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THE ICSID UNDER SIEGE

by

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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 favour 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.”

I. INTRODUCTION

2009, in the wake of the global financial crisis, was a bad year for the International Center 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 to “the liberation of our countries because [it] signifies colonialism, slavery with respect to transnationals, with respect to Washington, with respect to the World Bank.” This public representation was followed by a public 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. That was over two years ago, however the debate has continued, with Venezuela recently withdrawing from the ICSID Convention. Is the ICSID ideologically, structurally, procedurally, or functionally deficient? Are those deficiencies ascribed by President Raphael Correa of Ecuador to the ICSID justified and if so, why? 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? Why have major economies and destinations for foreign investment in Asia, varying from Vietnam to India, never acceded to the ICSID? Why has Brazil excluded the ICSID Arbitration Rules

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entirely? These questions are economically, politically and socially important. If neither country to an investment treaty is a party to the ISCID Convention, or if their investment treaty provides for investor-state arbitration under the arbitration 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. 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.

This article evaluates the criticisms leveled at the ICSID in five particular respects. Firstly, it considers the perceived bias of the ICSID towards wealthy Western states and their investors as an ideological and normative proposition. Secondly, it evaluates the extent to which the processes of the ICSID incorporate this perceived bias into its institutional mechanisms. Thirdly, it considers whether ICSID arbitration is a viable alternative to domestic courts resolving investment disputes between states and foreign investors. Fourthly, 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. Fifthly, it reflects on dispute avoidance alternatives to both arbitration and national courts in resolving investment disputes.3

A contrite and diffident defense of the ICSID is that its problems can be ascribed to the complexity of 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.4 The purpose of this article is not to identify 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


4 For a defense of the ICSID, see for example, BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY (Michael Waibel et al eds., 2010). See too, EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION (Chester Brown & Kate Miles eds., Cambridge Univ. Press, 2011); LUCY REED, JAN PAULSSON & NIGEL BLACKABY, GUIDE TO ICSID ARBITRATION (2d ed, Kluwer, 2011); MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY: ESSAYS IN HONOUR OF DETLEV VAGTS (Pieter Bekker, Rudolf Dolzer & Michael Waibel eds., Cambridge Univ. Press, 2010).
Whether international arbitration jurisprudence not limited to ICSID arbitration can evolve into generally accepted principles of international investment law is open to debate. Arguably, the failure of the global community of states to reach a multilateral investment accord in the past demonstrates the difficulty of states finding common ground on the treatment of foreign investment, including institutions and processes for dispute resolution. In dispute is whether investment rights ought to be determined by general principles of investment law, or more truly by geo-political and economic interests that circumscribe those principles. 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.

i. 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. 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 economic and social plight of capital importer states in Africa, Asia and Latin America that historically were economically exploited by colonial powers.


7 By far the dominant view is that investment law is based on determinative principles. See e.g. Schreuer & Dolzer, supra note 3, ch. 1. For a critique of this principled approach, see M. Sornarajah, The Case Against an International Investment Regime, in Trakman & Ranieri, International Investment Law, supra note 2, ch.4.

and their investors.9 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.10

The attacks by developing states on economic exploitation imputed to investors from wealthy developed states are also reflected in human rights challenges to international investment law and investor-state arbitration in particular. The accusation is that principles of investment law are espoused through a privileging of the rule of law regime devised by old world powers at the expense of the new developing world order.11 It can be argued that, whereas international human rights are based on universal norms of fair treatment, the treatment of foreign investors is grounded in self-serving norms directed at the market efficiency of capital flows.12 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 investors.13 The alleged enemy is a super-power like the United States with an Alien Tort Claims process by which non-US citizens can be held liable in any United States civil court for causing harm to American interests anywhere in the world. The limit on this power is perceived as minimal at best: the defendant must be in the United States in order to be subject to a subpoena.14

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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 even though those same Western nations denounced those defenses when they were capital exporters. 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. A countervailing concern is that developing states like South Africa are willing to conclude bilateral investment agreements providing for investor-state arbitration only with capital exporting countries. The signing of bilateral investment agreements incorporating investor-state arbitration is therefore not simply about developed states imposing their will on developing states. These agreements are strategically important and states elect among them in a calculated manner according to the perceived benefits arising from prospective investment flows.

The fact that the choice of bilateral investment agreements and investor-state arbitration is strategic still does not gainsay 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. The inference is not that ICSID arbitrators have acquiesced formally in 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

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16 On international regime theory, see REGIME THEORY AND INTERNATIONAL RELATIONS (Volker Rittberger ed., 1993).

17 On such criticism, see SORNARAJAH, *supra* note 9, chs. 7–8.

treaty textually in favor of that capital exporter. 19 Added to this is the concern that ICSID arbitrators who are usually commercial and not public lawyers, will pay less heed to the public policy consequences of their awards for developing states than the plain words of treaties devised by dominant treaty parties. 20

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. 21 However, the perception is that, in interpreting investment treaties literally, ICSID arbitrators have continued to service developed states such as by applying regulatory defenses crafted by developed states in their particular interests. 22 This concern gives rise to the inference that investment arbitrators have devised a self-serving ius cogens more through interpretative practice than by design. 23 They have recognized international investment laws, not limited to investment treaties that protect the property of transnational corporations from expropriation by developing states. They have failed adequately to address the tension between protecting private property and promoting international investment on the uneven investor-state platform of multistate relations. 24

A related dilemma is that, with new super-economic powers like 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 from foreign investors and the interests of its investors abroad. China is also likely to follow the direction of the Supreme People’s Court that is perceived, correctly or otherwise, to be

19 On such ‘imbedding’, see for example, JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 1, 3–16 (Oxford Univ. Press, 2010).
20 On this tension, see INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW (Stephan W. Schill ed., Oxford Univ. Press, 2010); GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW, ch. 6 (Oxford Univ. Press, 2007).
22 On the allegedly customary roots of international investment law, see e.g. Stephen Schwebel, The Influence of Bilateral Investment Treaties on Customary International Law, TRANSNAT’L DISP. MGMT, Nov. 2005, 1. 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, 701 (2010).
24 On the alleged foundations of investment law in contract and property, see e.g. SCHREUER & DOLZER, supra note 3, chs. 1–2.

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The feared result 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. The related concern is that these defenses will assume ever newer forms, such as when bilateral investment agreements of some Asian countries limit investment protection to investments “approved in writing” or made in “accordance with the laws and regulations from time to time in being.” 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.

Supporters of the ICSID respond that, whatever the ills of investor-state arbitration may be, the ICSID is not to blame. The ICSID merely facilitates the resolution of investment disputes through the ICSID Convention and Rules. Independent arbitration panels decide those disputes. 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.”


