ICSID'S JURISDICTIONAL JURISPRUDENCE: LEGITIMACY IN THE BALANCE.

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I. INTRODUCTION

The International Centre for the Settlement of Investment Disputes (ICSID) was created to promote global economic development through private international investment.[2] On one hand, ICSID has given foreign investors an opportunity to invest in states that have poor judicial systems or are politically unstable.[3] On the other hand, ICSID has given developing countries the opportunity to build their economies through foreign direct investment (FDI).[4] However, current backlash culminating over the past decade – mainly the denunciation of ICSID by both Bolivia and Ecuador - indicates that ICSID is no longer serving its purpose, and its existence is being threatened.

For 21 years, ICSID jurisdiction was almost exclusively based on State consent manifested in a contractual agreement between the investor and the host State.[5] In the 1990s, after the proliferation of bilateral investment treaties (BITs), ICSID began to find consent of the host State to arbitrate in BITs, despite the lack of a direct agreement between the host State and investor. Now, the bilateral investment treaty-based consent cases have outnumbered contract-based consent cases six to one.[6]

BITs are usually concluded between developed (investor) and developing (host State) countries and were created to protect foreign direct investments through assurances for investors' property rights.[7] However, many scholars argue that developing countries are pressured, even coerced, into entering into BITs in order to attract foreign investors, which has created clear unequal bargaining power for most developing countries.[8] Furthermore, the fact that many BITs only offer ICSID as an option to arbitrate investment disputes and that only generic consent is given by host States indicates that ICSID is eroding the consensual nature of jurisdiction to the international arbitration tribunal. ICSID's shift of jurisdiction to BIT-based claims versus contract-based claims demonstrates an error in the system, thus affecting ICSID's legitimacy as a tribunal.

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[1] J.D., University of Baltimore School of Law (2010). This paper won first place in the 2010 Center for International and Comparative Law Essay Contest.

[2] LUCY REED, ET. AL., GUIDE TO ICSID ARBITRATION 2 (2004).

[3] SURYA P. SUBEDI, INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE 30 (2008).

[4] *Id.*

[5] Kathleen S. McArthur & Pablo A. Ormachea, *International Investor—State Arbitration: An Empirical Analysis of ICSID Decisions on Jurisdiction*, 28 REV. LITIG. 572 (2009).

[6] *Id*.

[7] Asha Kaushal, *Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime*, 50 HARV. INT'L L. J. 491, 497 (2009).

[8] Annie Leeks, *The Relationship Between Bilateral Investment Treaty Arbitration and the Wider Corpus of International Law: The ICSID Approach*, 65 U.T. FAC. L. REV. 1, 8 (2007).

In Part II, this article will begin by discussing the evolution of foreign investment law. A full understanding of the history of the foreign investment regime is critical to discerning the current environment. Part III of this article addresses the creation and purpose of ICSID. This section also discusses ICSID's jurisdiction through both contractual (direct agreements) and non-contractual (BITs) ICSID arbitration. Section IV discusses the backlash ICSID has received over the past decade, including the withdrawal of Bolivia and Ecuador from the ICSID Convention and the proposed alternatives to ICSID. Part V of this article argues that it is ICSID's jurisdictional jurisprudence that is ultimately affecting its legitimacy. This section defines both legitimacy and international courts and identifies ICSID's purpose and function as an international court. Further, this section characterizes the differences between domestic and international courts, which play a role in the factors that influence the legitimacy of the international arbitration tribunal.

II. THE EVOLUTION OF FOREIGN INVESTMENT LAW

In order to discern the current foreign investment regime, it is essential to understand its history. Most importantly, it is essential to recognize the two main principles that incessantly surround the foreign investment regime: territorial sovereignty (of developing States) and nationality (proper treatment of foreigners abroad). From the beginning of its history, these two principles continuously shifted the balance of the foreign investment system.

