

# The Antinomies of the (Continued) Relevance of ICSID to the Third World

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## I. INTRODUCTION

The international law on foreign investment is commonly accepted as one of the most controversial areas of international law.<sup>1</sup> Not only does international investment law lack clear rules on investment promotion and protection, this area of the law has always generated opposing rules, and implicates divergent interests in the process.<sup>2</sup> In the face of unclear rules, and against the backdrop of the need to protect foreign investment through the internationalization of investment dispute settlement,<sup>3</sup> and the position that this will facilitate investment flows to Third World states,<sup>4</sup> the World Bank established the International Centre for the Settlement of Investment Disputes (ICSID).<sup>5</sup> In the last quarter of the 20th century, investment arbitration garnered considerable international attention, especially in relation to issues that implicate international and local public interest, including environmental protection, labor and human rights. While issues of human rights and environmental protection are relevant the world over, a further issue of economic development arises in the case of the Third World. The drafters of the ICSID Convention did not contemplate, at least not explicitly, public interest issues related to foreign investment that have become prominent lately. However, they did consider ICSID's utility in facilitating the economic development of

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1. M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 1 (2d ed. 2004) [hereinafter SORNARAJAH, *INTERNATIONAL LAW ON FOREIGN INVESTMENT*].

2. For an instructive analysis of the intricacies of investment promotion and protection in developing countries, see Jurgen Voss, *The Protection and Promotion of Foreign Direct Investment in Developing Countries: Interests, Interdependencies and Intricacies*, 31 INT'L & COMP. L.Q. 686 (1982).

3. See Karl-Heinz Bockstiegel, *Settlement of Disputes between Parties from Developing and Industrial Countries*, 15 ICSID REV.-FILJ 275 (2000) (discussing other institutions that settle investment disputes).

4. See Ahmed Sadek El-Kosheri, *ICSID Arbitration and Developing Countries*, 8 ICSID REV.-FILJ 104 (1993) (arguing that ICSID was established to encourage foreign investment in developing countries and not in the industrialized West).

5. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 5 I.L.M. 532 (1965) [hereinafter ICSID Convention]. The ICSID Convention came into force on October 14, 1966. See also Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 5 I.L.M. 524 (1965) [hereinafter ICSID Report]. In addition, ICSID provides "Additional Facility Rules" for the settlement of disputes that do not fall within the purview of the ICSID Convention. The "Additional Facility Rules" are applicable where either party to a dispute is a state that has not ratified the ICSID Convention or is a national of such a state, or where the legal dispute does not arise directly out of an investment. See Article 2 of ICSID Additional Facility Rules ICSID/11 April 2006. For an article-by-article commentary on the ICSID Convention, see CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* (2001). See also MOSHE HIRSCH, *THE ARBITRATION MECHANISM OF THE INTERNATIONAL CENTER FOR THE SETTLEMENT OF INVESTMENT DISPUTES* (1993); LUCY REED ET AL., *GUIDE TO ICSID ARBITRATION* (2004).

the Third World. Nevertheless, the question remains whether ICSID has been able to facilitate economic development in the Third World. While this might be difficult to determine without empirical research, an examination of ICSID's work in balancing the needs of the Third World and foreign investors, seems a modest and appropriate endeavor to undertake in this article.

Because of its focus on international investment dispute settlement as opposed to international commercial arbitration or inter-state arbitration, ICSID is situated in a somewhat complicated position in present international legal discourse.<sup>6</sup> While international commercial arbitration focuses on dispute settlement between private parties, and inter-state arbitration involves only states, investment arbitration oscillates between international commercial arbitration and interstate arbitration.<sup>7</sup> ICSID sits at the margins of international commercial arbitration and inter-state arbitration and borrows from both types of established dispute settlement mechanisms. However, because international investment arbitration involves states and foreign investors, it is more complicated as it implicates the commercial interests of private parties, and states' obligations and rights with all the public interest strings attached. This article questions ICSID's ability to respond to the inevitable multiplicity of interests that arise in investment dispute settlement, especially in relation to Third World states and foreign investors.

In purporting to provide a balanced approach to investment dispute settlement between the Third World and capital exporting states, which are mostly developed states, ICSID was established to play a dual role—settle foreign investment disputes (through arbitration and conciliation) and in the process, facilitate the flow of investment to states that need it, especially in the Third World. ICSID has adequately responded to investment protection but whether or not it has achieved the second goal

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6. For a historical account of foreign investment arbitration, see Matthew Cobb, *The Development of Arbitration in Foreign Investment*, 16 MEALEY'S INT'L ARB. REP. 48 (2001).

7. M. SORNARAJAH, *THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES* 161 (2000) [hereinafter SORNARAJAH, *SETTLEMENT OF INVESTMENT DISPUTES*]. Although ICSID offers both arbitration and conciliation facilities, conciliation has not been a major feature of ICSID dispute settlement, as only five of those cases have been submitted and two were settled. See Ibrahim Shihata & Antonio Parra, *The Experience of the International Centre for Settlement of Investment Disputes*, 14 ICSID REV.-FILJ 299 (1999) [hereinafter Shihata & Parra, *Experience of ICSID*]. Since the article was written, there have been two other conciliation cases. See ICSID, *List of Concluded Cases*, <http://www.worldbank.org/icsid/cases/conclude.htm>.

is arguable, as there is no empirical research to that effect.<sup>8</sup> It has become a forum of choice for foreign investors seeking to settle disputes that arise in the course of investment in host states, especially Third World states. The Centre settles legal disputes that arise out of investments between contracting parties and nationals of other contracting parties.<sup>9</sup> An overwhelming percentage of ICSID arbitrations are initiated by foreign investors from developed states against Third World states. Since the establishment of ICSID, only few arbitral proceedings have been initiated against developed states.<sup>10</sup> Even more significantly, all 110 cases that are presently pending before ICSID were initiated by foreign investors against non-(high income) Organization for Economic Cooperation and Development (OECD) states.<sup>11</sup> This data suggest that ICSID arbitration is more relevant to Third World states and raises questions as to why they are more prone to investment disputes.<sup>12</sup> Indeed investor-state arbitration has been referred to as a “Third World” type of investment regime.<sup>13</sup>

Since its inception, ICSID has acquired growing importance both to Third World states and foreign investors for several reasons. First, ICSID specializes in the settlement of foreign investment disputes. This

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8. Jose E. Alvarez, *The Emerging Foreign Direct Investment Regime*, ASIL PROC. 94-95 (2005). In discussing the foreign direct investment (FDI) regime generally, of which ICSID is an important part, Professor Alvarez states as follows: “There are also different assessments about whether the FDI regime has worked. If the aim of some of these treaties is to advance political-strategic alliances, there is little doubt investment treaties have achieved that. Furthermore, if the goal is to improve the lot of the foreign investor, the FDI regime has been successful in that realm. But if the goal of investment treaties is to increase the actual flow of FDI to LDCs, the UN Conference on Trade and Development and World Bank Studies to date have failed to establish any clear cause-and-effect relationship. . . .” *Id.*

9. ICSID Convention, *supra* note 5, art. 25.

10. The arbitral proceedings initiated against developed states under ICSID’s auspices include one against Iceland, another against New Zealand, one against Spain, and three against the United States under NAFTA. See ICSID, *List of Concluded Cases*, <http://www.worldbank.org/icsid/cases/conclude.htm>.

11. See ICSID, *List of Pending Cases*, <http://www.worldbank.org/icsid/cases/pending.htm>. This is the figure presented on ICSID’s website as of April 10, 2007. See the World Bank’s categorization of countries, [http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20421402~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html#High\\_income](http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20421402~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html#High_income).

12. See generally, Jan Paulsson, *Third World Participation in International Investment Arbitration*, 2 ICSID REV.-FILJ 19 (1987) (arguing that arbitration is a neutral process where parties participate on an equal footing and Third World states are no longer prejudiced by the system in any way).

13. Thomas W. Walde, *Investment Arbitration Under the Energy Charter Treaty—From Dispute Settlement to Treaty Implementation*, 12 ARB. INT’L 429, 446 (1996) [hereinafter Walde, *From Dispute Settlement to Treaty Implementation*]. Professor Walde argues that it was not feasible to apply investor-state arbitration only to the Commonwealth of Independent States under the Energy Charter Treaty without extending such discipline to Western states. *Id.*

is important because foreign investment has become a major contributor to capital by which Third World states seek to fuel their economies. Second, there is a recent proliferation of bilateral investment treaties (BITs), which usually include Third World state parties, with ICSID arbitration clauses for the settlement of disputes. Third, in a bid to attract foreign investment, many Third World states have enacted investment promotion legislation that refer disputes to ICSID.<sup>14</sup> Fourth, ICSID is an arm of the World Bank—an institution that continually reiterates its commitment to development and is one of the major international financial institutions (IFIs) that make decisions that affect Third World states.<sup>15</sup> In addition, ICSID arbitration clauses are included not only in BITs and domestic investment promotion legislation, but also in multilateral instruments including the North American Free Trade Agreement (NAFTA),<sup>16</sup> the Colonia Protocol for Reciprocal Promotion and Protection of MERCOSUR Investments,<sup>17</sup> and the Energy Charter Treaty (ECT).<sup>18</sup>

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14. See generally, Antonio Parra, *Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment*, 12 ICSID REV.-FILJ 287 (1997). Parra considers these instruments as reflecting a consensus favoring investment liberalization and highly protective foreign investment standards. Also, he notes that industrialized states have only made investment protection commitments among themselves in the context of NAFTA and the ECT. *Id.*

15. For an example of the World Bank's development agenda for a region and its concept of governance by which it seeks to regulate Third World states, see GRAHAM HARRISON, *THE WORLD BANK AND AFRICA: THE CONSTRUCTION OF GOVERNANCE STATES* (2004).

16. North America Free Trade Agreement, U.S.-Can.-Mex., art. 1120, Dec. 19, 1992, 32 I.L.M. (1993). On NAFTA investor-state dispute settlement, see generally, Robert K. Paterson, *A New Pandora's Box? Private Remedies for Foreign Investors under the North American Free Trade Agreement*, 8 WILLIAMETTE J. INT'L L. & DISP. RESOL. 77 (2000); J. Anthony VanDuzer, *NAFTA Chapter 11 to Date: The Progress of a Work in Progress*, in WHOSE RIGHTS? THE NAFTA CHAPTER 11 DEBATE 47, 47 (Laurie Ritchie Dawson ed., 2002).

17. Jan. 1, 1994, approved by Decision No. 11/93 of the Common Market Council, art. 9(4). The Colonia Protocol is one of the Protocols to the Treaty Establishing a Common Market between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (Treaty of Asuncion), Mar. 26, 1991, 30 I.L.M. 1041 (1991).

18. Energy Charter Treaty, art. 26(4), Dec. 17, 1994, 34 I.L.M. 373, 381 (1995), reprinted in 10 ICSID REV.-FILJ 258 (1995). See Walde, *From Dispute Settlement to Treaty Implementation*, supra note 13; Thomas Walde, *Investment Arbitration under the Energy Charter Treaty: An Overview of key Issues*, in ARBITRATING FOREIGN INVESTMENT DISPUTES 193 (2004).

In order to understand ICSID's relationship with the Third World, it is important to note that like most of the international economic order, ICSID dispute settlement is multifaceted. The institution is not autonomous but is situated at the intersection of law (the ICSID Convention and rules, including applicable procedural and substantive laws, and arbitral tribunals); politics (the broader framework of the Developed World/Third World relations); and economics (World Bank lending and surveillance, and World Bank administered dispute settlement institutions). In addition to these intersections, international investment dispute settlement, including the ICSID mechanism, addresses investment disputes that often implicate issues of international magnitude that affect the welfare of local populations like economic development, environmental protection and human rights. Also, investment dispute settlement now includes several relevant actors with different interests—transnational corporations (TNCs), developed country home states, capital importing Third World states, and non-governmental organizations (NGOs) that argue that they espouse interests that affect individuals. This article focuses on ICSID's investment dispute settlement, particularly involving Third World states, within this broader framework. It suggests that more often than not, ICSID tribunals are preoccupied with the commercial interests of foreign investors even though ICSID occupies a position where it can develop robust analyses of investment and investment related issues. While the protection of foreign investment is a necessary and legitimate endeavor, a lopsided commitment to investment protection without adequate attention to other interests might not bode well for the continued development of an international law on foreign investment that reflects the interests of all relevant actors. And of course, a neglect of the interests of foreign investors is not the strategy to adopt either. Rather, it is argued in this article that in order to ensure that ICSID retains its relevance and legitimacy within the international order, ICSID tribunals need to constantly take multiple and diverse interests into account in settling investment disputes. For investor-state arbitration is not only about investor protection, it also impacts significantly on states and the people that they represent.