On such phraseology in an investment agreement with the Philippines, see Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/03/25 (Aug. 16, 2007).


Association [ICDR] and the International Chamber of Commerce [ICC].\textsuperscript{31} It provides rules of operation to govern the appointment of arbitrators, the conduct of arbitral proceedings and the rendering of awards, nothing more.

A further defense of ICSID arbitration is that attacks by countries like Ecuador upon an ICSID process or award reflect an individual net cost-benefit analysis for that state. They do not reflect a systemic bias in ICSID proceedings or awards against developing states and their investors in general. 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.

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.

\textbf{ii. Impact of Ideology on ICSID Arbitration}

Lending credence to the perception that ICSID arbitration empowers both old and new wealthy countries at the expense of poorer countries is 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 view 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 American and prosperous Western European countries and in the long-term, wealthy countries in general that can afford its services. While the ICSID’s homepage presents the ICSID as an “autonomous international organization”,\textsuperscript{32} member countries are members of the World Bank. The Governor of the Bank is an \textit{ex officio} member of the ICSID’s governing body, the Administrative Council. The chair of the Administrative Council is the President of the World Bank. The annual meeting of the World Bank and its Fund coincides with the annual meeting of the Administrative Council of the ICSID. Not insignificantly, the World Bank funds the ICSID Secretariat. 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

\textsuperscript{31} This is the opening statement of the ICSID in discussing its Dispute Settlement Facilities, available at \url{http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=RightFrame&FromPage=Dispute Settlement Facilities&pageName=Disp_sett1_facilities}.

\textsuperscript{32} This self-description appears on the ICSID’s home page, available at \url{http://icsid.worldbank.org/ICSID/Index.jsp}.
appointment process allegedly favors developed countries. ICSID hearings are often held in Washington, London and Paris, locations that are convenient for and affordable to wealthy investors, but not the more distant and poorer developing states, their investors and civic groups in their countries.

A further contention is that international principles of investment law that require developing states to pay “fair and equitable” compensation for expropriation bypass the fact that many developing states lack the resources to compensate foreign investors according to such “international” standards. As a result, “fair and equitable” 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. Conversely, new investment treaties devised by developed states that are now capital importers may artfully invoke defenses of necessity, national security, health, safety and the protection of the environment to deny “fair and equitable” treatment to investors from developing countries.

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The inference is that successful arbitration awards favoring wealthy investors sometimes undermine the legitimate expectations of developing states seeking to protect their fledgling economies from a litany of exploitative foreign investors.\textsuperscript{38}

A related criticism is that in ICSID and UNCITRAL investor-state arbitration, state defenses all too often trump the equitable claims of foreign investors. For example, expansive defenses of necessity were upheld in \textit{LG&\textsuperscript{E} v Argentine Republic}\textsuperscript{39} and \textit{Continental Casualty Company v Argentine Republic}.\textsuperscript{40} Minimalist standards of “fair and equitable treatment” were applied under customary investment law in the NAFTA case of \textit{Pope and Talbot v Canada} administered by the UNCITRAL,\textsuperscript{41} and to a variety of specific defenses in the US and Canadian Model Investment Treaties.\textsuperscript{42}

A further criticism leveled against investor-state arbitration is that substantive defenses invoked by developed states to foreign investor claims have grown exponentially. This is typified in the NAFTA case, \textit{Methanex v United States of America},\textsuperscript{43} the US and Canadian Model Treaties,\textsuperscript{44}


\textsuperscript{39} ICSID Case No. ARB/02/1 (Jul. 25, 2007), available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC786_En&casedId=C208>.


and the India-Singapore Economic Cooperation Agreement. Each treaty includes defenses to investor claims on such grounds as health, morals and welfare, and sustainable development. ICSID tribunals have accommodated these defenses. They have 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” in protecting its public interests over the human rights claims of foreign investors.

These objections are directed at more than treaty exceptions to standards of treatment accorded to investors from wealthy countries. The objection is that wealthy countries are able to impose their model codes and treaties on foreign investors, along with self-serving substantive intellectual property and other laws. 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, marginalizing their “legitimate expectations”.


See Andrew Newcombe, General Exceptions in International Investment Agreements, in SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 355 (Marie-Claire Cordonier Segger et al eds., Kluwer, 2011).


See SUSAN SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS, ch. 5 (Cambridge Univ. Press, 2008).

iii. Complexity and Cost

A functional challenge to ICSID arbitration is the sheer cost and complexity of ICSID proceedings. Arbitration proceedings are also perceived to be dilatory, difficult to manage, disruptive, unpredictable and not subject to appeal.\(^{52}\) 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.\(^{53}\) They also lack the econometric data to verify the adverse impact of foreign investment upon their local economies.

What developing countries require is the capacity to identify, explore and verify complex socio-economic data to defend against investor claims. 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 foreign states and their investors. Trying to generate such complex economic data places developing countries at a comparative disadvantage compared 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 up competing policies in regulating direct foreign investment and in defending against foreign investor claims. 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.\(^{54}\)


On the absence of an appeal from ICSID arbitration, see Convention on the Settlement of Investment Disputes between States and Nationals of Other States, ICSID/15 (Apr. 2006), art. 53 (1): ‘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.


On how different investment policies can influence investment law, see further Andreas von Staden, Towards Greater Doctrinal Clarity in Investor-State Arbitration: The CMS, Enron and Sempra Annulment Decisions, 2
Concerns about the high costs of investor-state arbitration are not entirely partisan or isolated. Nor are the cost hurdles of arbitration limited to developing states and their investors. 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:

Moreover, the 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, 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.55

However plausible these concerns may be, the actual cost of an ICSID arbitration is sometimes hard to fathom with accuracy. Some costs are known. The ICSID’s memorandum of the fees and expenses of ICSID arbitrators are specified, as at July 6, 2005, on the ICSID Website. The new Schedule of ICSID Fees came into effect on January 1, 2012.56 However, the length and complexity of ICSID hearings that have cost implications are not known, other than as macro statistics. The fees of party representatives, primarily lawyers, are also often not known. 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. Added to this is the tendency of some poorer countries that depend on foreign investment to deflect concerns about their costs in order to be perceived as being economically and politically stable. Civic groups from such countries can help to demonstrate the social cost of adverse determinations against their countries, but only if those groups are privy to cost data, only if they can afford to petition to be heard, and only if their petitions are granted.57


56 On these costs and fees, see supra note 53.

57 On the plight of civic groups seeking status to file amicus curiae briefs, see infra Section IV (iii). On third parties in international commercial arbitration, see STAVROS BREKOUKIS, THIRD PARTIES IN INTERNATIONAL COMMERCIAL ARBITRATION (Oxford Univ. Press, 2011).
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% of all arbitration cases were filed against G8 countries. However, all those cases were reportedly filed by US investors. 74% of ICSID cases were brought by investors against so-called middle-income states, while low-income states accounted for 17% of ICSID cases. Evidencing the extent to which large corporations invoked the ICSID was the statement that 20% 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 70% of ICSID decisions allegedly favored foreign investors.58