In the 1800s, European traders began to travel to Asia, Africa and Latin America in search of investment opportunities.[9] Europeans began to trade and engage in business with the local communities, and as disputes arose, "it was held that the local laws could not be applied to the [European investors] since they were already subject to the laws of their home country."[10] European businessmen also sought special treatment from the local population, which shielded their assets from being expropriated or nationalized through legislation of local laws.[11] Essentially, it became customary practice for foreigners to be exempt from local law since Europeans "were subject to the superior body of law of their home country."[12] This practice became official through treaties between European countries and Asian and African States.[13] Therefore, in the early years of foreign investment law, it was customary that States could not invoke laws that would expropriate or nationalize foreign assets.[14]

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[9] SUBEDI, *supra* note 2, at 7.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.* at 7-8. For example, in 1861, the Sheikhdom of Bahrain and the British government entered into a treaty that held that "British subjects and dependents in Bahrain [would] receive the treatment and consideration of the most favoured people." *Id.*
[14] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, INTERNATIONAL INVESTMENT AGREEMENTS: KEY ISSUES, Vol. 1, 8 (Karl P. Sauvant ed., 2004) [hereinafter UNCTAD KEY ISSUES].

During the nineteenth century, indirect foreign investment (loans and the floating of government bonds) was far more dominant than foreign direct investment (FDI), but by the twentieth century, FDI "began gradually to assume the forms prevalent today."[15] However, FDI remained a matter of national concern and did not enter the international realm until the latter part of the twentieth century.[16] During this time, two fundamental principles became a point of contention: "the principle of territorial sovereignty, asserting each State's full and exclusive jurisdiction over persons and events in its territory", and "the principle of nationality, involving each State's interest in the proper treatment of its nationals abroad."[17] Developing States (capital-importing States), especially Latin American countries, stressed the principle of sovereignty and "held that foreign investors were entitled to no more than equality of treatment with the host State's nationals."[18] On the other hand, developed States (capital-exporting States), asserted the importance of compensation for its nationals abroad for any injuries to persons or property from a foreign investment.[19]

It was not until the 1917 Russian Revolution when issues arose out of laws protecting foreign investment.[20] During this time, the Soviet Union had "expropriated national enterprises without compensation and attempted to rely on its empty standard of national treatment for the protection of alien property."[21] The case, the *Lena Goldfields Arbitration*, was tried in 1930, in which the arbitration tribunal required the Soviet Union to pay compensation to the foreign investors based on unjust enrichment.[22]

In 1938, another major dispute arose between Mexico and the United States regarding the nationalization of US interests in the Mexican agrarian and oil businesses.[23] The United States pushed for international rules that allowed expropriation of foreign property and Mexico countered with the right for the foreign investors to seek compensation in the domestic courts of Mexico.[24] These international disputes gave rise to a set of rules regarding the status of foreigners in host States; this international standard emerged with a sense that foreigner investors will be protected, but only from unacceptable measures of the host State.[25] The amalgamation of these principles became known as the international minimum standard.[26]

The two contending principles that continue to be debated today became a continuous point of controversy throughout the twentieth century. Relying on the notions of sovereignty, newly independent developing countries asserted that

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[15] *Id.* at 5.
[16] *Id.*
[17] *Id.* at 6.
[18] *Id.*
[19] *Id.*
[20] *Id.* at 11.
[21] *Id.* at 13.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*

every sovereign State had the right to expropriate or nationalize foreign assets, but only if foreign investors were provided compensation.[27] Though, "if local law were considered inferior, not well developed or failed to meet the standards of justice and equality, the international minimum standard, rather than national law, would apply to foreign investors."[28] Once foreign investors began to benefit from the international minimum standard, the home States of the investors would create laws to protect their citizens and their investments abroad, under the notion of diplomatic protection.[29]