In seeking to contribute a perspective that offers optimistic suggestions for incorporating the interests of Third World peoples in ICSID dispute settlement, while recognizing ICSID's limitations, the article proceeds in stages that allow for a systematic discussion of the issues that relate to ICSID's relationship with the Third World.<sup>19</sup> Each substantive part

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19. The analysis in this article could proceed in several ways. For example, one could decide to address procedural issues. However, I find it pertinent to address fundamental issues that will ensure ICSID's continued relevance in settling investment disputes that involve Third World parties.

addresses the three-pronged issues of the aims of ICSID, its effectiveness in resolving disputes involving Third World states, and recommendations for enhanced effectiveness. Part two discusses ICSID's neoliberal roots and its continued subscription to neoliberal economic principles, through an analysis of the historical development of investment arbitration generally, and the institution in particular, and ICSID's aims as defined in its founding documents. Part three analyzes ICSID's dispute settlement relationship with the Third World and the latter's adoption of an ambivalent posture due to the conflicting paradigms that Third World capital importing states on one hand, and TNCs on the other hand, sometimes adhere to. The article does not ignore the fact that some Third World states are capital exporters in some instances, but often and especially within ICSID's context, they are mostly capital importers, and usually defendants before ICSID tribunals. Part four provides suggestions for enhancing ICSID's effectiveness and ensuring its continued relevance in the international economic order. The last part concludes the article on the note that ICSID has the potential to accommodate diverse interests and contribute significantly to the development of an international law on foreign investment that reflects the paradigms of a constantly evolving global society.

## II. THE ESTABLISHMENT OF A NEO-LIBERAL INVESTMENT PROTECTION MECHANISM

International investment arbitration has always generated ideological conflicts involving capital importers (mostly Third World countries) and capital exporters (mostly developed countries). At the time ICSID was established, it was a novel institution charged with facilitating the settlement of investment disputes between states and foreign investors. Its establishment was a particularly ingenuous measure since non-state actors did not have international legal personality at the time. Even today, the position of these actors as subjects of international law is still questionable.<sup>20</sup> In addition to providing an institutionalized mechanism that allows foreign investors to be parties to ICSID proceedings, it excludes recourse to diplomatic protection and separates its dispute

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20. See generally JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* (2nd ed., 2006); Jonathan I. Charney, *Transnational Corporations and Developing Public International Law*, DUKE L.J. 748 (1983).

settlement mechanism from municipal legal systems.<sup>21</sup> ICSID also established a unique and limited *jurisdiction ratione materiae* (disputes must arise directly from an investment) and *jurisdiction ratione personae* (one disputing party must be a state or constituent subdivision or agency of a state that has ratified the ICSID Convention and the other, a national of another ICSID member).<sup>22</sup> In addition, it provides for an internal annulment mechanism,<sup>23</sup> and a relatively more effective enforcement mechanism compared to other dispute settlement facilities.<sup>24</sup> However, aside from the ingenuity of the drafters of the ICSID Convention, there were several other factors that shaped the emergence and character of ICSID, as it was not established on a blank historical page. The creation of the institution was mainly a reaction to what many capital exporting countries and their multinational corporations considered as threats to their economic interests in the Third World.<sup>25</sup> And, through the years, ICSID has established itself as foreign investors' dispute settlement institution of choice for settling investment disputes involving foreign investors and Third World states.<sup>26</sup>

The ICSID Convention was drafted in the heydays of Third World nationalist convergence and at a time when the vestiges of direct colonial domination were crumbling. Prior to this time, foreign investment protection was assured through the instrumentality of merging the legal systems of the colonized and the colonizer and where this failed, or where the territory in question was not a colony of any colonial power of the time, through gunboat diplomacy.<sup>27</sup> As such, the need for an international regime on foreign investment protection was minimal. Colonial domination and gunboat diplomacy as the primary choices for investment protection reflect the power asymmetry that prevailed in the colonial era, and, which continued to influence the reaction of Third World states to foreign investment even after the end of direct colonial domination. Indeed, the development of the international law on foreign

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21. ICSID Convention, *supra* note 5, art. 26-27.

22. *Id.* art. 25.

23. *Id.* art. 52. See Shihata & Parra, *Experience of ICSID*, *supra* note 7, for an analysis of ICSID's annulment mechanism.

24. ICSID Convention, *supra* note 5, art. 53-55

25. See generally SORNARAJAH, INTERNATIONAL LAW ON FOREIGN INVESTMENT, *supra* note 1, at 19, 37.

26. In a discussion of international arbitration and ICSID's relationship with the World Bank, Professor Graving asserts that "it borders on an axiom to observe that ICSID arbitration is preferable to any other when its jurisdictional requirements can be met." He states that ICSID assures a level of efficacy unequaled elsewhere. Richard J. Graving, *The International Arbitration Institutions: How Good a Job are they Doing*, 4 AM. U. J. INT'L. L. & POL'Y 319, 365 (1989).

27. SORNARAJAH, INTERNATIONAL LAW ON FOREIGN INVESTMENT, *supra* note 1, at 19, 37.



investment has always involved power exertion and struggles within the international order, not only among states but also with non-state actors like TNCs and NGOs exerting significant influence in this area of the law.

Based on the “colonial origins of international law”, many Third World states perceived a need to redefine international economic law.<sup>28</sup> Thus, they espoused views at the United Nations General Assembly, which were usually contrary to those of many industrialized states. These efforts culminated in such declarations like the Declaration on Permanent Sovereignty over Natural Resources,<sup>29</sup> the Charter of Economic Rights and Duties of States,<sup>30</sup> and the much contested Declaration on the Establishment of a New International Economic Order (NIEO).<sup>31</sup> In addition to the changing views of Third World states in international forums, the wave of nationalizations that accompanied the decolonization movement posed threats to the economic interests of erstwhile colonial powers and necessitated the development of investment protection

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28. On Third World Approaches to International Law (TWAIL) and the work of TWAIL scholars that analyze and critique international law's engagement with the Third World, see generally Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 WIS. INT'L L.J. 353 (1998); Makau wa Mutua, *What is TWAIL?*, 94 ASIL PROC. 31 (2000); B.S. Chimni, *Third World Approaches to International Law: A Manifesto* in THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS AND GLOBALIZATION 47 (Antony Anghie et al., eds., 2003); Obiora Chinedu Okafor, *Newness, Imperialism and International Legal Reform in Our Time: A TWAIL Perspective*, 43 OSGOODE HALL L.J. 171 (2005); James Thuo Gathii, *Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory*, 41 HARV. INT'L L. J. 263 (2000); Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 SOC. & LEG. STUD. 321 (1996).

29. G.A. Res. 1803 (XVII), 17 UN GAOR Supp. (No. 17) at 15, U.N. Doc. A/5217 (Dec. 14, 1962). See generally NICO SCHRIJVER, *SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES* (1997).

30. G.A. Res. 3281 (XXIX), UN GAOR, 29th Sess., Supp. (No. 31) at 50, U.N. Doc. A/3235 (Dec. 12, 1974).

31. G.A. Res. 3201 (S-VI), 6 (Special) U.N. GAOR, 6th Spec. Sess. Supp. No. 1, at 3, U.N. Doc. A/9559 (1974) (May 1, 1974). On the question of the success or otherwise of the NIEO, see generally Mickelson, *supra* note 28; Obiora Chinedu Okafor, *The Status and Effect of the Right to Development in Contemporary International Law: Towards a South-North Entente*, 7 AFR. J. INT'L. & COMP. L. 865 (1995); Thomas M. Franck, *Lessons of the Failure of the NIEO*, in CANADIAN COUNCIL ON INTERNATIONAL LAW PROCEEDINGS (Canadian Council on International Law, 1986) 82; BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* 82-91 (2003); Obiora Chinedu Okafor, *Poverty, Agency and Resistance in the Future of International Law: An African Perspective*, 27 THIRD WORLD Q. 799, 808 (2006).

mechanisms separate from the domestic jurisdiction of states. Since World War II, investment disputes became increasingly internationalized (or delocalized), as they were subject to international arbitration and application of international law, and not just the municipal law of the host state as the applicable law. This was mainly due to the conception of TNCs and their home states that the application of the host state's law and adjudication by domestic tribunals in the host state might be prejudicial to TNCs' interests.<sup>32</sup>

Internationalization further permeated the system through frequent insertion of arbitration clauses, stabilization clauses, and choice of law clauses into investment contracts. These clauses indicated that investment contracts were not subject to municipal law.<sup>33</sup> In the 1950s, three international arbitral awards further helped to shape the internationalization of investment disputes. In *Petroleum Development (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi*,<sup>34</sup> *Ruler of Qatar v. International Marine Oil Co. Ltd.*<sup>35</sup> and *Saudi Arabia v. Arabian American Oil Co.*,<sup>36</sup> the contracts clearly had the closest connections to the laws of the host states.<sup>37</sup> Dicta in the awards suggest that the arbitrators considered that the applicable law was inescapably the domestic laws of the host states according to prevailing legal authority at the time. Like in the Qatar and Aramco arbitrations, in the Abu Dhabi Arbitration, the arbitrator, Lord Asquith, however, found that domestic laws of the host state were not mature enough to deal with petroleum disputes emerging from state contracts and as a result of the perceived lacuna, applied the general principles of law recognized by "civilized nations" to the dispute.

Internationalization of foreign investment disputes was the rational choice for industrialized states at the time, given the history of their interaction with Third World states. Generally, internationalization reflected a discomfort with the laws of Third World states and their ability to ensure justice for foreign investors and to protect their commercial interests. By placing investment disputes within the international domain, former colonial powers could ensure that their economic interests

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32. Jan Paulsson, *Delocalization of International Commercial Arbitration: When and Why it Matters*, 32 ICLQ 53 (1983).

33. SORNARAJAH, SETTLEMENT OF INVESTMENT DISPUTES, *supra* note 7, ch. 8.

34. The Abu Dhabi Arbitration, 18 I.L.R. 144 (1951).

35. The Qatar Arbitration, 20 I.L.R. 534 (1953).

36. The Aramco Arbitration, 27 I.L.R. 117 (1958).

37. SORNARAJAH, SETTLEMENT OF INVESTMENT DISPUTES, *supra* note 7, at 251-52. See also *Sapphire Int'l Petroleum Ltd. v. Nat'l Iranian Oil Co.*, 35 I.L.R. 136 (Int'l Arb. Trib. 1963); *Texaco Overseas Oil Petroleum Co. v. Libyan Arab Republic*, 53 I.L.R. 389 (I.C.J. Arb. 1977) [hereinafter *Texaco Arbitration*]; Lord McNair, *The General Principles of Law Recognized by Civilized Nations*, 33 BRIT. Y.B. INT'L L. 1 (1957).

remained within structures that were accessible to (and dominated by) them at the time.