One can draw equally broad, albeit not necessarily reliable, inferences from this macro data, including that the brunt of ICSID arbitration is borne by middle-income and, relative to their economic wealth, poorer countries; and that investors mounting successful claims include wealthy transnational corporations. However, that data does not take account of developing countries that settle disputes 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. Developing countries may also succumb to foreign investor demands because of the cost and reputational damage arising from such arbitration. What is distinctive about investor-state arbitration is that such capitulation can occur in many different ways in investment practice, a good deal of which is difficult to detect in the absence of a public claim or other publicity. All this 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 which satisfactorily identifies when 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.

iv. The Public-Private Nature of ICSID Arbitration

A further critique relates to investor-state arbitration in particular. Investment arbitration, not limited to ICSID, is modeled somewhat on “private” commercial arbitration. Investment arbitrators are ad hoc appointees, not domestic judges holding permanent office. ICSID deliberations are often conducted privately. Third parties including civic interest groups are permitted to participate in proceedings only if the disputing parties consent. Arbitration awards are published, again only if the parties agree, although the ICSID Arbitration Rules do state that “the Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.” 59. ICSID decisions may be reviewed by a review committee with limited authority which includes no right to overturn an ICSID award. 60 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.” 61

One consequence of private hearings and ad hoc awards is that there is limited public understanding of the processes through which arbitration institutions like the ICSID function. There is uncertainty over the limits of investor rights and state powers, and significant variations in the compensation and other remedies that ICSID tribunals award for an expropriation. 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. The Secretary General is required “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”.62 However, the Secretary General is only required to publish reports of conciliation commissions or awards rendered by arbitral tribunals in ICSID proceedings “with the consent of both disputing parties”. So, too, 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.

The uncertain public access to ICSID deliberations is typified in the 2002 ICSID arbitration of Aguas del Tunari, S.A. v. Republic of Bolivia.63 In that case, 300 representatives of social organizations across Bolivia sought the right to file amicus curiae briefs, as well as to secure access to prosecution and defense statements. They argued that ICSID hearings should be public, and that the arbitrators should visit Cochabamba, Bolivia, where the alleged impact of the investment in dispute was most profound. Six months later the ICSID Tribunal responded that it lacked authority to decide such matters which rested with the parties.64

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.65 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

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62 These requirements, replicated on the ICSID website, are available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases_Home>. On the ICSIDs procedural Order of Feb. 2, 2011, inviting third parties to apply to submit amici curiae briefs under ICSID Arbitration Rule 37(2), see infra note 111.


65 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. While 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 too 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).
additional desirable consequence of increasing the transparency of investor-state arbitration.” However, the petition was denied because the corporate complainant refused access, although the Government of Argentina clearly would have allowed it.

One result 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, nor the presiding arbitrators. ICSID parties may have good reason to deny public access to awards. 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 that: “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.” Given that investor-state arbitration under the NAFTA is sometimes conducted under the ICSID’s auspices, this development is of some significance. In 2006, the ICSID adopted a new Rule 37 which provides tribunals with at least some discretion to admit third party evidence. In addition, the admission of *amicus curiae* briefs is now endorsed within new bilateral investment agreements. These developments will be discussed in Sections IV and V below.

v. 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 defending parties in ICSID proceedings. 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

66 ICSID Case No ARB/03/19 (Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, May 19, 2005), para. 19, 22.


own image. 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.

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. Firstly, investors from some developing countries, such as China and India as new capital exporters, have increasing economic incentives to mount ICSID claims against developed countries that are now capital importers. The result is that wealthy developed countries that are more dependent on imported capital investments are increasingly likely to be the subject of ICSID claims. Secondly, investors from developing countries are ever more likely to file investment claims against other developing countries, given divergence in their economic, political and social stature and the prospect of adversarial investor-state relationships. Such changes in the new world order are likely to evolve slowly. It is notable that the first such ICSID arbitration was filed by a Malaysian construction company against China in May 2011. This case conceivably challenges the conviction that only powerful transnational corporations are able to mount investor-state claims against superpowers; and that investors from developing countries seldom have the economic and political muscle to do the same.

### III. A FUNCTIONAL DEFENSE OF THE ICSID

A defense of investor-state arbitration under the ICSID is that, while 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, too, 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.

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69 For argument that the primary interests of wealthy developed states are economic and less about perception of bullying, see SORNARAJAH, supra note 9, chs. 1-2.


72 Vandevelde writes that in 1969 there were only 75 BITs. During the 70’s, nine BITs were negotiated each year; that rate doubled in the 80’s and has been increasingly geometrically ever since then. See Kenneth Vandevelde, A
A further defense is that the ICSID is not the archetype villain that surreptitiously protects investors from wealthy countries at the expense of poor developing countries with impoverished populations. Developing countries presumably conclude 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 concluding investment agreements, or entering into such agreements with dispute prevention and avoidance options and/or resorting to domestic courts to resolve investor-state disputes. Whether developing countries, unlike developed countries such as Australia, have the political and economic influence to negotiate agreements in which investor-state disputes are resolved by domestic courts is not self-evident. For some developing countries, concluding bilateral investment treaties is a means of economic survival, not a dispensable luxury.

A countervailing macro argument is that developing states have contributed to their own economic disadvantages. They have concluded bilateral investment treaties ill-advisedly, on terms that privilege their investment partners. They have failed to protect themselves en masse against the institutional and structural biases that inhere in bilateral investment agreements that incorporate investor-state arbitration. 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 its own self cogent evidence of complicity by developing states in perpetuating their or their investors’ economic disadvantages. For many developing countries, succumbing to the demands of a dominant treaty partner is preferable, on balance, to concluding no treaty at all.

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73 On dispute prevention and avoidance options, propagated by the UNCTAD, see infra Section VI.

Further, it must be acknowledged that an ever growing number of ICSID members is from developing countries. ICSID members also conclude second and third generation bilateral investment agreements in which newly prosperous developing countries, like China not only include ICSID arbitration in their bilateral investment agreements; they also affirm their commitment to the rule of law in relation to the rights of foreign traders and investors.

Developing countries are also increasingly parties to bilateral investment treaties; including double taxation treaties, the total number of international investment agreements, has grown to approximately 6,000 today. The ICSID, too, has expanded geometrically from 20 members in 1966 to 157 members that, again, now include most developing countries. ICSID annual revenues arising in part from disputes between member states and investors have expanded from $250,000 a decade ago to over $21 million in 2010. Two thirds of these revenues derive from investment arbitration disputes that, again, include developing countries.