Conversely, the Calvo Doctrine was instituted in response to the creation of laws protecting foreign investors, including the international minimum standard.[30] Carlos Calvo, an Argentinian jurist, was the first to articulate the notion of economic sovereignty in terms of requiring "aliens to submit disputes arising in a country to that country's courts."[31] Calvo's principles were imbedded in many Latin American constitutions, treaties, and contracts.[32]

It was not until the period between 1945 through 1990 that the status of customary law governing foreign investment became problematic.[33] The number of newly independent developing countries that emerged during this period created a collection of conflicting positions.[34] On one hand, developing countries insisted on State sovereignty and economic decolonization.[35] On the other hand, these new countries were in the process of building their economies and were in need of the benefits of foreign investments.[36] These concerns were expressed in a number of United Nations resolutions throughout the 1950s.[37] In 1962, the United Nations General Assembly Resolution 1803 (XVII) definitively addressed concerns over the principle of permanent sovereignty over natural wealth and resources.[38] More specifically, Resolution 1803 provided "for the payment of appropriate compensation for any taking of property and stressed that governments should be observed in good faith."[39] Through the 1960s, developing States continued to battle for their sovereign rights.[40] The movement culminated in 1974, where the UN General Assembly passed several resolutions calling for a "New International Economic Order."[41] The resolutions abolished the "rules of

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[27] SUBEDI, *supra* note 2, at 8.
[28] *Id.*
[29] *Id.* at 9.
[30] *Id.* at 14.
[31] *Id.*
[32] I*d.* at 15.
[33] RUDOLF DOLZER AND CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 14 (2008).
[34] *Id.*
[35] *Id.*
[36] UNCTAD KEY ISSUES, *supra* note 13, at 7.
[37] *Id.*
[38] *Id.*
[39] *Id.* at 8.
[40] DOLZER & SCHREUER, *supra* note 32, at 15.
[41] *Id.*

international law governing the expropriation of alien property," which was replaced by national laws to be determined by each host State.[42]

During the next few decades, the doctrine of New International Economic Order led to insecurities for foreign investors.[43] This phase lasted until 1990, when the Socialist view of property collapsed and economic independence initiated a major economic crisis.[44] Latin American States began to enter into bilateral investment treaties (BITs) in opposition to the Calvo doctrine.[45] The proliferation of BITs began in the 1990s, and has continued through the 2000s, which has shifted the balance of the foreign investment regime in favor of foreign investors. Critics of the BIT revolution have suggested that BITs present an unequal bargaining power for developing countries, and only serve to protect foreign investors. However, recent developments indicate developing countries are attempting to shift the balance in their favor.

III. INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID)

A. *Creation and Purpose*

The International Centre for the Settlement of Investment Disputes was established under the 1965 ICSID Convention.[46] The International Bank for Reconstruction and Development (IBRD) – commonly known as the World Bank, sponsored the Convention (also known as the Washington Convention).[47] The Convention was conceived by the Organization for European Economic Co-operation (now the Organization for Economic Cooperation and Development, or OECD) to create a framework for the protection of international investment.[48] Earlier efforts to create such a framework revealed many points of contention regarding the proper level of compensation for expropriation of foreign investments.[49] The purpose of the ICSID Convention ultimately was to promote foreign investment.[50]

The Report of the Executive Directors on the Convention emphasized the aim of "promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it."[51] Most importantly, the Executive Directors aimed to strike a balance - "to promote much-needed international investment by officering a neutral dispute

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[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] REED, ET. AL., *supra* note 1, at 1.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.* at 2.
[51] International Bank for Reconstruction and Development, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965), in 1 ICSID Reports 23-33 (1993).

resolution forum both to investors that are (rightly and wrongly) wary of nationalistic decisions by local courts, and to host States that are (rightly and wrongly) wary of self-interested actions by foreign investors."[52] From the point of view of some member States, the creation of ICSID helped depoliticize investment disputes by distancing the dispute from the home State of the investor.[53]

B. *ICSID Jurisdiction*

The jurisdictional requirements for ICSID are mandatory and if the requirements are not met, ICSID must refuse to hear the dispute.[54] Article 25 of the Convention defines the scope of ICSID:

> (1) the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw unilaterally.[55]

Thus, in order to be subject to ICSID's jurisdiction: (1) the dispute must arise out of an investment; (2) the dispute must involve a contracting State and a national of another contracting State; and (3) a contracting State must accept jurisdiction in writing for a particular dispute or class of disputes.[56] A contracting State can also give its consent in advance through BITs; however, the parties may not waive any jurisdictional criteria by contract.[57]

A study conducted by Kathleen McArthur and Pablo Ormachea found that it has been extremely rare for ICSID to decline jurisdiction.[58] The study concluded that out of seventy-nine cases, ICSID denied jurisdiction in only twelve cases; thus, the tribunal found jurisdiction in eighty-five percent of the cases heard before the court.[59] Furthermore, during the first 26 years of ICSID's existence, there was not a single denial of jurisdiction.[60]

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[52] REED, ET. AL., *supra* note 1, at 14.
[53] DOLZER & SCHREUER, *supra* note 32, at 20.
[54] *Id.*
[55] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, art. 25(1) [hereinafter ICSID Convention].
[56] *See* ICSID Convention, *supra* note 52, at art. 25; REED, ET. AL., *supra* note X, at 14.
[57] REED, ET. AL., *supra* note 1, at 14.
[58] McArthur & Ormachea, *supra* note 4, at 568.
[59] *Id.* at 569. The empirical research project includes every jurisdictional decision by ICSID that was publicly available. *Id*. at 564. Since some ICSID cases are confidential, it is difficult to be precise on the number of jurisdictional cases. *Id.* at n. 15. Current studies indicate there have been very few confidential cases. *Id*. However, of the cases that are confidential, approximately seventeen jurisdictional decisions have been excluded from this study. *Id*. This study did not include cases concerning "provisional measures, disputes which settled prior to a decision on

From ICSID's inception in 1965 until 1986, ICSID jurisdiction was almost exclusively based on State consent through a direct contractual agreement between the investor and the host State.[61] From 1987 until 2007, BIT-based claims have outnumbered contract-based claims six to one.[62] More specifically, about 60% of the cases heard in ICSID are based on host State consent through a BIT, and another 11% of cases are based on the North American Free Trade Agreement (NAFTA). Only 22.8% of ICSID cases are based on consent to jurisdiction based from a contract.[63] Although contract based claims have accounted for less than a quarter of all jurisdictional decisions, they have accounted for one-third of denials of ICSID jurisdiction.[64]

C. *Contractual ICSID Arbitration*

Investing in a foreign country initiates a long-term relationship between the investor and host State.[65] Generally, investors advance substantial resources into projects with expectations to recoup its original investment plus some return on the investment.[66] In preparing for such a complex and long-term relationship, both foreign investors and host States must establish "a legal structure that is suitable not only to the implementation of the project in general but also to minimize risk that may arise during the period of investment."[67] Thus, host States and investors enter into investment agreements in order to protect their interests.

ICSID arbitration traditionally arose out of investor-State contracts that contained "express reference to ICSID for dispute resolution, provided that both the host State and the investor's country of origin were parties to the ICSID Convention and certain other jurisdictional limitations were met."[68] The parties are able to limit the scope of consent to ICSID arbitration by "defining it in general terms, by excluding certain types of disputes, or by listing the questions they are submitting to arbitration."[69] Some investment agreements are complex and can be arranged in a number of contracts, and the parties are able to limit consent to arbitration through each individual agreement.[70]

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jurisdiction, and disputes for which a decision on jurisdiction is pending, including where the decision had been joined to the merits and the merits have not been reached." *Id*. at 564-65. If ICSID upheld jurisdiction on any of the claims presented by the parties, the study classified the decision as a case where jurisdiction was granted. *Id*. at 565. This methodology was used because the ultimate goal of the study was "to measure the relationship (if any) between certain external factors and access to ICSID." *Id*.