ICSID was established in the euphoria of these ideologically charged times under the auspices of the World Bank and filled the need to protect foreign investment in the Third World.<sup>38</sup> The drafters sought to effect a balance between the needs of investors and Third World states, and took caution and care in ensuring that the consultative process included as many Third World states as were willing to participate.<sup>39</sup> In spite of the suspicion of international arbitration, a considerable number of Third World states, except most Latin American countries, signed the ICSID Convention at its inception. Several reasons could account for the early acceptance of the ICSID Convention. These rationales mostly reflect factors that Third World states could have considered, including the potential benefits and losses from being parties to the ICSID Convention. First, without engaging in a normative consideration of the nature of participation, many Third World states probably felt some connection to the institution, having participated in the consultative process that led to the adoption of the ICSID Convention. This was not the case with most international institutions of the time, which had been established when these states were under formal colonial domination. Second, it is likely that the general rationale provided for the establishment of ICSID—

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38. Western states included territories under their control—for example, Southern Rhodesia (Zimbabwe)—within the jurisdiction of ICSID within a few years of ratifying the Convention, even though some of these territories were initially excluded. See ICSID, SEVENTEENTH ANNUAL REPORT 1982/1983 6-7 (1983). In 1968, the United Kingdom designated twenty of its subdivisions including Antigua, Belize, Dominica, Hong Kong, and Seychelles as competent parties to disputes before ICSID. See Annex 2 of ICSID, CONTRACTING STATES AND ACTIONS TAKEN BY THEM PURSUANT TO THE CONVENTION (AS OF NOVEMBER 15, 1975) 8-9 (ICSID/8/Rev.2).

39. For example, twenty-nine African states and the African and Malagasy Organization for Economic Cooperation (OAMCE) were represented at the Consultative Meeting of Legal Experts held at Addis Ababa, Ethiopia from December 16-20, 1963. See ICSID, ANALYSIS OF DOCUMENTS CONCERNING THE ORIGIN OF THE FORMULATION OF THE CONVENTION (Volume 2, Part 1) 236-95 (1970). Many other Third World states were included in other such Consultative Meetings that were held in Chile (where Latin American countries expressed their reservations on conflicts between the proposed Convention and their constitutions which embodied the equality of foreigners and nationals), and in Thailand. See *Documents 27 & 31* respectively, in ICSID, DOCUMENTS CONCERNING THE ORIGIN OF THE CONVENTION Vol. 2:1. It is however, possible to query the character of Third World participation in drafting the ICSID Convention, whether it was substantive or merely procedural.

attracting foreign investment—contributed to the institution’s attractiveness.<sup>40</sup> Third World states sought and still seek foreign investment to fuel their economies and an institution that sought to facilitate the flow of such investment cannot easily be ignored. Third, a possible explanation for the suspicion of international arbitration and the simultaneous signing of the ICSID Convention is that Third World states might have thought that ratifying the ICSID Convention would not necessarily amount to being subject to the Centre’s jurisdiction, as further consent is required before ICSID can assume jurisdiction.<sup>41</sup> However, if this was the position, it is highly misplaced given the prevailing possibilities of unilateral consent to arbitration that has been referred to “arbitration without privity”<sup>42</sup> that arise from BITs, domestic legislation, regional agreements like the NAFTA and sectoral agreements like the ECT. Fourth, commentators have argued that ratifying the ICSID Convention served as a possible guarantee of obtaining loans from IFIs, the World Bank—the parent body of ICSID—inclusive.<sup>43</sup> Thus, with developed nations’ need to protect foreign investment and the Third World’s desire to increase private capital flows, ICSID found its place in the multifarious world of international investment dispute settlement.

#### A. *The Promise of ICSID*

As stated earlier, ICSID was a novel type of institution at the time it was established, given its institutionalization of investor-state arbitration.<sup>44</sup> It sought to establish a balance between the conflicts surrounding the interests and positions of developed capital exporting states and Third World capital importing states. The institution purportedly achieved this

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40. Paragraph 12 of the ICSID Report states *inter alia* that “adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of private international investment into its territories, which is the primary purpose of the Convention.”

41. ICSID Convention, *supra* note 5, art. 25(1).

42. Jan Paulsson, *Arbitration without Privity*, 10 ICSID REV.–FILJ 232 (1995). It is important to note that not all references to ICSID in domestic legislation and international investment agreements amount to consent. On this point, see Aron Broches, *Bilateral Investment Treaties and Arbitration of Investment Disputes*, in THE ART OF ARBITRATION: ESSAYS ON INTERNATIONAL ARBITRATION: LIBER AMICORUM PIETER SANDERS 1912-1982 63 (Jan C. Schultz & Albert Jan van den Berg eds., 1982). However, majority of recent ICSID cases arise from consent provided in BITs. See David R. Sedlak, *ICSID’s Resurgence in International Investment Arbitration: Can the Momentum Hold?*, 23 PENN. ST. INT’L L. REV. 147, 160 (2004).

43. M. SORNARAJAH, INTERNATIONAL COMMERCIAL ARBITRATION: THE PROBLEM OF STATE CONTRACTS 43 (1990).

44. The first recorded ad hoc investor-state arbitration was the 1930 Lena Goldfield Arbitration. See Arthur Nussbaum, *The Arbitration between the Lena Goldfields, Ltd. and the Soviet Government*, 36 CORNELL L.Q. 31 (1950).

balance through provisions in the ICSID Convention discussed in part three of this article, specifically, the applicable law and the exclusion of diplomatic protection by the home state of the foreign investor once a dispute is submitted to ICSID, thereby seeking to depoliticize investment disputes.<sup>45</sup> However, as discussed in part four of this article, ICSID did not anticipate concerns that emerged in the last quarter of the 20th century. These concerns of international law that ICSID did not anticipate mostly include the public interests of the local populations in the geopolitical zones that are affected by investment activities. However, in part four of this article, I suggest that it is possible to accommodate diverse and even conflicting interests within ICSID's dispute settlement mechanism, noting that the accommodation of erstwhile marginalized interests will require a deliberate reorientation regarding the purpose of investment dispute settlement.

ICSID's founding documents reveal three broad purposes that the institution sought to achieve. They reflect the tenets of an institution that subscribes to a neoliberal economic paradigm, as ICSID sought to enshrine the legal/political and the public/private divide by excluding the state from the sphere of foreign investment, which is considered by some as a private sphere.<sup>46</sup> The ICSID Convention represents a neoliberal document in that it seeks to project a form of neutrality in investment

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45. See generally IBRAHIM F.I. SHIHATA, TOWARDS A GREATER DEPOLITICIZATION OF INVESTMENT DISPUTES: THE ROLES OF ICSID AND MIGA (1993) [hereinafter SHIHATA, DEPOLITICIZATION OF INVESTMENT DISPUTES] initially published at 1 ICSID REV.-FILJ 1 (1986). See also Augustus A. Agyemang, *The Suitability of Arbitration for Settling "Political" Investment Disputes Involving African States*, 6 J. WORLD TRADE 123 (1988) (where the author differentiates between legal investment disputes and political investment disputes and argues that the latter category of disputes is better settled through negotiation. His argument that negotiation is a better means of settling political investment disputes involving African states (all part of the Third World), almost totally writes ICSID out of the picture of the African investment protection scene. This is important given that many of the disputes that arise in relation to investment—for example, nationalizations pursuant to the espousal of radically different economic or social policies—could conveniently fall under Agyemang's categories of political investment disputes).

46. See Amr Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419 (2000) (arguing that Libya lost in the Libyan Oil Nationalization cases, including the Texaco Arbitration not because it did anything illegal but because it carried out a political act). The public/private distinction exists at several levels. One is the Lockean dichotomy between the domestic sphere and civil society, which is critiqued by feminist scholars. Another, which is relevant to international investment and other economic activities, is the distinction between politics on the one hand, as public and economics on the other as private. See Hilary Charlesworth, *The Public/Private Distinction and the Right to Development in International Law*, 12 AUSTL. Y.B. INT'L L. 190 (1988/89).

and dispute settlement, facilitate free markets, and discourage government participation or intervention in international investment. Also pertinent to the liberal investment agenda is investor-state arbitration, which provides an avenue for transferring disputes from the political sphere to the legal. However, experience has dictated that it is difficult to totally exclude governmental intervention in foreign investment. While this is true for developed states, it is particularly relevant for Third World states as their economies and populations are more vulnerable to the negative effects of foreign investment. This perhaps, explains in part, why Third World states constitute the majority of defendants before ICSID as the state of their economies dictate the necessity for some level of government intervention in foreign investment.

The first of ICSID's three-fold promise is directed toward foreign investors. ICSID was clearly established to protect foreign investment in the Third World through the provision of facilities for settling investment disputes between contracting states and foreign investors. The vacuum left by the crumbling direct colonial hold on many Third World states in the mid 20th century necessitated the establishment of such an institution. Secondly, one of the major rationales that proponents espouse for the establishment of ICSID—referred to as the “primary purpose” of the ICSID Convention—is the promotion of investment flows to Third World states. ICSID was established within the first development decade that spanned the 1960s, at the time when “it became increasingly clear that if the plans established for the growth in the economies of developing countries were to be realized, it would be necessary to supplement the resources flowing to these countries from bilateral and multilateral governmental sources by additional investments originating in the private sector.”<sup>47</sup> This was a time when the World Bank began to have a foothold in the Third World, just after the establishment of the International Development Association (IDA)—the World Bank's arm that provides development loans—in 1960. Articulating the reason for the establishment of ICSID, Ibrahim Shihata, then Secretary General of ICSID stated that “ICSID should not be viewed merely as a mechanism of conflict resolution. It should be regarded as an effective instrument of international public policy which is meant in the final analysis to secure a stable and increasing flow of resources to developing countries under reasonable conditions.”<sup>48</sup> However, even though it is touted that ICSID was established to both settle investment

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47. ICSID, ANALYSIS OF DOCUMENTS CONCERNING THE ORIGIN OF THE FORMULATION OF THE CONVENTION (Volume 1) 2 (1970).

48. Ibrahim F.I. Shihata, *Introduction by the Secretary-General*, in ICSID, 1984 ANNUAL REPORT 5 (1984).

disputes and facilitate the flows of private capital to the Third World, the ICSID Convention only substantively provides for the former. References to the latter rationale are mostly included in the ICSID Report<sup>49</sup> and it has gained prominence mostly through anecdotal repetition.

The ICSID Report states that the ICSID Convention is premised on the position that guaranteeing investment protection by providing a mechanism for dispute resolution fosters the flow of private capital to host states.<sup>50</sup> As such, ICSID was established to be more than an investment dispute settlement institution; it was meant to facilitate investment flows with a view to economic development. This position was reiterated in *Amco Asia Corp. v. Indonesia*, where the tribunal cited the ICSID Convention's preamble with approval and went on to argue that protecting investments amounts to the protection of the "general interest of development and of developing countries."<sup>51</sup> Thus, ICSID's third promise combines the first two purposes in the claim that it promotes mutual confidence between host states and foreign investors. Paragraph 9 of the ICSID Report states:

In submitting the attached Convention to governments, the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development. The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of *mutual confidence* and thus stimulating a larger flow of private international capital into those countries which wish to attract it. (Emphasis added)<sup>52</sup>

Professor Toope captures the argument adequately when he challenges the mutual confidence position articulated in the ICSID Report above. He states that the assertion of balanced interests is, "at best, disingenuous."<sup>53</sup> For Professor Toope, the position that a larger flow of private capital is desirable can be legitimately challenged, given the coexistence of a variety of economic systems. He also argues that the idea of confidence is a Western, market oriented conception of economic policy; that the ICSID

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49. This is the report of the Executive Directors attached to the ICSID Convention that explains the need for and the provisions of the Convention.

50. ICSID Report, *supra* note 5, para. 12.

51. *Amco v. Indonesia*, 23 I.L.M. 351, 369 (1984); 1 ICSID REP. 413.

52. Paragraph 13 of the ICSID Report also states that "while the broad objective of the Convention is to encourage a larger flow of international investment, the provisions of the Convention maintain a careful balance between the interests of investors and those of host States . . . ."

53. STEPHEN J. TOOPE, *MIXED INTERNATIONAL ARBITRATION: STUDIES IN ARBITRATION BETWEEN STATES AND PRIVATE PERSONS* 219-20 (1990).