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. That impetus is fueled somewhat by dissatisfaction among developed states with multilateral trade and investment initiatives, notable in the World Trade Organization [WTO]. 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

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76 RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW, chs. 6, 10 (Cambridge Univ. Press, 2002).

77 See World Investment Report 2010, United Nations Conference on Trade and Development, UNCTAD/WIR/2010 (July 22, 2010), p. xxv, wwwunctad.org/en/docs/wir2010_en.pdf. Vandevalde writes that in 1969 there were only 75 BITs. During the 70’s, nine BITs were negotiated each year; that rate doubled in the 80’s and has been increasingly geometrically ever since then: see Kenneth Vandevalde, A Brief History of International Investment Agreements, 12 U.C. DAVIS J. INT’L L. & POL’Y 157, 172 (2005).

78 The membership of the ICSID is available at: Member States, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=MemberStates_Home> (last visited July 1, 2011).

79 Financial statements are included in the Annual Reports of the ICSID, including 2010, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnualReports>

both numerical superiority, the will and sometimes the capacity, to exercise their power collectively.\textsuperscript{81}

Nor is it fitting to blame the ICSID for the development of bilateral investment treaties between state parties that include both developed and developing countries. 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 “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. Nor do home states ordinarily collude with their investors abroad in order to secure political or economic advantage for those investors in host states.

It is also not reasonable to blame the ICSID for all the ills imputed to the operation of investment arbitration generally. 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 government members; it does not impose itself on those members.

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. However, while these standards are sometimes fragmented and it is difficult to derive cohesive principles from \textit{ad hoc} and unpublished ICSID awards, an international investment jurisprudence does exist.\textsuperscript{82} 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.\textsuperscript{83} Nor should the ICSID Secretariat be blamed when ICSID proceedings are not transparent and awards are not published; the rules governing ICSID procedures are approved by

\textsuperscript{81} On such motivations of developed states to engage in bilateralism, see Leon E Trakman, \textit{The Proliferation of Free Trade Agreements: Bane or Beauty?} 42 J. World Trade 367, 378, 385–86 (2008).

\textsuperscript{82} See e.g. Trakman & Ranieri, supra note 2; Sornarjah, supra note 9; Schreuer & Dolzer, supra note 3; Schill, supra note 5; Wenhua Shan & Sheng Zhang, \textit{The Treaty of Lisbon: Half Way Toward a Common Investment Policy.} 21 Eur. J. Int. L. 1049 (2010).

ICSID members that are and represent nation states. It is also unfair to accuse the ICSID of inconsistencies in reasoning and determinations reached by ICSID arbitrators who, while guided by the ICSID, reach decisions somewhat independently of it.\textsuperscript{84}

This is not to suggest that ICSID operations are beyond reproach. In not being a party to bilateral investment agreements, the ICSID may nevertheless be an instrument which dominant treaty parties try to utilize to perpetuate their control over investment markets. 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 like China whose full endorsement of those liberties is questioned. However much China has embarked along the road to the rule of law, investment tribunals may still encounter difficulties in determining the significance of that passage in particular cases. It is harder, too, to categorize China as a typical developing state in light of its enormous economic resources and global political power. 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. Comparable issues may well arise in relation to India as it shifts from being a capital importer to a global capital exporter.\textsuperscript{85}

**IV. REFORMING THE ICSID FROM WITHIN**

Concerns about the ICSID’s operations are sporadic, uneven in gravity and lack a unified voice. Governments are often cautious about taking critical positions against institutions like the ICSID, in part because they cannot be sure when they may become embroiled, directly or indirectly, in an investment dispute before the ICSID. Neither developed nor developing governments, nor


\textsuperscript{85} On China’s progression toward the rule of law, see PEERENBOOM, supra note 76.
ICSID Administrative Council members, nor ICSID officials ordinarily hold office sufficiently long to both initiate and effectuate ICSID reform.\textsuperscript{86} 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.

i. ICSID Secretariat Discussion Paper

A start to internally generated reforms of the ICSID began in October 2004 with a discussion paper prepared by the ICSID Secretariat entitled, “\textit{Possible Improvements of the Framework for ICSID Arbitration}”. 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.\textsuperscript{87}

The rationale behind the 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.\textsuperscript{88}

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.\textsuperscript{89} Its key proposals included: to encourage the endorsement of \textit{amicus curiae} briefs being admitted into arbitral proceedings and to promote the publication of arbitral awards. These proposals implicitly anticipated the lack of transparency and publicity in cases like \textit{Aguas del Tunari S.A. v. Republic of Bolivia} in which third party participation in ICSID proceedings on public interest grounds was denied.\textsuperscript{90}

\textsuperscript{87} \textit{Suggested Changes to the ICSID Rules and Regulations} (Working Paper of the ICSID Secretariat, May 12, 2005), available at \texttt{<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=22_1.pdf>}
\textsuperscript{88} See \textit{id.} at 11. The Working Paper 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.’
\textsuperscript{89} See Working Paper, \textit{supra} note 87, at 9 (Publication of Awards); and Access to Third Parties, at 10.
\textsuperscript{90} ICSID Case No. ARB/02/3, discussed \textit{supra} note 63, available at \texttt{<http://ita.law.uvic.ca/documents/AguasdelTunari-jurisdiction-eng_000.pdf>}. 
The responses to the proposals at the time were uneven at best. Neither developed nor developing countries nor investor constituencies adopted unified positions to address them. Notwithstanding the expectation that developed states might oppose it, a think tank on trade and investment in Canada -- the International Institute for Sustainable Development [IISD] -- supported it. It favored wider public participation in ICSID proceedings through the admission of *amicus* briefs and argued that doing so would benefit disputing parties in general and not be cost prohibitive for civic groups of member states. It proposed that the ICSID would benefit from public participation arising from *amicus* briefs and that this would promote transparent and cost effective proceedings. It also noted that public participation in WTO proceedings had not forced any significant increase in the costs or administrative superstructure of the WTO.\(^91\)

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. 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. The South Centre also suggested that some developing states would prefer private to public arbitration proceedings, presumably for varied and not necessarily consistent reasons.\(^92\) Interestingly, the South Centre subsequently withdrew its objections, but the sting of its initial onslaught on the proposed reform of the ICSID remained.

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 constituencies that one would expect to show greater support for the proposals were troubled about them.