[60] McArthur & Ormachea, *supra* note 4, at 569.

[61] *Id.* at 572.

[62] *Id.* The empirical research project includes every jurisdictional decision by ICSID that was publicly available. *Id.* at 564.

[63] *Id.* at 573.

[64] *Id.*

[65] DOLZER & SCHREUER, *supra* note 32, at 3.

[66] *Id.* at 3-4. Returns on an investment can sometimes continue for 30 years or more. *Id.* at 4.

[67] *Id*. at 4.

[68] REED, ET. AL., *supra* note 1, at 7.

[69] DOLZER & SCHREUER, *supra* note 32, at 239.

[70] *Id.*

D. *Non-Contractual ICSID Arbitration*

The proliferation of BITs and other international treaties have made it possible for a private investor to initiate ICSID arbitration without a direct agreement between each individual investor and the host State.[71] In 2000, ICSID reported that two-thirds of the pending arbitrations were initiated under international treaties.[72] According to the new bi-annual 2010 ICSID report, international treaties are the basis of consensual jurisdiction in 73% of registered ICSID cases, with national legislation of the host State as the basis of consent in five percent of registered ICSID cases.[73] These statistics indicate a clear trend toward international treaty-based consent in the current foreign investment regime.

1. Bilateral Investment Treaties (BITs)

Due to the long-term nature of foreign investments, bilateral investment treaties were created to protect foreign investments.[74] BITs are concluded between two States and establish obligations owed by each host State to investors within their territory. Traditionally, local and international laws would attempt to protect foreign investments; however, host States and international standards changed and investors had to find new methods to protect their investments.[75] BITs gave foreign investors the important guarantee that no State can unilaterally change the provisions of the agreements.[76]

Most BITs have similar obligations and contain five core substantive provisions.[77] First, the majority of BITs require certain minimum standards of treatment including: (1) fair and equitable treatment; (2) full protection and security; (3) non-discrimination; (4) national treatment; and (5) most-favored nation treatment.[78] Second, BITs contain an "umbrella clause" that requires each contracting party to "observe any obligations it may have entered into with regard to investments of nationals or companies" of the other contracting party.[79] The highest obligation the umbrella clause has held is the elevation of all breaches of contracts to the level of breaches of the treaty.[80] Third, many BITs contain provisions guaranteeing the right of the investor to repatriate capital and profits.[81] Fourth, BITs limit the ability of a host State to expropriate foreign investments to

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[71] *See* REED, ET. AL., *supra* note 1, at 35.
[72] *Id.*
[73] INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES, ICSID CASELOAD STATISTICS, Issue 2010-1, at 10 (2010) [hereinafter ICSID CASELOAD STATISTICS].
[74] SUBEDI, *supra* note 2, at 83.
[75] *Id.*
[76] *Id.*
[77] Leeks, *supra* note 7, at 5
[78] *Id.*
[79] *Id.* at 6.
[80] *Id.*
[81] *Id.*

circumstances in which the expropriation is for a public purpose with compensation.[82] Finally, most BITs provide for the settlement of disputes arising between the host State and the investor through arbitration.[83]

There were two specific guarantees afforded to investors that led to the BIT revolution: (1) the inclusion of specific substantive rights and (2) the guarantee of recourse to direct remedies for the investor.[84] As a result of World War II and the economic destruction it caused, Germany was in a grave financial position and was in great need of the benefits of foreign direct investment (FDI).[85] Thus, Germany sought more effective means to attract FDI and became one of the first countries to successfully negotiate a BIT.[86] Soon after, many European States began to enter into BITs, including Switzerland, France, the United Kingdom, the Netherlands, and Belgium.[87] By 1977, European countries had concluded approximately 130 BITs.[88] In 1981, the United States launched its own BIT program.[89] Although the US entered late into the game, by September 2004, the US had signed 45 BITs with developing countries.[90]