Convention does not “increase a developing state’s “confidence” that a foreign private investor will behave in a manner consistent with public policy or national aspirations”; and that the foreign investor is the only party whose “level of confidence is significantly enhanced.”<sup>54</sup>

Essentially, ICSID’s argument that economic development arises from the protection of foreign investors and private capital stems from a subscription to neoliberal economic theory.<sup>55</sup> Economic liberalism is premised on the assumption that foreign investment is beneficial to host states. As such, it flows from this premise that such investment should be protected through the provision of investment protection mechanisms including international dispute resolution. Also, it is thought that foreign investments enhance the Third World’s development and that “the entirely altruistic reasons for which foreign investments are made are worthy of protection by international law.”<sup>56</sup> However, while it is pertinent that foreign investment is protected, it is equally important not to ignore the negative effects of such investment and extend protection to those affected by the detrimental effects.<sup>57</sup>

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54. *Id.* at 220-21.

55. For conflicting economic theories on foreign investment, see SORNARAJAH, *INTERNATIONAL LAW ON FOREIGN INVESTMENT*, *supra* note 1, at 50-65. *See also*, Kenneth Vandeveld, *Sustainable Liberalism and the International Investment Regime*, 19 MICH. J. INT’L L. 373 (1998) (for a general survey of political economic theories applicable to foreign investment). On stages of economic growth in neoclassical economic theory, see W.W. ROSTOW, *THE STAGES OF ECONOMIC GROWTH* 4-16 (1960); W.W. ROSTOW, *THE PROCESS OF ECONOMIC GROWTH* (1962). On the different circumstances of the West and the post World War II Third World, see ARTURO ESCOBAR, *ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD* 83 (1995).

56. *See* SORNARAJAH, *INTERNATIONAL LAW ON FOREIGN INVESTMENT*, *supra* note 1, at 342 (positing that this argument can be dismissed as being without merit).

57. History is replete with examples of mass disasters that have occurred directly from foreign investment. The Union Carbide disaster in Bhopal in India provides a case in point. *See generally* UPENDRA BAXI, *INCONVENIENT FORUM AND CONVENIENT CATASTROPHE: THE BHOPAL CASE* (1986); UPENDRA BAXI & THOMAS PAUL, *MASS DISASTERS AND MULTINATIONAL LIABILITY: THE BHOPAL CASE* (1986). Most of the time, the local population is the worst hit by the disasters and they are usually written out of the picture of foreign investment. An example is provided by the West African Gas Pipeline project, funded by TNCs, financially guaranteed by the IDA and the Multilateral Investment Guarantee Agency and financially supported by the United States Agency for International Development and the Overseas Private Investment Corporation and has the potential support of the European Investment Bank, the United Kingdom Export Credit Guarantee Department and the United States Export-Import Bank. The operating companies are registered not in any of the four African countries involved—Nigeria, Togo, Benin and Ghana—but in Bermuda, an overseas territory of the United Kingdom. Friends of the Earth reports that the consortium of operating companies have stated clearly that they will not be responsible for the indirect impacts of the project and as a result, the local people will have no means of seeking redress from the various violations that have been outlined as consequences of implementing the project. It is intriguing that IFIs can only see or rather, acknowledge the potential benefits of the project. They refuse to acknowledge the potential negative impacts on the masses. *See generally*



In addition to its two principal functions—protecting foreign investment through the facilitation of investment dispute settlement and facilitating economic development through the promotion of investment flows—ICSID also performs several secondary functions.<sup>58</sup> These include the design of model clauses that refer disputes to ICSID, drafting investment dispute settlement clauses for BITs,<sup>59</sup> publication of investment treaty and legislation volumes, and the organization of conferences on arbitration and other topics. Professor Baker notes that over a thousand ICSID model clauses have been included in investment agreements and treaties.<sup>60</sup> However, many investment treaties and legislation provide for arbitration without privity and do not reflect the balance of interests that ICSID's founding documents purport to achieve. This further enhances the point that the focus on the protection of foreign investment seems to be more paramount than the balancing of interests between Third World host states and foreign investors. For example, even the ICSID Convention and the ICSID Report envisage situations where states could offer unilateral consent to submit disputes to ICSID. Under article 25 of the ICSID Convention and paragraph 24 of the ICSID Report, a host state might give consent to ICSID jurisdiction in its investment promotion legislation and the foreign investor may accept this unilateral offer at the time of initiating proceedings. By enacting such legislation, states give a blanket and general consent to submit to arbitration without the need for further consent in a contract. Third World states usually include such provisions in their investment promotion statutes.<sup>61</sup> These statutory provisions have sometimes formed the basis for ICSID jurisdiction in cases initiated against Third World defendants.<sup>62</sup> Such unilateral consent to investment arbitration

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Friends of the Earth International, *The Myths of the West African Gas Pipeline* (Jan. 2006), available at <http://www.foei.org/publications/pdfs/wagp-inet.pdf>.

58. For example, ICSID's Secretary General often acts as the appointing authority of arbitrators for ad hoc arbitration usually under the United Nations Commission on International Trade Law's (UNCITRAL) Arbitration Rules. See <http://www.worldbank.org/icsid/news/n-16-1-5.htm> (last visited Feb. 15, 2007).

59. This no longer forms a significant part of the institution's work.

60. JAMES C. BAKER, *FOREIGN DIRECT INVESTMENT IN LESS DEVELOPED COUNTRIES: THE ROLE OF ICSID AND MIGA* 62-67 (1999).

61. See INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, *INVESTMENT LAWS OF THE WORLD* (Oceana Publications, Inc., 2005) (1977). While the collection is titled *Investment Laws of the World*, it only includes investment laws of 132 Third World countries and Eastern European economies in transition. It does not include the laws of developed states.

62. *Southern Pacific Properties (Middle East), Ltd. v. Arab Republic of Egypt* (SPP v. Egypt), 3 ICSID REP. 112, 131 (1995) 45, 57-62; 32 ILM 933 (1993); *Manufacturers*

generally forecloses the ability to bring claims seeking to protect the non-commercial interests of Third World peoples before ICSID, as foreign investors retain the right to initiate arbitration proceedings, a privilege which the host state does not have under conditions of arbitration without privity.

From a perusal of ICSID cases, one can conclude that ICSID has relatively fulfilled its first promise of investment protection, since foreign investors have seized the opportunity presented by the availability of the Centre to seek redress for harms allegedly done to their investments. The materialization of the second promise of increased investment flows and Third World development, is however, more difficult to ascertain. In spite of this difficulty, it is necessary to consider ways that ICSID can keep its third promise of "mutual confidence" as this is pertinent to its continued relevance to the Third World. This is necessary in view of the fact that the ICSID Convention is still in force and parties have recourse to the institution. As such, the Third World needs to find ways of making the most of the institution by seeking to enhance its effectiveness in addressing Third World interests. The balance of the article is dedicated to that focus. Essentially, I argue that in order to keep ICSID relevant to the Third World and to foster the fulfillment of its promises, states should be allowed to determine their own economic policies without being penalized for adopting policies that do not conform to prevailing thoughts of IFIs and developed states, as long as such policies will ameliorate difficult situations in their countries. In addition, they should have redress for harms arising from foreign investment for foreign investment, like all investments, includes both detriments as well as benefits.<sup>63</sup>

### III. ICSID AND THE THIRD WORLD: 40 YEARS OF AMBIVALENCE

Like industrialized states sometimes do, many Third World states have simultaneously embraced and rejected the neoliberal economic agenda.<sup>64</sup> On one hand, it has been difficult to avoid the adoption of

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Hanover Trust Co. v. Arab Republic of Egypt, ICSID Case No. ARB/89/1 (1993); Tradex Hellas S.A. v. Republic of Albania, 5 ICSID REP. 47, 70 (2002); Ghaith R. Pharaon v. Republic of Tunisia, ICSID Case No. ARB/86/1, ICSID/16/Rev. 26 (*discontinued*). See also Amazu A. Asouzu, INTERNATIONAL COMMERCIAL ARBITRATION AND AFRICAN STATES 314-15 (Cambridge University Press, 2001).

63. Professor Louis Wells has noted that about 60 to 70 percent of foreign investment projects are beneficial to the host country, while in the remaining percentage, the costs exceed the benefits. Louis T. Wells, *Foreign Direct Investment, in ASIA AND AFRICA: LEGACIES AND OPPORTUNITIES IN DEVELOPMENT* 337, 341 (David L. Lindauer & Michael Roemer eds., 1994).

64. In the context of foreign investment, industrialized states also exhibit nationalistic tendencies. See Kenneth Vandeveld, *The Political Economy of a Bilateral Investment*

neoliberal economic policies due to post-debt crisis conditionalities imposed by the IMF,<sup>65</sup> and other factors like the prevailing provisions of investment agreements and ICSID dispute settlement; and on the other hand, many of these states have expressed reservations on the utility of such policies for development.<sup>66</sup> Essentially, these states have encountered difficulty in espousing alternative economic policies, especially in bilateral relationships with IFIs and in BIT negotiations, although they continue to espouse these alternative ideas in multilateral negotiations, due to their continuous belief in the utility of these alternatives and the strength in their numbers in the latter fora. As stated earlier, many Third World states ratified the ICSID Convention when the institution was first established and many more have become signatories over the years. Thus, in spite of the inability to measure its benefits to the Third World, it is difficult to maintain that ICSID is totally devoid of any benefits. It is possible to assert among other things,<sup>67</sup> that the inclusion of an ICSID arbitration clause in treaties, agreements and domestic legislation have a signaling effect on investment flows, as investors may take that as evidence of a favorable investment environment.<sup>68</sup> However, in spite of

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*Treaty*, 92 AJIL 621 (1998). For example, some industrialized states including France relied on sovereignty erosion arguments during the Organization for Economic Cooperation and Development's (OECD) Multilateral Agreement on Investment (MAI) negotiations, the European Union sought to restrict the application of the most favored nation clause in the MAI negotiations and within the World Trade Organization, and the United States and the European Union continually refuse to liberalize trade in agriculture. On the arguments marshaled against the adoption of the MAI, *see generally* Glen Kelley, Note, *Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations*, 39 COLUM. J. TRANSNAT'L L. 483 (2001).

65. *See generally* Sundhya Pahuja, *Technologies of Empire: IMF Conditionality and the Reinscription of the North/South Divide*, 13 LEIDEN J. INT'L L. 749 (2000).

66. Commentators have sought to explain the ambivalence on the part of Third World states. *See* Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639 (1998); Kenneth Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157 (2005); SORNARAJAH, *INTERNATIONAL LAW ON FOREIGN INVESTMENT*, *supra* note 1, at 24.

67. Factors that affect the flow of foreign investment to Third World countries include a particular country's natural attributes, the size of its market, a large population, the quality of its infrastructure and work force, and of course, its legal and administrative structures. Jeswald W. Salacuse, *Direct Foreign Investment and the Law in Developing Countries*, 15 ICSID REV.-FILJ 382, 386 (2000).

68. *See* Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment in Developing Countries?*, 33 WORLD DEV. 1567 (2005). Although the article is on the effects of BITs on investment flows, an overwhelming majority of BITs include ICSID arbitration clauses, and one can extrapolate the possible

ratifying the ICSID Convention, there have been situations where some states have advanced arguments that are contrary to the position that many traditional proponents of investment protection and dispute settlement espouse.

Although ICSID's contribution to investment flows is difficult to measure, its dispute settlement mandate is relatively clear. ICSID tribunals have engaged mainly in settling disputes between foreign investors as claimants and Third World states as defendants. An overwhelming majority of ICSID cases fall within this category. The most common reaction of states has been to adopt a legal argument open to defendants—challenging ICSID's jurisdiction over disputes. The last section of this part discusses two prominent examples of Third World states' reaction to the simultaneous initiation of ICSID arbitrations against them. Based on the ICSID Convention and the ICSID Report's assertions that the institution would promote mutual confidence between foreign investors and the Third World, the bulk of this part of the article is dedicated to discussions of the ICSID Convention's provisions (and some ICSID cases) that seek to balance the interests of the Third World with those of foreign investors and their home states. The part includes concise discussions of themes such as ICSID's treatment of the Third World's development concerns; the ICSID Convention's provisions on applicable law, scholarly reaction to the provisions and the practice of ICSID tribunals; ICSID's depoliticization agenda; and a discussion of Jamaica and Argentina's reactions to simultaneous initiation of ICSID arbitration against them.