However seemingly unexpected, these reactions to the proposals are explicable. The ICSID Secretariat lacks the legal authority to initiate substantial reform. It cannot promise authoritative timelines and procedures for the implementation of reforms, let alone promise reform. A practical limitation is that ICSID officials who championed the proposals were not in office


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sufficiently long to shepherd them to fruition. 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.93

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. That Rule provided that a tribunal may admit the brief of a non-disputing party “regarding a matter within the scope of the dispute.”94

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.” 95

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.”96

This 2006 Rule 37(2) on the Submissions of Non-disputing Parties is limited in key respects. Firstly, 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 upon their particular commercial or other interests.

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93 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. For the ICSID’s organizational chart, see supra note 86.
95 Id.
96 Id.
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 “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.97

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 private arbitration. That impact does not constitute a principled basis for commercial arbitrators to admit them into proceedings because this would violate the autonomy of the disputing parties.98

Even if an ICSID tribunal allows third parties to participate in proceedings under Rule 37 that still does render those proceedings “public” in the sense of being transparent. 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 a third party, but decline to provide it with the full record of proceedings. For example, it can deny requested information on grounds that the third party has failed to justify why it should receive that information, because it is already publicly available, or because it is privileged.99

97 See e.g. Methanex Corporation v. United States of America, Arbitration under Chapter 11 of the NAFTA and the UNCITRAL Arbitration Rules (Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae, Jan.15, 2001), at para. 49: “there are of course disputes involving States which are of no greater general public importance than a dispute between private persons”. The decision is available at <http://naftaclaims.com/Disputes/USA/Methanex/MethanexDecisionReAuthorityAmicus.pdf >. See too, Suez and others v. Argentina, ICSID Case No. ARB/03/19 (Order in Response to a Petition for Transparency and Participation as Amicus Curiae, May 19, 2005), at para.19.


Furthermore, even if a tribunal provides a third party with requested information, it may still place a gag on that party, prohibiting it from making public disclosures. The result is that, despite third parties participating in ICSID proceedings, the proceedings may still be shrouded from public gaze.  

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 hearing. Among other concerns, admitting a public interest will inevitably “burden” or “prejudice” 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 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 good 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. In granting qualified arbitral discretion, it exposes the tribunal to subsequent attack for failing to comply with those qualifications. Adding to this is Rule 37’s description of third parties as “non-disputing parties”. A reasonable inference for a tribunal to draw 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. Third parties may better inform the tribunal and the parties about the investment issues in dispute; they may facilitate greater

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transparency in proceedings; they may add to rather than disrupt hearings; and they may assist tribunals to reach determinations with greater confidence and erudition.

Certainly investment tribunals could exclude third parties in general from participating in proceedings, something they could not do in respect of disputing parties. However, the ultimate question ought to be whether the public interest in allowing non-disputing parties to participate in proceedings outweighs the procedural efficiency attained by excluding them.

ii. 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, as distinct from a public hearing. A further attribute of commercial arbitration is that it reflects the autonomy of the disputing parties; and that any change in proceedings such as the admission of public interpleading, requires their consent. Even though investor-state arbitration takes place between states and private parties under the ICSID, as distinct from 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.101

This is not to claim that investor-state arbitration is inevitably or totally secret. 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. All that is asserted is that the private attributes of investor-state arbitration are inherited 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 20th Century in formulating dispute resolution in the ICSID Rules.102 Principal among its similarities to commercial arbitration is the right of


102 On the influence of commercial law, as distinct from public international law, on the development of investment law, see Van Harten, supra note 20. On investment arbitration under Chapter 11 of the NAFTA, see Leon E. Trakman, Arbitrating Investment Disputes under Chapter 11 of the NAFTA, 18 J. Int’l Arb. 385 (2001)
investor-state parties to require proceedings and awards to be private in a manner that judicial proceedings ordinarily are not.103

Nevertheless, investor-state arbitration under the ICSID is distinct from private arbitration in key respects. Firstly, 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. As such, investor-state disputes are subject to the accord of state parties that conclude regional and bilateral investment agreements in respect of which foreign investors are not parties.104

Secondly, 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. 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 the Middle East or 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 byproduct of private arbitration.105

Thirdly, 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 need for disputing parties to consent to public participation insofar as protected information may arise during proceedings. However, this concern is endemic to investor-state arbitration in general, not to public interest participation in particular. Arbitrators can impose restrictions on access to and disclosure of such information upon public interest participants, as they do upon investor-state parties.

Forthly, 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

103 On such confidentiality requirements, see KYRIAKI NOUSSIA, CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION, ch. 4 (Springer, 2010); Leon E. Trakman, Confidentiality in International Commercial Arbitration, 18 ARB. INT’L 1 (2002).

104 This tension between the law governing treaties state-investor disputes, see SCHREUER & DOLZER, INTERNATIONAL INVESTMENT LAW, supra note 3, ch.1; SCHREUER, THE ICSID CONVENTION: A COMMENTARY, supra note 3, chs.1-2; SCHILL, supra note 5.

105 See e.g. Franck, supra note 59.
as Paris, London and New York, all high cost cities. There are further costs to the ICSID and World Bank in institutionalizing such participation in arbitration proceedings. These vary from accommodating third party participants at arbitration venues, to managing the submission of *amicus curiae* briefs and ensuing hearings in which civic interest groups participate. There are also the management and publicity costs associated with third party representation in ICSID proceedings.

iii. 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 further 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.

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. 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. Another is whether admitting third parties will provoke annulment proceedings. Yet another is whether admitting civic interest groups in principle will prejudice those that cannot afford the direct or indirect costs of doing so.

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106 The precise extent to which these costs inhibit participation by public interest groups is speculative, except that they seldom have deep pockets comparable to international corporate parties to state-investor disputes. See Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3 (Oct. 21, 2005), available at <http://ita.law.uvic.ca/documents/AguasdelTunari-jurisdiction-eng_000.pdf>, discussed supra notes 63–64.

107 On such costs, see supra note 53.

108 See Harrison, supra note 83. On ICSID conciliation, see Designations to the ICSID Panels of Conciliators and of Arbitrators by the Chairman of the ICSID Administrative Council, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (News Release, Sept. 15, 2011) <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement95>. 31
The thorny issue of whether investment arbitrators ought to have some latitude in deciding whether and how to admit third parties is complicated by already robust challenges to their appointment or continuance, not least of all for being in a conflict of interest.109

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. 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.110 A Procedural Order of the ICSID of February 2, 2011, also provides a process by which non-disputing parties can file such briefs.111 The 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 that was applied in a recent case involving third party participation in investment proceedings.112 The response is that the ICSID has done enough to facilitate public participation in its proceedings.

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


110 ICSID Arbitration Rule 37 (2) is available at <http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partF-chap04.htm#r37>.