Scholars argue that the BIT revolution was born out of necessity and to the disadvantage of host States.[91] The benefits of BITs to developed States (foreign investors) are clear – BITs provide legal protection for foreign investors and require host States (developing States) to provide higher standards of treatment than required by customary international law.[92] However, the benefits for developing States are uncertain.[93] The purported benefit for developing States is the increase of foreign direct investment.[94] On the contrary, empirical evidence suggests that BITs by themselves do not attract foreign investment.[95]

At the very least, the expansion of BITs indicates that developing States believe BITs attract foreign investment.[96] This belief has led many developing States to enter into BITs in order to increase foreign direct investment from the limited pool of available assets.[97] However, BITs can limit a developing State's "ability to implement domestic regulation and may be effectively contracting out of the protection of international law."[98]

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[82] *Id.* at 7.
[83] *Id.*
[84] Gabriel Egli, *Don't Get BIT: Addressing ICSID's Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions* 34 PEPP. L. REV. 1045, 1051 (2007).
[85] *Id.*
[86] *Id.* at 1052.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.* at 1050; Kaushal, *supra* note 6, at 502-03.
[92] *See* Kaushal, *supra* note 6, at 503.
[93] *Id.*
[94] *Id.*
[95] *See* Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a Bit and they Could Bite*, WORLD BANK POLICY RESEARCH, Working Paper No. 3121 (August 2003).
[96] Leeks, *supra* note 7, at *8*.
[97] *Id.*; Kaushal, *supra* note 6, at 503.
[98] Leeks, *supra* note 7, at 8.

2. Multilateral Investment Treaties

The wide acceptance of BITs in foreign investment "led to the adoption of similar provisions in the 'investment chapters' of multilateral economic cooperation treaties and free trade agreements."[99] Among these types of multilateral treaties are Chapter 11 of the North American Free Trade Agreement (NAFTA) and Part III and Article 26 of the 1994 Energy Charter Treaty (ECT).[100]

The investment chapter of NAFTA identifies the standards for treatment of investors and establishes a dispute resolution mechanism for the arbitration of investor-State disputes (similar those in BITs).[101] The dispute resolution mechanism "may be invoked by any investor of a NAFTA State that has invested in the territory of another NAFTA State and incurred loss or damage as a result of measures adopted or maintained by the host State."[102] Only an investor of a State party (Canada, Mexico or the United States) can invoke arbitration under Chapter 11, and may bring a claim regarding any "measure" that is adopted by a State party that causes injury to an investor, including "any law, regulation, procedure, requirement or practice, with no specific requirement that the measure have legal force."[103] Currently, the NAFTA treaty forms the basis of consent for 4% of registered ICSID cases.[104]

In 1994, forty-nine States plus the European Community (now the European Union) signed the Energy Charter Treaty (ECT), which "provides a comprehensive international framework for cross-border economic cooperation in the energy sector."[105] The treaty's primary goals include promoting "legal stability and predictability" in order to "attract investment and stimulate business activity in the energy sectors of member States."[106] Under Article 1 of the ECT, member States can bring claims for investments, including "claims to money and claims to performance pursuant to a contract having an economic value and associated with an Investment."[107] Under the ECT, each member State gives unconditional consent for international arbitration of a dispute, unless the investor has previously submitted to another dispute resolution institution.[108] Currently, the ECT treaty forms the basis of consent for 5% of registered ICSID cases.[109]

3. National Legislation

ICSID arbitration can be based upon the national investment legislation of the host State where the host State offers to submit investment disputes to ICSID

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[99] *See* REED, ET. AL., *supra* note 1, at 62.
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.* at 66-67.
[104] ICSID CASELOAD STATISTICS, *supra* note 72, at 10.
[105] REED, ET. AL., *supra* note 1, at 68.
[106] *Id.*
[107] Energy Charter Treaty, opened for signature Dec. 17, 1994, 34 ILM 381 (1995).
[108] *See* REED, ET. AL., *supra* note 1, at 70.
[109] ICSID CASELOAD STATISTICS, *supra* note 72, at 10.