The purpose of this part of the article is to determine how the provisions of the ICSID Convention that purport to balance the interests of the Third World and foreign investors play out in practice. First, in spite of ICSID's claim of providing cooperation for development, this most relevant issue to the Third World has generally not been a prominent feature in ICSID jurisprudence. Second, in practice, the provision on the applicable law has tilted mostly in favor of international law not domestic law. Finally, although ICSID's purported attempt at depoliticizing investment disputes is certainly laudable, one cannot separate this from the general power imbalances in the international economic order. While depoliticization in practice, seems to have worked more in favor of the foreign investor within the realm of ICSID, as states are precluded from politicking at the expense of the foreign investor, disputes cannot be totally depoliticized between host states and the foreign investors' home states within the broader context of international economic law and politics.

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effects of dispute settlement clauses from the authors' argument on the signaling effects of BITs.

*A. Development Concerns*

The development concerns of Third World states have not featured before ICSID tribunals.<sup>69</sup> One would have thought that being one of the major concerns of Third World states that constitute the overwhelming majority of ICSID defendants, ICSID jurisprudence would be replete with principles of the (international) law of development, or at least principles akin to this.<sup>70</sup> Also, given the oft-repeated claim that ICSID possesses the ability to promote mutual confidence between the Third World and foreign investors, it is surprising that references to economic development are sparse in ICSID's jurisprudence. This buttresses the point that the tribunals' focus has gravitated mainly towards investment protection.

The most frequently discussed ICSID decision that explicitly considered issues of economic development is *Klockner v. Cameroon*.<sup>71</sup> The Klockner Group signed an agreement with the Government of Cameroon undertaking to erect a fertilizer plant to be operated as a joint venture between the parties when completed. After erecting the plant, Klockner alleged non-payment by the Cameroonian Government while the latter alleged that the project was poorly implemented. The initial arbitral tribunal read several duties into the agreement, and noted explicitly that the agreement was between a TNC and a developing country. The tribunal was of the opinion that the plant's output was of major importance to the country's

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69. However, some commentators regard the ICSID Convention as "one of the first links in the international law of development." See Phillipe Kahn, *The Law of Development and Arbitration Tribunals*, in *INTERNATIONAL LAW OF DEVELOPMENT: COMPARATIVE PERSPECTIVES* 163, 166 (Francis Snyder & Peter Slinn eds., 1987).

70. On the international law of development, see generally MILAN BULAJIĆ, *PRINCIPLES OF INTERNATIONAL DEVELOPMENT LAW: PROGRESSIVE DEVELOPMENT OF THE PRINCIPLES OF INTERNATIONAL LAW RELATING TO THE NEW INTERNATIONAL ECONOMIC ORDER* (1986); F.V. GARCÍA-AMADOR, *THE EMERGING INTERNATIONAL LAW OF DEVELOPMENT: A NEW DIMENSION OF INTERNATIONAL ECONOMIC LAW* (1990); THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW (Subrata et al. eds., 1992); Oscar Schacter, *The Evolving International Law of Development*, 15 COLUM. J. TRANSNAT'L L. 1-16 (1976). See also R.P. ANAND, *CONFRONTATION OR COOPERATION?: INTERNATIONAL LAW AND THE DEVELOPING COUNTRIES* (1987); KOEN DE FEYTER, *WORLD DEVELOPMENT LAW: SHARING RESPONSIBILITY FOR DEVELOPMENT* (2001).

71. *Klöckner Industrie-Anlagen GmbH v. United Republic of Cameroon & Société Camerounaise des Engrais*, 1 ICSID REV.-FILJ 89 (1986); 2 ICSID REP. 1, 9 (1994). The award focused primarily on the foreign investor's duty of disclosure. The dissenting opinion is reported at 2 ICSID REP. at 77 (1994). Both the majority and dissenting opinions were rendered on October 21, 1983. See Jan Paulsson, *The ICSID Klöckner v. Cameroon Award: The Duties of Partners in North-South Economic Development Agreements*, 1 J. INT'L ARB. 145 (1984).

agricultural sector that formed the foundation of Cameroon's economy. It concluded that it was not enough to merely construct a fertilizer plant; the plant had to have the required capacity and be managed in a manner that fulfilled the attainment of its goals. The tribunal seemed to infer that the performance of the foreign investment contract had to meet the development aspirations of a Third World country like Cameroon. In its decision, the tribunal rejected both the foreign investor's claim and Cameroon's counterclaim. The *Klockner v. Cameroon* award was, however, annulled on the ground *inter alia* that the tribunal had failed to apply correctly, the law of Cameroon to the dispute.<sup>72</sup>

The decision in *Antoine Goetz v. Republic of Burundi* is one that could have generated a sustained engagement with the economic development dimensions of Burundi's actions, especially as the tribunal alluded to the "common good" and "interests of the national economy" that the Government's decision was meant to serve.<sup>73</sup> The decision turned on the expropriatory effects of Burundi's actions as included in the 1989 BIT between Belgium-Luxembourg Economic Union and Burundi that formed the basis for ICSID's jurisdiction. The dispute arose from Burundi's withdrawal of a "free zone certificate" that had earlier granted exemptions from tax and customs duties to the investor's company. The defendant state withdrew the certificate on the grounds that the free zone had ceased to apply to companies engaged in the extraction and sale of ore and the applicant company fell within this category. Based on the parties' subsequent agreement, the tribunal did not issue an award but rendered a decision on liability, finding that the withdrawal of the certificate constituted a measure tantamount to expropriation, specifically, a measure depriving of and restricting property. Given that the BIT allowed the application of both domestic and international law, it would have been well within the tribunal's power to consider, for example, emerging international laws and the right to development. While the tribunal's eventual conclusion is not the focus here and the issue is not about the correctness of the decision, the point made in this article is that in the absence of the consideration of the development impacts of Third World states' decisions and actions vis-à-vis foreign investors, ICSID tribunals might only be scratching the surface of the disputes and not dealing with the major catalyst issues behind the disputes. One can garner this from the

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72. *Klöckner v. Cameroon*, 2 ICSID Rep. at 95 (1994). The annulment decision was delivered on May 3, 1985.

73. *Antoine Goetz v. Republic of Burundi*, 15 ICSID REV.-FILJ 457 (2000); 6 ICSID REP. 3, 4-5 (2004), paras. 112, 126. The Tribunal noted at paragraph 126 that "it is not the Tribunal's role to substitute its own judgment for the discretion of the Government of Burundi of what are 'imperatives of public need . . . or of national interest.'"

fact that in spite of the agreement between the parties, and the tribunal's decision on liability that was reached without adequate consideration of economic development and the impact of the decision on Burundi, differences subsequently emerged as to Burundi's compliance with the terms of the agreement. As a result of the subsequent differences, a new arbitration request was submitted to ICSID in 2001 and a decision has not rendered.

Given the history of ICSID tribunals' approach to dispute settlement, which might not completely dispose of disputes between Third World states and foreign investors, it is easy to conclude that the institution cannot account for Third World interests. However, one can choose to adopt an optimistic view of the institution's ability to turn its attention to both commercial and non-commercial interests in its dispute settlement processes. When considered carefully, even though the general background philosophy of ICSID as an institution is based on the protection of foreign investors, without much consideration of the multifaceted effects of foreign investment, ICSID tribunals have the capacity to infuse awards with development concerns as deemed necessary, as the first tribunal in *Klockner* demonstrated. However, like in *Klockner*, if such decisions are not founded expressly on the applicable law, they might be annulled for being manifestly beyond the tribunal's powers. Nevertheless, this does not have to be so, as such considerations can usually be raised within the context of the law applicable to the dispute. It remains important that some tribunals are willing to explore alternative economic conceptions, particularly those that consider the bigger picture of the needs of the Third World. Even if the tribunals' concept of development remains the classical position, the willingness to look to and beyond investment protection to the economic needs of the country in question represents a crucial starting point for addressing development concerns. For ICSID, to fail to accommodate multiple interests is to fail to transform itself into an international economic order that is constantly evolving and to fail to see that a myopic view of investment dispute settlement will not facilitate the institution's relevance in the international investment order.

### *B. The Applicable Substantive Law*

There are, perhaps, only a few provisions of the ICSID Convention and their applicability in practice that have generated as much debate as the substantive law applicable to disputes. The general position has been

that Third World states have favored the applicability of their domestic law, while foreign investors and their home states have leaned in favor of the applicability of international law.<sup>74</sup> Article 42(1) of the ICSID Convention seeks to balance these conflicting views by providing that “the Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the contracting state party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”

Commentators have sought to interpret article 42(1), many of them articulating the position that international law is supreme. Aron Broches, the principal drafter of the ICSID Convention, has opined that an ICSID “tribunal will first look at the law of the host state and that will in the first instance be applied to the merits of the dispute. Then the result will be tested against international law. That process will not involve the confirmation or the denial of the host state’s law, but may result in not applying it where that law or action taken under that law, violates international law. In that sense, . . . international law is hierarchically superior to national law under Article 42(1).”<sup>75</sup> Professor Weil has also noted that, “the reference to the domestic law of the host state, even if designed only to ascertain whether it is, or is not, compatible with international law, is indeed a pointless exercise, the sole *raison d’être* of which is to avoid offending the sensibilities of the host state.”<sup>76</sup> Where parties have not expressed a choice on the applicable law, ICSID tribunals have taken different positions on the applicability of domestic law, sometimes applying domestic law and at other times, international

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74. This is a North-South paradigmatic conflict on the applicable law, which is beginning to lose its fervor mostly because of the South’s need for investment capital. SORNARAJAH, SETTLEMENT OF INVESTMENT DISPUTES, *supra* note 7, at 28.

75. Aron Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 136 RECUEIL DES COURS 331, 392 (1972). In Ibrahim Shihata & Antonio Parra, *Applicable Substantive Law in Disputes between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention*, 9 ICSID REV.-FILJ 183, 192 (1994) [hereinafter Shihata & Parra, *Substantive Law*], the authors also adopt a similar view, arguing that under the second sentence in article 42(1) of the ICSID Convention, a tribunal could set aside applicable national law where it is inconsistent with international law.

76. Prosper Weil, *The State, the Foreign Investor and International Law: The No Longer Stormy Relationship of a Menage A Trois*, 15 ICSID REV.-FILJ 401, 409 (2000). *Contra* W. Michael Reisman, *The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of its Threshold*, 15 ICSID REV.-FILJ 362, 363 (2000) (arguing that from the drafting history of article 42(1) of the ICSID Convention, it was intended that domestic law should be the default applicable law). Professor Reisman argues that the drafting history does not express “an intent for a disguised superordination of international law in all cases.” *Id.*



law.<sup>77</sup> In fact, Third World states themselves have sought to rely on domestic law or international law depending on which one furthers their case. However, in practice, international law has been the most frequently applied law to disputes submitted to ICSID. For example, in *SPP v. Egypt*, the defendant argued that the law of Egypt was applicable given the fact that the tribunal found jurisdiction based on a domestic Egyptian legislation, but the tribunal found in favor of the claimant on that point, holding that international law was the law applicable to the dispute, as Egyptian law did not cover every point in the dispute.<sup>78</sup> For most Third World countries, their agreements, if they include the host state's domestic law as the applicable law, are usually accompanied by a reference to international law,<sup>79</sup> or some adopt international law as the dominant applicable law, with domestic law playing a supplementary role.<sup>80</sup> Alternatively, like in the NAFTA, the investment agreement in question is designated as the applicable law.<sup>81</sup>

In several instances, Third World states have sought to apply international law to the dispute before ICSID tribunals. In *Santa Elena v. Costa Rica*, the claimant and defendant found themselves in ironic situations where the former argued for the applicability of Costa Rican law and the latter argued that international law was applicable.<sup>82</sup> The tribunal found that Costa Rican law was consistent with international law and that both parties' divergent positions lead to the same conclusion. It applied international law to the dispute and awarded \$16 million in compensation to the claimant.