112 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 v. Republic of El Salvador, ICSID Case No. ARB/09/12 (Registered, June 15, 2009).
developing countries is counterbalanced by the risk of not being able to fund that participation adequately. If such groups are to have a voice that is heard, the case for funding their participation is greater. However, if public participation is to be subsidized, it ought to be based on evenhanded policies such as to redress systemic disadvantages, not unlike defense or aid funds for needy litigants. Subsidization ought also to be based on verifiable data, such as confirmation of limited funding to participate in proceedings.\(^\text{113}\)

The question of determining when in principle to admit or deny third party participation in ICSID proceedings is difficult to answer. A complicating factor is that ICSID arbitration is essentially *ad hoc*. Principles governing the conduct of international investment law are the product not only of an evolving consensus, but also of dissention. 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. 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 US and Canada.\(^\text{114}\)

None of this addresses resistance which investor-state arbitrators face in deciding in practice whether to allow third party participation. A principled objection is the perceived ingrained right of disputing parties to deny consent to third party participation. The practical difficulty is in arbitrators ameliorating public and private tensions within investor-state arbitration. These include: 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 it; and complying with the rules of the ICSID and the applicable investment treaty in reaching such determinations.  

Arbitrators need not make these determinations in a vacuum. 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.  

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 Central American Free Trade Agreement [CAFTA]. 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.

iv. Inconsistent Decisions

A particular critique of international investment arbitration not limited to the ICSID is that arbitrators will reach different determinations in otherwise comparable cases. This criticism can be directed against any form of decision-making involving discretion. However, ICSID arbitrators have the additional burden of having to interpret differently worded treaties and applying variable conceptions of expropriation and fair and equitable treatment to particular cases. Added to these interpretative and substantive difficulties are dissimilar practices among

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115 On this public-private tension, see Alex Mills, The Public-Private Dualities of International Investment Law and Arbitration, in EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION (Chester Brown & Kate Miles eds., Cambridge Univ. Press, 2011); Catherine A. Rogers, International Arbitration’s Public Realm, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS (Martius Nihoff Publishers, 2010); Franck, supra note 59; Alvarez &., Park, supra note 70.


investment arbitrators 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. 118

Illustrating inconsistent methods of construing international investment law are five 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 which foreign investors alleged was unfair to them. 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. 119 CMS and Sempra rejected Argentina’s pleas under both treaty and customary law and found Argentina responsible for causing damage to foreign investors that required compensation. 120 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. 121 An Annullment Tribunal following CMS held that the investment Tribunal had interpreted the Treaty incorrectly, in construing 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. 122 Enron and Sempra were also annulled. 123

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120 CMS Gas Transmission Co. v. The Argentine Republic, ICSID Case No. ARB/01/8 (Award, May 12, 2005); Enron Corporation Ponderosa Assets, L.P. v. The Argentine Republic, ICSID Case No. ARB/01/3 (Award, May 22, 2007); Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16 (Award, Sept. 28, 2007).


122 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, U.N. GAOR, 56th Sess., Supp. 10, Ch. 4, U.N. Doc. A/56/10 (2001). On the ILC’s statement on State Responsibility, see <http://untreaty.un.org/ilc/summaries/9_6.htm>. 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
The problem of arbitrators reaching inconsistent decisions in seemingly similar cases is not entirely one that investor-state arbitrators can resolve. Nor is the problem of inconsistency limited to investor-state arbitration. Judicial precedent is a common law, not a civil law concept. Nor does international law, including the International Court of Justice, adhere to case precedent. 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. The uniform interpretation of investment treaties is also likely to be elusive when the wording of treaties diverges and when customary investment laws and practices diverge. Further undermining the prospects of investment arbitrators reaching uniform awards is the realization that international investment law focuses on the expropriation of property; the law of property varies from jurisdiction to jurisdiction; and there is no truly international law of property governing investment. Not only are investment arbitrators under the ICSID called upon to interpret complex property concepts; they need to reach decisions based on divergent conceptions of property in otherwise similar

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).


126 On such differences, see for example, Salini Costruttori SpA & Italtrade SpA v. Kingdom of Morocco (Decision on Jurisdiction, July 23, 2001); 42 I.L.M. 609 (2003). See too MONIQUE SAXSON, SUBSTANTIVE LAW IN INVESTMENT TREATY ARBITRATION: THE UNSETTLED RELATIONSHIP BETWEEN INTERNATIONAL AND MUNICIPAL LAW, see especially ch. 4 (2010). For a discussion of requisites that must be met to invoke the ICSID’s jurisdiction, see Omar E. Garcia-Bolivar, Protected Investments and Protected Investors: The Outer Limits of ICSID’s Reach, 2 TRADE L. & DEVELOP 145 (2010); SCHREUER, THE ICSID CONVENTION: A COMMENTARY, supra note 3, at 90–91.
cases. Against such a background, investment arbitrators understandably struggle to reach decisions which, with the benefit of hindsight, appear confusing, or at worst wrong in subsequent annulment proceedings.

v. Greasing the Squeaky Wheel

The ICSID Secretariat’s recommendations are not as intensely under the public microscope today as they were when the Secretariat proposed them. Nevertheless, they have had an incremental political and jurisprudential influence in providing greater transparency and publicity to arbitration hearings. This shift towards greater transparency is attributable in part to the growth of informed investment reporter services on ICSID developments including arbitration awards. Ever reader and cheaper access to information makes it difficult to shroud ICSID hearings or awards in secrecy. The Internet, too, provides foreign investors with ready access to databases of arbitration cases and commentaries that demystify, among others, complex property concepts in particular cases. And then, there are information leaks.

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, it was the Attorney General of the Republic of Argentina who published the relevant arbitration proceedings along with the reasons why civic groups in Argentina were denied the right of petition. Coupled with this is the lukewarm support for the publication of investment arbitration awards in the 2006 ICSID case of Biwater Gauff (Tanzania) Ltd v Tanzania.

There are also attitudinal changes, including among ICSID members and foreign investors that greater openness, or at least the appearance of it in ICSID proceedings, is often appropriate. A

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128 For an articulation of this interpretative confusion in the trilogy of investment claims against the Government of Argentina, see *supra* Section IV (iv).


130 ICSID Case No ARB/03/19. See *further supra* note 66 and the accompanying text

131 ICSID Case No ARB/05/22 (Procedural Order No. 3, Sept. 29, 2006) at para 12. 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 further antagonise the parties, exacerbate their differences, unduly pressure one of them, or render the resolution of the dispute potentially more difficult” (at para 149). For the contention that a party to an ICSID arbitration can publish the award, see Christoph H. Schreuer, *The ICSID Convention: A Commentary* 822 (Cambridge Univ. Press, 2001).
debateable but nevertheless identifiable attitudinal change is the 2006 ICSID Rule 37 providing for submissions of non-disputing parties subject to limiting guidelines.\textsuperscript{132} Added to this is the wider availability of investor-state awards on the ICSID website, along with references to academic and professional commentaries on ICSID cases.\textsuperscript{133} These attitudinal changes do not in themselves simplify the complexity of international investment law and investor-state arbitration in particular. Notwithstanding Arbitration Rules 35 and 36 providing for expert witnesses,\textsuperscript{134} expert testimony on the significance of conflicting conceptions of contract and property law can complicate as much as it clarifies such differences. Added to this is the uneven access that investor-state parties have to such evidence and the difficulty of ensuring that such evidence is heard and understood.

