. Thus, despite an increase in the number of annulments relative to awards, annulment proceedings are occasional and seldom successful.[291]

Finally, ICSID needs a process for the ongoing scrutiny of proposals such as those above, directed at implementing new or modified rules to redress problems relating to investor–state arbitration.

In defense of the ICSID and its Secretariat, although the ICSID can regulate investor–state arbitration procedurally, it cannot adopt substantive law requirements. For example, the ICSID cannot determine how the defense of necessity ought to apply in particular cases, or how to construe intellectual property rights. These are matters for arbitration tribunals to decide.

A further defense of the ICSID is that, even in devising procedural rules to govern investor–state arbitration, the ICSID cannot require states to adopt particular dispute resolution clauses by treaty, or investor–state parties to adopt them by agreement. These are matters to be determined by host and home states, and by host states and foreign investors respectively.

VIII. CONCLUSION

A state that foreign investors consider unattractive may lose not only stature in the global community of states and investors, but also credibility in the eyes of its domestic constituents. As the history of ICSID arbitration has demonstrated, debate about the value of international institutions such as the ICSID is significantly about perceived political and economic costs and benefits to social interests groups not limited to states and investors. A state that identifies a benefit in becoming a signatory to an

[291] *See id.*

international investment convention such as the ICSID may as a consequence of losing a case quickly shift to condemning ICSID arbitration, and, with it, lose stature both domestically and in the international community. Bad experiences that states have with ICSID arbitration is one factor in periodic attacks on it, such as Latin American governments asserting that ICSID proceedings perpetuate systemic inequalities in favor of investors from wealthy Northern countries at the expense of their Southern neighbors.

These criticisms notwithstanding, the ICSID is unlikely to be overhauled institutionally in the absence of widely endorsed motivations for such reform. Simmering resentment about secrecy in investor–state arbitration, explosive challenges to the appointment of ICSID arbitrators, and adverse awards in particular cases will not be enough to incite the radical transformation of international investment law. If a body, such as the ICSID Secretariat, that is best able to evaluate the efficient operation of ICSID arbitration is unable to further instigate institutional reform leading to greater transparency in proceedings and publicity in awards, the prospects for such reform recede further.

However, the ICSID Secretariat should not be expected to be the center of gravity for reforms to the structure and operation of the ICSID. The Secretariat does not have the authority to reform ICSID rules: it is not the ICSID's governing body, and it, unavoidably, lacks the gravitas among its membership to spearhead change. It is also unfair to blame the ICSID Secretariat for failing to effectuate reforms that, realistically, are beyond its grasp. Indeed, proposals for reform of the ICSID rules require the support of the ICSID signatory states, which is dependent on these states being able to reconcile their often inconsistent political and economic agendas.

On the other hand, it is unlikely that ICSID member states will agree that domestic courts resolve investor–state disputes as an alternative to investor–state arbitration. Notwithstanding Australia's stand-alone commitment to forsake arbitration in favor of domestic courts, few states are likely to follow suit due to concerns about national biases among national courts and confusion over disparate domestic systems of law, among other factors.

States may incorporate dispute prevention and avoidance provisions into investment treaties as plausible ways to dissipate conflict. However, such measures may represent preliminary steps leading to investor–state arbitration or litigation. They may also delay and increase the cost of an investor–state conflict.

However, the greatest threat to the ICSID is not about the availability of alternatives to investor–state arbitration. Rather, the greatest threat is one of perception about how it ought to operate, and who it ought to and does in fact benefit. That threat to the ICSID is most strongly articulated by some developing states, not limited to Latin America. Their perception is that the track record of investor–state arbitration reflects a history of servicing developed states and their investors above developing states and their civic interests. A further perception among some developing states is that ICSID proceedings lack transparency; ICSID arbitrators sometimes fail to make material disclosures or are otherwise in a conflict of interest; ICSID arbitrators reach

inconsistent decisions in seemingly similar cases; and the costs of ICSID proceedings are sometimes prohibitive for governments, investors, and civic interest groups from poorer countries.

However, the problem with any assault on the ICSID is in failing to recognize that the ICSID is the supplicant of its signatories. The ICSID did not create itself, but rather member states created it. Blaming ICSID for a myriad of ills is to forget that, insofar as it is a singer, the song was scripted by member states that now include the vast majority of developed and developing states.

Nor should the sufficiency of the ICSID depend on a tally of states, investors, and public interest groups that favor it juxtaposed against a tally of those that do not. Indeed, the sufficiency of the ICSID depends on whether competing interests favoring or opposing it can be reconciled. Consequently, mediating among such competing interests will be a key determinant of the future of investor–state arbitration and the ICSID in particular.

Short of a robust account of the capacity of the ICSID to satisfy a plurality of competing interests, systematic reform of ICSID principles and rules of operation is unlikely to materialize. Conversely, inertia in the face of concerted attacks on the ICSID's credibility is likely to undermine its stature among states, investors, and public interest groups that distrust it, however much they use its services. If investors see that the ICSID takes on these challenges but still fails sufficiently to redress them, it will be perceived as being as being paralyzed and unable to progress beyond the status quo.

The stakes are high for states, foreign investors, and public interest groups. Should stakeholders push for reform now and fail, they may undermine confidence in international investment law and practice, beyond the perceived failings of investor–state arbitration. On the other hand, should stakeholders wait patiently for the next rampage of crises of confidence in investor–state arbitration to materialize, they may make it harder to declare that these crises were unprecedented and unavoidable. In truth, we have all been warned.