Positions such as that adopted by Costa Rica in the *Santa Elena* case might suggest that Third World states have embraced the internationalization

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77. In *LETCO v. Liberia*, 26 I.L.M. 647 (1987), 2 ICSID REP. 343, 357-58 (1994), the tribunal found domestic law sufficient as the applicable law.

78. For a commentary on the proceeding, which was subsequently discontinued at the annulment phase, see Georges Delaume, *The Pyramids Stand—The Pharaohs Can Rest in Peace*, 8 ICSID REV.-FILJ 231 (1993).

79. See *Kaiser Bauxite Company v. Government of Jamaica*, ICSID REP. 296 (1993). Commentators have observed that ICSID tribunals apply domestic law where it is found to be in conformity with international law. See Shihata & Parra, *Substantive Law*, *supra* note 75, at 205-206.

80. *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, 30 I.L.M. 577 (1991), ICSID REV.-FILJ 526 (1991).

81. See *Maritime Int'l Nominees Establishment v. Government of the Republic of Guinea*, ICSID REV.-FILJ 95, 111 (1990).

82. *Compania del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, 15 ICSID REV.-FILJ 169 (2000), paras. 61, 62, 64, 65. See also *Klöckner v. Cameroon*, *supra* note 72.

of foreign investment disputes. However, this is not necessarily so. The more accurate position is that these states (like foreign investors) adopt the legal position that best suits their interests at that point in time, and in the Santa Elena case, Costa Rica believed that the international law position was more favorable to its interests. But generally, international law is the law most frequently applied to disputes settled by ICSID tribunals.

### *C. Depoliticization*

One of the major contributions of ICSID to the settlement of investment disputes is its ability to exclude the home states of foreign investors from formally participating in the dispute once a claim has been submitted to ICSID.<sup>83</sup> The ICSID Convention deems the exclusion of diplomatic protection of foreign investors necessary to balancing the interests of Third World states, and powerful capital exporting states and their nationals who invest abroad.<sup>84</sup> Also, commentators regard ICSID's Administrative Council—the institution's governing body—with its one representative per country quota and each having an equal vote, as a reflection of equal representation for all contracting states and a balance of interests.<sup>85</sup>

In practice, ICSID's depoliticization agenda—to the point that it entails avoiding the formal espousal of foreign investors' claims by their home states—has been successful, as there have been no cases necessitating diplomatic protection in the context of ICSID. However, given the nature of international investment law generally, investment dispute settlement always remains politicized to an extent, at least, at the international level. States have a stake in the interpretations of clauses and the jurisprudence of arbitral tribunals. A case on point is the interpretations adopted by the NAFTA Free Trade Commission—which comprises the three state parties to NAFTA—in 2001.<sup>86</sup> Of course, it

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83. This position is aptly stated in article 27(1) of the ICSID Convention as follows: "No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute."

84. See generally SHIHATA, *DEPOLITICIZATION OF INVESTMENT DISPUTES*, *supra* note 45; Andrew Jacovides, *International Tribunals: Do they Really Work for Small States?*, 34 NYU J. INT'L L. & POL. 253 (2001).

85. SHIHATA, *DEPOLITICIZATION OF INVESTMENT DISPUTES*, *supra* note 45, at 5. See articles 4(1) & 7(2) of the ICSID Convention for the provisions on the administrative council.

86. NAFTA Free Trade Commission, *Notes on Interpretation of Certain Chapter 11 Provisions* (31 July 2001), <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpreten.asp>. For many, investor-state arbitration initiated against Canada and the United

might not be ICSID's place to address the politicization of investment disputes on a general international level, especially between majority of Third World states on the one hand, and foreign investors and developed home states on the other hand; but one should not ignore the realities of international investment dispute settlement—that it is an arena for power struggles aimed at espousing particular view points as representing the position of international law on foreign investments. As such, the better claim for ICSID's proponents to make might be the specific assertion that ICSID excludes formal diplomatic protection once a case is before the institution and not the broader and more encompassing claim that ICSID depoliticizes investment disputes.

#### *D. Third World States and Reactions to ICSID: Some Examples*

Generally, the relationship between Third World states and ICSID has seemed cordial. However, despite this appearance of cordiality and even though most of ICSID members are Third World states, there have been some negative reactions to the institution. Third World states are not alone in this regard as even developed states in the context of NAFTA—Canada and the United States (along with Mexico)—have proceeded to retreat from liberal access to investor-state arbitration and have sought ways to restore their regulatory sovereignty.<sup>87</sup> This section considers three examples of adverse reactions to ICSID. First, most Latin American states did not ratify the ICSID Convention at the institution's inception due to their adoption of the Calvo doctrine.<sup>88</sup> However, over the years these states have gradually embraced the ICSID Convention.<sup>89</sup> This

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States under NAFTA came as a surprise as developed states are not used to being defendants in institutional international investment arbitration.

87. Charles H. Brower II, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 COLUM. J. TRANSNAT'L L. 43 (2001); Marcia J. Staff & Christine W. Lewis, *Arbitration Under NAFTA Chapter 11: Past, Present and Future*, 25 HOUS. J. INT'L L. 301 (2003).

88. For an introduction to the Calvo doctrine and its effects in relation to ICSID, see SHIHATA, *DEPOLITICIZATION OF INVESTMENT DISPUTES*, *supra* note 45. It is important to note that even though critical of Latin American states' adoption of the Calvo clause, developed states have also adopted similar principles by excluding oil and gas disputes from international arbitration until recently when the negotiation and entry into force of the Energy Charter Treaty necessitated submitting oil and gas disputes to international arbitration, even for developed state parties to the Treaty. See Walde, *From Dispute Settlement to Treaty Implementation*, *supra* note 13, at 437-38.

89. A group of Third World states including states mostly from Latin America—Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru,

phenomenon has been explained as being due to the perceived benefits of ratifying the ICSID Convention. For example, Professor Baker states that since Peru ratified the ICSID Convention, it has become more appealing to foreign investors.<sup>90</sup> Moreover, ICSID might be relevant even to states that do not ratify the ICSID Convention, as an ICSID tribunal may assume jurisdiction in a dispute that involves such a state through the Additional Facility Rules. Mexico provides a case on point. Even though it has not ratified the ICSID Convention, by being a state party to NAFTA, Mexico has been a defendant in seven concluded and six pending cases under ICSID's Additional Facility Rules.

Second, in spite of the fact that Jamaica was one of the states that ratified the ICSID Convention at the institution's inception, it unilaterally withdrew from three simultaneous ICSID proceedings citing technicalities and rejected ICSID's jurisdiction.<sup>91</sup> The disputes arose because contrary to an agreement that stabilized local taxes in relation to aluminum producers for 25 years—the entire period of the bauxite mining concession in question—the Jamaican government levied a tax on bauxite mining. The ICSID tribunal made a ruling on jurisdiction but the cases were discontinued before the tribunal could render a decision on the merits of the cases. Baker states that “most economic analysts at that time forecast that the Jamaican Government's actions in this area would be costly to that country's development. The international stigma attached to the withdrawal by a government from an internationally sanctioned procedure after accepting that procedure certainly has long term ramifications for Jamaica.”<sup>92</sup> It would have been instructive if the tribunals had expressed their opinion on the stabilization clauses and the apparent tensions they generate, had Jamaica defended the cases instead of settling.

Third, and more recent, is the case of the more than thirty ICSID cases pending against Argentina. Despite its adoption of neoliberal economic policies, Argentina experienced severe economic crisis in 2001. In

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the Philippines, Uruguay and Venezuela—expressed their disapproval with the proposed ICSID Convention at the time it was being drafted. *See* International Bank for Reconstruction and Development Resolution on Settlement of Investment Disputes, *adopted* Sept. 10, 1964, 3 I.L.M. 1171, 1174-75 (1964). In more recent years, all these states except Brazil and Mexico have ratified the *Convention*. The Dominican Republic and Haiti have only signed but not ratified the *Convention*.

90. BAKER, *supra* note 60, at 179.

91. Alcoa Minerals of Jam., Inc. (U.S.) v. Jamaica, 4 Y.B. COM. ARB. 206 (1979); Kaiser Bauxite Company v. Jamaica, 114 I.L.R. 144 (1999); ICSID REP. 296 (1993); Reynolds Jam. Mines Ltd. v. Jamaica, ICSID Case No. ARB/74/4 (1975). All three cases were discontinued and settled.

92. Baker, *supra* note 60, at 75. While the impacts of Jamaica's actions may not have been measured at the time or even fully measurable, it is possible that there were initial panic reactions by foreign investors. However, it is uncertain that Jamaica lost investment flows that could have accrued to it.

response to the crisis, it adopted policy choices that resulted in what has been referred to as the “daunting task” of defending more than thirty ICSID cases. Commentators have estimated that Argentina is likely to lose most of these cases and faces millions of dollars in compensation.<sup>93</sup> In reaction to this, the Argentinean government has adopted the extreme legal position that its BITs obligations are unconstitutional and therefore unenforceable under domestic law. Thus, there is a case of growing opposition not only to investment treaties but also to ICSID in Argentina.<sup>94</sup>

These examples, especially the last one, reflect the legitimacy crisis that ICSID faces. This is mostly attributable to the Convention’s assumption of a single economic rationale for investment protection and the tribunals’ insufficient attention to interests that do not necessarily conform to the neoliberal paradigm. Most Third World states’ needs are not reflected in tribunal decisions, which explain their ambivalence towards ICSID. The argument is not that ICSID tribunals should decide cases where states clearly breach their obligations in favor of those states. Rather, it is that ICSID tribunals should recognize, like the initial Klockner tribunal did, but within the parameters of the applicable law, that there may be explanations for a state’s actions, and factor this into their decisions, even if they eventually reach a finding against the state.

#### IV. TOWARD THE ACCOMMODATION OF MULTIPLE PARADIGMS AND INTERESTS

International law like all law, is changing.<sup>95</sup> At the time the ICSID Convention was drafted, it was the first of its kind—having given individuals the ability to sue states for breaches of obligations arising from investments. Today, forty years later, international law has gone further than the ICSID Convention contemplated. NGOs have proliferated and

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93. Jason Webb Yackee, *Are BITs Such A Bright Idea? Exploring the Ideational Basis of Investment Treaty Enthusiasm*, 12 U.C. DAVIS J. INT’L L. & POL’Y 195, 222 (2005).

94. See 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 INVESTMENT & TRADE 417 (2005); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005).

95. MARGARET DAVIES, *DELIMITING THE LAW: ‘POSTMODERNISM’ AND THE POLITICS OF LAW* 114 (1996) states that the law is “a becoming rather than a being.” On the changes to international law in the context of international dispute settlement see ORREGO VICUNA, *INTERNATIONAL DISPUTE SETTLEMENT IN AN EVOLVING GLOBAL SOCIETY: CONSTITUTIONALIZATION, ACCESSIBILITY, PRIVATIZATION* (2004).

have become a force to be reckoned with in the international order. Human rights and international environmental law have become major areas of international law and the rights of natural persons have garnered considerable attention that cannot be ignored. The economic development of the Third World has also assumed a magnitude beyond what it was when ICSID was established.