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. That practice is affirmed by the NAFTA Free Trade Commission.\textsuperscript{135} Regional and bilateral treaties also reflect these changes, notably in the CAFTA in which public access to arbitration proceedings is required and to which a disputing party cannot object.\textsuperscript{136} Further illustrating the publicity of investor-state proceedings and awards is the CAFTA arbitration, \textit{Commerce Group Corporation and San Sebastian Gold Mines v Republic of El Salvador}, decided by the ICSID. Those proceedings were broadcast live

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\textsuperscript{132} Amended Rule 37 of the ICSID Arbitration Rules is discussed in the text \textit{supra} Section IV(i). \textit{See too supra notes 94-98.}

\textsuperscript{133} On ICSID cases, see \textit{ICSID Cases, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES}, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases_Home>.

\textsuperscript{134} \textit{See ICSID Arbitration Rules, supra note 29.}

\textsuperscript{135} On public access to Chapter 11 proceedings under the NAFTA, see NAFTA Free Trade Commission, \textit{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>. This is further reflected in the interpretation of Chapter 11 by the Free Trade Commission, confirming the decision in \textit{Metalclad v Mexico} that: “Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration”: \textit{id.}

on the world-wide web and both the proceedings and award are available on the ICSID website.  

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 them 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 by bilateral or other agreements, the substantive laws states invoke to govern such participation and the 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 changes to the transparency and publicity of ICSID arbitration are contemplated, the World Bank may need to establish block grants to subsidize developing countries and particularly civic groups that qualify for subsidization. Levies on richer countries may also be needed to subsidize the costs of public participation by civic groups, which are not necessarily limited to poorer countries. Developed states may agree to subsidize such participation in order to diffuse the hostility of some developing countries towards investment arbitration and the ICSID.

A 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. If such a groundswell does not eventuate, the tendency will be to grease the squeaky wheel, not change it.

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137 ICSID Case No. ARB/09/17 (Award, Mar. 14, 2011). The webcast of the hearing which occurred on Nov. 15, 2010 is available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement71>..
A more invasive approach is for the ICSID to consider the approach 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.”

The Trade Commission’s interpretation is distinctive in these respects. Firstly, the NAFTA is silent on *amicus curiae* briefs. Secondly, its interpretation establishes a procedure to which a non-disputing party must adhere in applying for leave to file a submission in arbitration. Nor is the Trade Commission’s interpretative statement isolated. Indeed, the US Trade Act of 2002 already required that trade negotiators establish “a mechanism for acceptance of amicus curiae submissions from businesses, unions, and nongovernmental organizations.” Nor is the US, the NAFTA, or the CAFTA isolated. More recent investment agreements, such as the Korea-US Free Trade Agreement and some model bilateral investment agreements provide for the admission of amicus briefs. They highlight three criteria: “(a) the appropriateness of the subject matter of the case, (b) the suitability of a given nonparty to act as amicus curiae in that case, and (c) the procedure by which the amicus submission is made and considered.” 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 go forward on the issue of transparency of proceedings.

V. DOMESTIC COURTS OR ICSID ARBITRATORS?

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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.\(^{143}\) It can be argued that 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.\(^{144}\) The inference is that domestic courts can ensure that foreign and domestic investors receive comparable rights and are subject to comparable duties.\(^{145}\) 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”.\(^{146}\) The intention is to ensure that investor-state parties resolve their investment disputes in a transparent, public and cost-effective manner before duly appointed domestic courts that also consider domestic public policies.\(^{147}\)

This development in Australia is not entirely novel. The Calvo Doctrine that was enunciated in Latin America decades before had a comparable focus, albeit reflecting the perspective of developing not developed countries. National law should govern the rights of foreign investors; and the authority of domestic courts should prevail over other options including resort to


\(^{145}\) On these arguments buttressing the dispute resolution mechanisms adopted under the Australia-United States Free Trade Agreements, see Trakman, Foreign Direct Investment: An Australian Perspective, supra note 144, at 48-49; Westcott, supra note 144.


\(^{147}\) On this view, see DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY’S PROMISE, chs. 2, 6 (Cambridge Univ. Press, 2008).
diplomatic channels. The jurisdictional rationale for this proposition is that investment disputes ought to be decided by the domestic courts of host states, not international tribunals. The substantive rationale is that domestic courts ought to confer only national treatment on foreign investors, being no better treatment than is accorded to local investors. The equitable inference 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.

i. The Case for and against Domestic Courts

There are several related arguments in support of domestic courts deciding investment disputes. Domestic courts decide according to domestic laws that include the interpretation of bilateral investment treaties between host and home states. Domestic courts are subject to established procedural and evidential constraints in deciding cases. Domestic courts are required to protect the rights of foreign investors while also taking account of the applicable public policy of the forum. Their decisions are subject to appeal.

In contrast, 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. Either party can request an annulment in which case an annulment committee is set up for that purpose, with power to modify or nullify an award on restrictive grounds under Article 75 of the ICSID Convention. These grounds include that: 1) the ICSID tribunal was not properly constituted; 2) the tribunal manifestly exceeded its powers; 3) there was corruption on the part of a tribunal member; 4) there was a serious departure from a fundamental rule of procedure; or 5) the award failed to state the reasons on which it was based. ICSID Annulment Committees historically have interpreted these
grounds expansively. However, resort to a domestic court is not considered an option under the ICSID Rules.151

Support for domestic courts over arbitrators deciding state-investor 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 of the likes of Philip Morris Australia that have deep pockets. In criticizing investor-state arbitration, the Commission contended: “At a minimum, the economic value of Australia’s preferential BRTAs has been oversold.”152 Notwithstanding the contention that litigation is often more fractious and costly than other modes of dispute avoidance, the Commission asserted that Australian courts are economically more fitting bodies to preside over such investor-state disputes than arbitrators.153 What was not adequately addressed is the often dilatory nature of judicial procedures, the unfamiliarity of foreign investors with domestic law, and the potential unfairness of applying that law to investor-state disputes.154

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 US 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. 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.