In recognition of the changing nature of international investment law, Professor Sornarajah notes three conflicting paradigms that have arisen in relation to foreign investment.<sup>96</sup> Previously, there were mainly two conflicting views—that of the Third World on the one hand, and TNCs as well as developed states on the other hand. However, presently, NGOs have carved a niche for themselves in espousing labor, environmental, and human rights claims. The free market paradigm, favored by many developed states, relies on several principles including, the free movement of foreign investment (a principle emphasized in ICSID's preamble); sanctity of the foreign investment contract; the international minimum standard; "full compensation" in the event of expropriation; international arbitration of foreign investment disputes; and the creation of international treaty regimes on investment protection. The prevalent Third World approach is supported by principles like the absence of freedom of entry for investment, the possibility of restructuring contracts based on arguments of sovereignty, national standard of treatment, localization of the foreign investment contract, and maintaining a difference between state contracts and ordinary contracts. Mostly, because of their development concerns and the need to attract foreign investment, Third World states usually contract outside the framework of these principles, for example, delocalizing foreign investment contracts by submitting to international dispute settlement. In spite of this, they usually espouse alternative views in multilateral forums, which do not always correspond with those of foreign investors and the majority of developed capital exporting states. The third paradigm, favored by NGOs, adopts a people-centered approach that transcends positivist conceptions of international law. Its focus is on the environment and human rights, and sometimes, economic development. Claims by NGOs are not always in tandem with the positions espoused by either developed or Third World states.

Although the foregoing classification represents the dominant views that these groups subscribe to, some caveats are necessary. First, as stated earlier, Third World states often contract outside the principles they subscribe to for several reasons, such as the need to attract foreign investment, which is almost always achieved on particular terms based on the developed countries' free market paradigm. However, this does

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96. SORNARAJAH, SETTLEMENT OF INVESTMENT DISPUTES, *supra* note 7, at 77-84.

not necessarily imply that Third World states have changed their ideas on the international law on foreign investment. Second, developed states also adopt different arguments depending on whether they are in the position of capital exporters or capital importers. As capital exporters, they generally subscribe to the free market paradigm but as capital importers they make arguments similar to those adopted by Third World states. The position of NGOs is not entirely clear, and it will not be out of place to question whether there is an NGO paradigm in international investment law which is separate from the political economy of developed and Third World states. Irrespective of the conclusions on this point, there is clearly a paradigm that takes environmental and human rights issues into account. This is sometimes deployed as a strategic defense argument by developed as well as Third World states. Largely, the three groups can be identified based on the categorization above, with cautionary considerations of the intersections that sometimes occur.

Even though there have been general changes in international law and the different view points described above exist, ICSID is generally premised on a positivist conception of international law, a view that cannot accommodate the changes to international law without some deliberate re-conception. In order to maintain its relevance in an “evolving global society”, ICSID needs to accommodate divergent interests and multiple views expressed by different stakeholders in international investment. If this cannot be achieved, the institution cannot validly claim to be located in a space where it can continue to be reckoned with as the premier international investment dispute settlement institution. Since ICSID already adequately provides for investment protection, I will not address investment protection in my suggestions in this part. Rather, the focus will be on those interests that have not been adequately represented and which threaten the continued relevance of the system.

#### *A. Previous Recommendations to Enhance ICSID's Effectiveness*

Apart from considerations of incorporating an appeal mechanism into ICSID, which the institution decided not to adopt in the most recent amendments of its rules in April 2006, most of the suggestions for enhancing ICSID's effectiveness have focused on procedure.<sup>97</sup> However, a

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97. See ICSID Secretariat, Possible Improvements of the Framework for ICSID Arbitration, ICSID Secretariat Discussion Paper (Oct. 22, 2004), <http://www.worldbank.org/icsid/highlights/improve-arb.pdf>. See also Howard Mann, et al., *Comments on ICSID*

few commentators have taken on the issue of addressing substantive effectiveness. In the concluding chapter of his book on ICSID, Moshe Hirsch makes some recommendations for enhancing ICSID's effectiveness.<sup>98</sup> His suggestions largely turn on possibilities for broadening ICSID's substantive and personal jurisdiction. He argues that any changes to ICSID's substantive jurisdiction to allow it to settle non-investment disputes will substantively change ICSID's character contrary to the aim of its founders. On broadening personal jurisdiction to allow ICSID to settle disputes that arise between parties other than states and foreign investors, he argues that this will not detract from ICSID's character as an investment dispute settlement mechanism. However, he does not recommend that the Centre should settle disputes between states as this would amount to politicization. Nevertheless, he suggests that a state should be allowed to initiate proceedings against another state where the claimant state has substantially participated alongside the private investor in the investment project in the host state. He bases this suggestion on the rationale that "the present jurisdictional limitation of the Centre to settle only bilateral transactions, on one side of which is the private investor, with the host state on the other side, is likely to frustrate the comprehensive and final settlement of the investment dispute among all the parties to the dispute."<sup>99</sup> I do not subscribe to such jurisdictional expansion for two reasons. First, such expansion of jurisdiction will amount to politicization of investment disputes, which ICSID seeks to avoid, and will detract from the purposes of the Convention. The Convention expressly states that there should be no interference from the home state of the foreign investor where a dispute is before the Centre and the argument on comprehensive and final settlement of a dispute is not strong enough to make ICSID detract from one of its primary aims. Also, even where a home state and a foreign investor carry out an investment in the host state together, a settlement of the dispute in relation to the foreign investor should be sufficient disposal of any claims by the home state, since they would be acting in concert. Second, Hirsch's argument seems biased in favor of a position where the claimant is always a foreign investor and the defendant, a state. He does not envision a situation where an investor and his home state are in breach of an investment agreement. In that

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*Discussion Paper, "Possible Improvements of the Framework for ICSID Arbitration"* (Dec. 2004), [http://www.iisd.org/pdf/2004/investment\\_icsid\\_response.pdf](http://www.iisd.org/pdf/2004/investment_icsid_response.pdf); Luke Eric Peterson, *All Roads Lead out of Rome: Divergent Paths of Dispute Settlement in Bilateral Investment Treaties*, in *INTERNATIONAL INVESTMENT FOR SUSTAINABLE DEVELOPMENT: BALANCING RIGHTS AND REWARDS* 123 (Lyuba Zarsky ed., 2005).

98. HIRSCH, *supra* note 5, at 155-64.

99. *Id.* at 157-58.



case, can the host state bring a claim against both parties before ICSID too? He does not raise this question; nor does he proffer an answer to it.

Hirsch also suggests that personal jurisdiction may be broadened by allowing the Centre to deal with disputes arising between foreign private investors and private individuals or companies in the host state. Given the present case load of ICSID and its focus on disputes involving a state party or entity, private parties that enter into agreements should be able to settle their disputes through ad hoc international commercial arbitration, without implicating an international treaty-based mechanism like ICSID that retains its validity as such, through the involvement of states in the dispute settlement proceedings. It is understandable that such suggestions would have been made in 1993 when ICSID's caseload was not as heavy. Presently, with its caseload, the Centre does not need to expand its jurisdiction, rather, it needs to be effective in discharging its duties in relation to its current jurisdiction.

In considering the arbitrability of disputes, Professor Sornarajah has suggested that some categories of investment disputes should be settled by domestic courts or the International Court of Justice (ICJ).<sup>100</sup> He argues that the ICJ may be a more appropriate forum where international public interest is involved; and domestic courts may constitute better forums, where national interest is at stake. Even though the argument is meritorious, it is limited for two reasons. First, states are unwilling to submit investment disputes to the ICJ,<sup>101</sup> and even more so, the ICJ's jurisdiction is limited to inter-state dispute settlement. Second, and a point which Professor Sornarajah readily concedes, investors are skeptical about the domestic legal systems of host states. Further, considerations of sovereign immunity and private international law rules on *forum non conveniens* make the submissions of disputes to home states of foreign investors difficult.<sup>102</sup> Thus, until a time when states will be willing to

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100. SORNARAJAH, SETTLEMENT OF INVESTMENT DISPUTES, *supra* note 7, at 174-76.

101. For example, one of the few investment cases that have been submitted to the ICJ, the ELSI case, was submitted to a chamber of the ICJ and not the full court. *Elektronika Sicula S.p.A. (U.S. v. Italy)* 1989 I.C.J. REP. (Sec. 108) 65 (July 20, 1989).

102. This does not mean that some jurisdictions, especially the United States, have not assumed jurisdiction on claims brought by private individuals against United States' TNCs. However, this has not always been on the basis of domestic legislation providing for such jurisdiction foundations. For example, the United States' court assumed jurisdiction in *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002) based not on the *Alien Torts Claims Act*, but on the basis that there is a universal jurisdiction over violations of *jus cogens* principles of international law, irrespective of nationality. It is noteworthy that even though United States' courts have assumed jurisdiction in these cases, there has not

submit inter-state investment claims to the ICJ and when sufficient rules on private international law allowing access to home states courts are fully developed, one needs to consider the possibility of addressing public interest claims within ICSID. Next, I consider some suggestions for enhancing ICSID's effectiveness in this regard.

## *B. Recommendations for Balanced Dispute Settlement*

### *1. Adopting a More Robust Analysis of Investment Disputes*

First, it is important to distinguish between ICSID and ad hoc international arbitration. ICSID is a creation of treaty; thus, it potentially has a level of international legitimacy not shared by regular ad hoc arbitration. In addition, ICSID settles investment disputes involving at least one state party or entity, and it does not engage in ordinary commercial arbitration between private parties. As a result of the position that it occupies in the international economic order, it should be able to envision that public interest cases would arise since state parties are involved and they more often than not have other interests apart from purely commercial interests at stake.

Because it is an international institution specializing in settling investment disputes, ICSID should situate itself in a space where it can take matters of international concern and public interest into account—including the concerns of Third World peoples, economic development, environmental protection and human rights. These issues are not necessarily extra-legal since they all have international rules applicable to them and the bulk of the law applicable in ICSID proceedings is international law. So far, environmental issues have been the most prevalent public interest matters that ICSID tribunals have addressed.<sup>103</sup> One could derive a basis for the public interest argument from the ICSID Report's position on promoting "mutual confidence" between states and foreign investors.<sup>104</sup>

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been any finding of liability so far. On the problems with *forum non conveniens*, see BAXI, *supra* note 57; Upendra Baxi, *Mass Torts, Multinational Enterprise Liability and Private International Law*, 276 RECUEIL DES COURS 297 (1999).

103. See *Compania del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, 15 ICSID REV.-FILJ 169 (2000); *Metalclad Corporation v. United Mexican States*, 40 I.L.M. 36 (2001); *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, 43 I.L.M. 133 (2004).

104. Some ICSID tribunals have alluded to the responsibility of foreign investors in addition to their rights in some decisions, although not to the substantial degree that this article seeks. See *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (May 25, 2004), <http://www.asil.org/ilib/MTDvChile.pdf>; International Institute for Sustainable Development, *Investment Treaty News* (2006), [http://www.iisd.org/pdf/2006/itm\\_dec\\_19\\_2006.pdf](http://www.iisd.org/pdf/2006/itm_dec_19_2006.pdf); *World Duty Free Co., Ltd. v. Republic of Kenya* (Oct. 4, 2006), [http://www.investmentclaims.com/decisions/WDF-Kenya\\_Award.pdf](http://www.investmentclaims.com/decisions/WDF-Kenya_Award.pdf).

However, it is possible to argue that the “mutual confidence” clause is included in the Report and not the Convention. Such contention could be resolved by the application of the rules of interpretation in articles 31 and 32 of the Vienna Convention on the Law of Treaties, which recognizes supplementary means of interpretation.<sup>105</sup> Moreover, the ICSID Report is attached to the ICSID Convention and has been adopted as the document that describes the provisions of and explains the need for the Convention. Apart from the ICSID Report, the preamble to the ICSID Convention alludes to the need to encourage “international cooperation for economic development” and if the Centre is to continue to have any relevance in the multifaceted 21st century investment environment, the tribunals need to take matters of development into account. The OECD’s proposed Multilateral Agreement on Investment (MAI) negotiations provides a case on point. Because of the MAI’s inability to address divergent interests even among developed states, and through the clamor of NGOs, the negotiations were eventually derailed.<sup>106</sup>

The suggestion here is not that ICSID should address purely human rights, economic development or environmental issues, as doing so would be outside its jurisdiction if they do not arise from an investment. Rather, ICSID tribunals should not refrain from considering these issues where they constitute legal disputes arising directly out of an investment as contemplated by article 25(1) of the ICSID Convention. Investment disputes between states and foreign investors by their very nature implicate interests beyond the commercial, and it does a disservice to those affected to keep mute about these public interest matters. However, if some argue that considering non-commercial interests in addition to commercial interests amounts to overstretching article 25(1), recourse could be had under ICSID’s Additional Facility Rules, which allow the settlement of disputes that do not arise directly out of an investment. The limitation of this is that by article 3 of the Additional Facility Rules, the ICSID Convention, and its potential benefits do not apply to such proceedings.