152 PC, supra note 146, at XXII.


154 PC, supra note 146, at XXII.
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. The grounds for an appeal are ordinarily not only jurisdictional, but also on the merits. Appeal courts are subject to prescribed rules of procedure on the record. 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. 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 non-compliance.\footnote{On the ICSID, see supra notes 3 & 32.} 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.\footnote{This proposition is complicated, particularly by the fact that investment law is incorporated differently into different national legal systems. See especially M. Sornarajah, \textit{The Case against an International Investment Regime}, in Leon E. Trakman & Nick Ranieri, \textit{International Investment Law}, supra note 2.} The supposed insularity of ICSID arbitration from domestic law and procedure is also disputable on grounds that ICSID arbitrators cannot summarily disregard domestic law if a bilateral investment agreement that refers disputes to the ICSID chooses that law.\footnote{See e.g. Schreuer, \textit{supra} note 36, at 357.}

Choices must ultimately be made. An appeal to a domestic court is desirable if a final determination on jurisdictional and substantive grounds is sought. An annulment procedure on narrow jurisdictional grounds under Article 75 of the ICSID Convention is preferable if those grounds are considered suitable. Beauty lies in the eyes of the beholder.

ii. 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 by subtraction” which arguably is one reason why states failed to arrive at a multilateral investment accord in the first place.158

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 ordinarily experienced in international investment disputes.159 However, this reasoning, holding that ICSID arbitrators are specialized tribunals as distinct from national judges that operate as courts of general jurisdiction, is contestable. The ICSID does not ensure that arbitration is delivered expertly. Evidence of an expropriation calls for reasonable judgment. 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. 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 re-election.

In contrast, if a judgment about the virtue of ICSID arbitration depends on a study of ICSID jurisprudence, there are a limited number of ICSID arbitration cases to review. If 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 social 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 social costs of investment litigation. Only rarely do treaties refer investment disputes to domestic courts, such as under the US-Australia Free Trade Agreement.160 The


160 See Trakman, Foreign Direct Investment: An Australian Perspective, supra note 144, at 79-81; Westcott, supra note 144; Peter Drahos & David Henry, The Free Trade Agreement between Australia and the United States, BRIT
choice of investor-state arbitration by treaty is the pervasive norm; and ICSID jurisprudence also extends beyond investment treaties between states.

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 Medical Insurance Group Australia [MIGA], Overseas Private Investment Corporation [OPIC], or in relation to British investments, the Export Credits Guarantee Department [ECGD]. 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.

iii. Finding 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 towards 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 efficient and fair use of judicial or arbitral processes in discrete cases. However, ascribing normative values to decision making processes is unavoidably subjective. 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. 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.\footnote{162} They are also readier to endorse a “rule of law” culture with which they identify than a culture with which they do not.

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 pre-existing 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.\footnote{163} The reasons for this more recent shift towards domestic courts by a developed state like 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 arbitration, the imponderable is in determining how the rule of law should be defined, applied and enforced in relation to such disputes.\footnote{164} There are no fixed or infallible answers to these intertwined questions.

VI. DISPUTE PREVENTION AND AVOIDANCE

\footnote{162} These observations are exemplified in Chapter 11 jurisprudence under the NAFTA, notably under the Mondev and Loewen cases. See e.g. 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 American judicial decisions). See Mondev International Ltd v United States of America, ICSID Case No ARB(AF)/99/2 (Award, Oct. 11, 2002). On the Loewen arbitration, see Loewen Group, Inc v United States of America (Loewen), 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). On the judicial review of the Loewen Chapter 11 decision, see 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); William Dodge, id; Trakman, Foreign Direct Investment: An Australian Perspective, supra note 144, at 52.

\footnote{163} On this doctrine, see supra note 148.

Neither litigation nor investor-state arbitration is an exclusive means of resolving investor-state disputes. Dispute prevention and avoidance options are potentially low cost, informal, expeditious, party-friendly, private and non-disruptive ways in which foreign investors and host states can resolve differences while continuing their relationships with minimal disruption. 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.\textsuperscript{165}

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. Nor do such measures preclude parties from resorting to either arbitration or litigation should negotiation or conciliation fail.

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 endorsement of dispute avoidance options; it could promote innovation in reconciling differences between states and foreign investors; it could redress the effect of high cost and often complex arbitration and litigation proceedings; 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 treaties as requirements prior to investors initiating arbitration or litigation proceedings. They can also construct restrictive dispute resolution clauses in their investment agreements.\textsuperscript{166}

While 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. A systemic problem is that


investment disputes often arise between arms-length as distinct from informal investor-state relationships; investors interact impersonally with government bureaucracies; and informal methods of dispute avoidance are ill-suited to resolving disputes that are levered up to legal departments within those bureaucracies. Absence of a pre-existing 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.167

Nevertheless, there may be distinct advantages in states endorsing mandatory conflict prevention measures that are reinforced by international protocols. States may agree multilaterally or bilaterally upon inter-governmental mechanisms by which to redress investor-state disputes. These may vary from diplomatic measures, such as under modern treaties of peace, friendship, commerce and navigation to formal mechanisms for inter-governmental consultations such as under Chapter 20 of the NAFTA.

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; timelines within which to secure regulatory approval; facilitative meetings between investors and host states; contact persons to consult in complying with those regulations; warnings for non-compliance by investors; and procedures for curing non-compliance. They 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 resort to fractious, costly and disruptive arbitration or litigation. At their worst, 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 conciliator may fail to secure investor-state cooperation in managing a conflict such as the admission of public interest briefs.

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. 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 in general amounts, at best, to wishful thinking.

VII. CONCLUSION

A state that is considered unattractive to foreign investors may not only lose 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 like 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 international investment convention such as the ICSID may quickly shift to condemning ICSID arbitration as a result of losing a case and with it, losing stature both domestically and in the international community. Bad experiences which states have with ICSID arbitration is one factor in periodic attacks on it, such as in 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 like the ICSID Secretariat that is best able to evaluate the efficient operation of ICSID arbitration is unable to 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 of 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 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. 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 not a realistic alternative for states to conclude agreements that investment disputes with foreign investors should be resolved by domestic courts. Notwithstanding Australia’s standalone commitment to forsake arbitration in favor of domestic courts, most states are unlikely to follow suit due to concerns about national biases among national courts and confusion over disparate domestic systems of law.

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 a conflict.

The greatest threat to the ICSID is therefore not about the availability of alternatives to investor-state arbitration. The greatest threat is one of perception about how it ought to operate, and who it ought to and does benefit in fact. That attack 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 conflict of interest; they 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: it was created by member states. Blaming it 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. The sufficiency of the ICSID depends on whether competing interests favoring or opposing it can be reconciled. 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 the ICSID is seen to take on these challenges but still fails sufficiently to redress them, it will be perceived as being in a state of paralysis, and preserving 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 beyond the perceived failings of investor-state arbitration. 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.