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105. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679. The analysis of articles 31 and 32 of the Vienna Convention in MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 65-70 (5th ed. 2005) are instructive in this respect.

106. Riyaz Dattu, *A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment*, 24 FORDHAM INT’L L.J. 275 (2000); Kelley, *supra* note 64.

## 2. *Disinterested Development of the International Law on Foreign Investment*

The international law on foreign investment is still largely a contested site and one amenable to construction by dominant voices, including ICSID. ICSID's privileged position in this regard is enhanced by its gradual assumption of the status of a regime in foreign investment dispute settlement,<sup>107</sup> as a significant number of investment treaties, domestic legislation, and investment contracts refer disputes to the institution and it has the opportunity of interpreting the provisions of these documents.<sup>108</sup> In fact, Regulation 22(2) of ICSID's Administrative and Financial Regulations envisages the institution's contribution to the development of the international law on investments. Even though arbitral awards constitute a subsidiary source of international law,<sup>109</sup> and even though it is usually argued that arbitral tribunals are not subject to the doctrine of precedent, ICSID is in a good position to facilitate the development of clear rules on international investment law. Commentators usually note the difficulty of adopting consistent decisions in investment treaty arbitration.<sup>110</sup> While this is a legitimate concern when considering a host of dispute settlement options available in the investment regime, in the case of ICSID, which is a single institution, although there are no standing tribunals, and even without adopting a precedent based approach, there is room for the development of rules that eventually metamorphose into foreign investment laws. However, a lopsided support for any economic theory or any side of the debate that plagues this area of the law will not bode well for the development of the international law on foreign investment. Like Article 1 of the Charter of Economic Rights and Duties of States provides, "every State has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever." It recognizes the rights of states to determine their own destiny, although states' international obligations acquired under international investment treaties, suggest that exercising this right would require the delicate balancing of several competing interests.

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107. On a developing investment regime, see SORNARAJAH, SETTLEMENT OF INVESTMENT DISPUTES, *supra* note 7, at 163-172; Alvarez, *supra* note 8.

108. See *infra* notes 14-18 and accompanying text.

109. Statute of the International Court of Justice, Jun. 26, 1945, 59 Stat. 1055, 1060, T.S. No. 993, art. 38.

110. See generally Susan Franck, *supra* note 94; Alvarez, *supra* note 8.

The international law on foreign investment should not write off the applicability of domestic law thereby precluding states from expressing conceptions of development developed locally, especially where this conflicts with economic (neo)liberalism, and should not preclude states from maintaining their identities, their peculiarities and their difference, if any. Take the case of Argentina for example; analysts have predicted that it would lose most of the cases pending against it before ICSID and it adopted several counterarguments in response to this barrage of cases. Definitely, like any other state, or even any defendant generally, Argentina would have put up a defense, but it is unlikely that it would have resorted to its desperate arguments if it believed that its interests will be adequately accounted for. These arguments generally reveal that there is an intersection between domestic economic policies and ICSID cases that one cannot afford to ignore. ICSID disputes usually extend beyond mere disagreements between foreign investors and states, as they very often implicate the interests of millions of people that are affected by economic and other policies that form the subject of contention before ICSID tribunals. Argentina's argument in the jurisdictional phase of the *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic* case is instructive in this respect.<sup>111</sup> Argentina argued *inter alia* that the dispute was about the wisdom of general economic measures taken by the Argentinian government to deal with the economic and financial crisis it was facing and were general measures not directed specifically at the claimants. The claimants taking a contrary position, contended that Argentina's measures "specifically, concretely, and directly" violated commitments that it made to them as foreign investors in the privatized water industry. In particular, the claimants argued that Argentina failed to "reestablish the concession's financial equilibrium and to adjust tariffs." In paragraph 29 of its decision, the tribunal held that "the disagreement arises directly out of the investment impacted by governmental measures, not out of the measures themselves." It asserted that it was not concerned with "the wisdom, legality or soundness of the policy measures taken by Argentina to deal with the

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111. *Suez, Sociedad General de Aguas de Barcelona S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19 (Aug. 3, 2006), <http://ita.law.uvic.ca/documents/SuezVivendiAWGjurisdiction.pdf> (Decision on Jurisdiction); *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19 (May 19, 2005), <http://www.worldbank.org/icsid/cases/ARB0319-AC-en.pdf> (Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*).

economic crisis.” In spite of this argument, one cannot overlook the reality that Argentina’s ICSID cases arose out of measures the state took in reaction to its financial crisis.

Generally, states are more likely to take responsibility for the effects of the policies they adopt if they make such decisions based on the needs of the state and its peoples and not based on the imposition of foreign models or standards; for in reality, one size does not necessarily fit all states. This expression of domestic economic policies that may facilitate economic development is an important factor that ICSID tribunals cannot afford to rule out without backlash from the Third World. ICSID tribunals can be more proactive and are well situated to facilitate the development of a robust international law on investment. Such law is one that should consider all the necessary facets and effects of investment, including economic development, and environmental and human rights considerations. This is necessary to maintain ICSID’s effectiveness and continued relevance at a time where such issues are of international concern.

### *3. Constitution of Panels*

In order to accommodate diverse interests, some might argue that ICSID arbitrators are not competent to address human rights and environmental questions that arise directly out of an investment. This argument might derive from the qualification of ICSID arbitrators and the fact that the system like other arbitral systems is a consensual one where the parties select the arbitrators.<sup>112</sup> However, it is important to assume that arbitrators are independent and impartial and will discharge their duties to the best of their ability. The question of qualification is different though. According to article 13 of the ICSID Convention, arbitrators and conciliators are to be “persons of high moral character” having “recognized competence in the fields of law, commerce, industry or finance who may be relied upon to exercise independent judgment.” Clearly, this provision envisions mostly commercial disputes. However, other legal disputes may arise directly out of an investment and in order to enhance ICSID’s effectiveness in addressing legal (public interest) disputes

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112. See HOWARD MANN & KONRAD VON MOLTKE, A SOUTHERN AGENDA ON INTERNATIONAL INVESTMENT?: PROMOTING DEVELOPMENT WITH BALANCED RIGHTS AND OBLIGATIONS FOR INVESTORS, HOST STATES AND HOME STATES 17 (2005), <http://www.iisd.org/publications/pub.aspx?id=687> (suggesting that arbitrators in investment dispute settlement should be selected in a neutral manner and not by the parties to the dispute). The issue in this section of this article is not about who selects the arbitrators rather, the focus is on the qualifications of arbitrators that are selected, irrespective of the identities of those that do the selection.

that arise out of investments, there is a need for deliberate constitution of panels to reflect this.

I do not see any immediate need for amending the Convention on this point (more so, the procedure for amending the Convention is rigorous) or to include an additional mechanism as was done in 1978, when the Additional Facility Rules were included. Environmental and human rights lawyers, for example, are covered by article 13, as competence is not restricted to any particular area of law. This is important, for breaches of environmental and human rights laws in the course of carrying out investment amounts to legal disputes that arise from an investment. In the absence of an amendment, the responsibility falls on the parties to the disputes to select arbitrators with expertise in these areas where necessary. Any additional responsibility accrues to the Chairman of ICSID's Administrative Council, who is the President of the World Bank,<sup>113</sup> to select arbitrators learned in these matters in those instances where the Chairman assumes responsibility for selecting arbitrators on behalf of the parties where they do not appoint the arbitrator(s).<sup>114</sup>

#### 4. *Drafting Equal Model Clauses*

Although the ICSID Convention does not address this point explicitly, paragraph 13 of the ICSID Report states that "the Convention permits the institution of proceedings by host States as well as by investors and the Executive Directors have constantly had in mind that the provisions of the Convention should be equally adapted to the requirements of both cases." This provision remains relevant in spite of paragraph 24 of the ICSID Report that allows unilateral offers by states in domestic investment promotion legislation and acceptances by foreign investors of such offers of consent to ICSID jurisdiction. To date, majority of ICSID cases have been instituted by foreign investors against Third World states. The enabling agreements that provide such consent usually incorporate unilateral dispute settlement clauses that give rise to arbitration without privity in favor of the foreign investor, while the host state does not have a similar right. This totally defeats host states' ability to bring claims and sometimes, even counterclaims.

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113. ICSID Convention, *supra* note 5, art. 5.

114. *Id.* art. 38. By article 52(3) of the ICSID Convention, the Chairman of the Administrative Council is also responsible for appointing all members of *ad hoc* annulment committees.

Despite arbitration without privity clauses that now seem to prevail, by paragraph 13 of the ICSID Report, ICSID contemplates a dual dispute settlement mechanism, and as part of its secondary role in drafting model clauses, it could encourage the drafting of reciprocal investment dispute settlement clauses. This is important because in the absence of this, states will be precluded from initiating claims before ICSID and its purpose of enhancing “mutual confidence” will be partly defeated. Also, in order to avoid being considered as a system that places lopsided emphasis on the interests of foreign investors, in their information dissemination role, ICSID representatives should discourage or at least not encourage the drafting of clauses that lead to arbitration without privity.

## V. CONCLUSION

ICSID is capable of effecting changes. It established Additional Facility Rules in 1978. Also, procedurally, ICSID has commenced the development of a system that relies on transparent investment dispute settlement in recognition of the multiple rights that are implicated. For example, subject to exceptions, the recently amended ICSID Arbitration Rules, which came into force on April 10, 2006, allow ICSID tribunals to accept written amicus curiae briefs.<sup>115</sup> This came in response to the clamor for transparency in such cases as *Aguas del Tunari, S.A. v. The Republic of Bolivia*<sup>116</sup> and *Aguas Argentinas v. Argentine Republic*.<sup>117</sup> However, the suggestions in this article are more fundamental and may require some time to substantiate. They relate to ICSID’s continued relevance to the Third World and would necessarily involve challenges to dominant voices on the international law on foreign investment and investment dispute settlement. In my view, if the system ceases to be relevant, designing effective rules of procedure, as important as they are, becomes pointless.

The discussions in this article have focused on states and foreign investors as contemplated by ICSID. ICSID jurisdiction does not extend to cases where individuals may need to espouse claims against foreign investors without the intervention of states. A number of such claims, especially human rights claims arising from investments, have been submitted to United States’ Courts under the Alien Torts Claim Act.<sup>118</sup>

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115. ICSID, Rules of Procedure for Arbitration Proceedings, Rule 37 (Apr. 15, 2006), available at <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm>.

116. *Aguas del Tunari, S.A., v. Republic of Bolivia*, 20 ICSID REV. 450 (2005).

117. See *supra* note 111.

118. 28 U.S.C. § 1350 (2006) or 28 U.S.C.A. § 1350 (West 2006). *Doe v. Unocal Corp.*, 248 F.3d 915 (9th Cir. 2001) provides an example on this point. For a recent analysis of *Doe v. Unocal* and similar cases, see Andrew J. Wilson, *Beyond Unocal: Conceptual Problems in Using International Norms to Hold Transnational Corporations*



While one could explain ICSID's lack of focus on cases where individuals seek to enforce international obligations against foreign investors as being outside the institution's jurisdiction, the lack of adequate attention to non-commercial interests in those cases within its jurisdiction is non-excusable. This position reveals the failure of ICSID, and international law to develop fast enough to meet the challenges of globalization. Or rather, this reveals the unwillingness of ICSID and international law to shed positivist underpinnings and actively adopt a robust approach to investment dispute settlement. Accommodating multiple interests is not a task beyond the reach of ICSID; rather the question remains whether the tribunals will be willing to adopt such a course.