jurisdiction.[110] Once the foreign investor either accepts the State's offer to arbitrate or files a claim, the consent becomes effective.[111] The host State can withdraw its consent by either amending or repealing the investment legislation.[112] By adopting laws that include consent to arbitration, host States can limit the matters that can be arbitrated by ICSID.[113]

IV. ICSID's LEGITIMACY ISSUES

A. *State Criticism and Denunciation of the ICSID Convention*

The majority of the criticism that ICSID has received have come from developing States, particularly in the Latin American region. Nevertheless, there have also been some indications of dissatisfaction with the Centre from the developed States, specifically with regard to the United States and Canada.[114] The 2004 United States-Australia Free Trade Agreement excluded an investor-State dispute provision, despite the fact that these provisions are very common in similar agreements.[115]

In 2007, ICSID faced its first compelling manifestation of illegitimacy when Bolivia withdrew from the ICSID Convention.[116] Bolivia's discontent with ICSID began when the country saw an increase of nationalistic sentiment in the early 2000s.[117] In 2005, Bolivian President Evo Morales attempted to regain control over privatized natural resources by nationalizing Bolivia's oil and gas sector.[118] After its withdrawal, President Morales called upon all Latin American countries to denounce ICSID and stated, "[we] emphatically reject the legal, media and diplomatic pressure of some multinationals that […] resist the sovereign rulings of countries, making threats and initiating suits in international arbitration."[119]

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[110] REED, ET. AL., *supra* note 1, at 36.
[111] *Id.*
[112] *Id.*
[113] *See id.*
[114] Kate M. Supnik, *Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Law* 59 DUKE L. J. 343, 356 (2009).
[115] *Id.*
[116] Press Release, International Centre for Settlement of Investment Disputes, Bolivia Submits a Notice Under Article 71 of the ICSID Convention (May 16, 2007), http://icsid.worldbank.org (follow "Publication" then follow "News Release" hyperlink, then follow "Denunciation of ICSID Convention") (last visited April 21, 2010). The ICSID Convention allows States to withdraw from ICSID pursuant to Article 71, which States that denunciation shall take effect six months after the receipt of withdrawal by the World Bank. *See* ICSID Convention, at art. 71.
[117] Christopher M. Ryan, *Discerning the Compliance Calculus: Why States Comply with International Investment Law* 38 GA. J. INT'L & COMP. L. 63, 90 (2009).
[118] Carin Zissis, *Bolivia's Nationalization of Oil and Gas*, Council on Foreign Relations, May 12, 2006, www.cfr.org (search "Bolivia's Nationalization of Oil and Gas," then follow "Bolivia's Nationalization of Oil and Gas" hyperlink).
[119] Bretton Wood Project, *Threats to Withdraw from Bank's Investment Tribunal*, July 2, 2007, http://www.brettonwoodsproject.org/art-554233.

By withdrawing from ICSID, Bolivia aimed to limit investor disputes to national courts rather than ICSID.[120] Moreover, Bolivia also announced that it intended to revise its twenty-four BITs by redefining the definition of investment, performance requirements, and dispute resolution.[121] Again, Bolivia intended to limit the jurisdiction of investor disputes to domestic courts through the BIT revisions.[122]

Bolivia's withdrawal from the ICSID Convention signifies that the ICSID tribunal will no longer be a forum for resolving Bolivian-investor disputes with future investment partners.[123] Nevertheless, any consent to ICSID arbitration prior to the notice of withdrawal will not be affected.[124] For example, the Chilean chemical company, Química E Industrial del Bórax Ltd., has continued its claim against Bolivia despite Bolivia's withdrawal from ICSID.[125] The Chilean company filed for arbitration in October of 2005, which predated Bolivia's withdrawal.[126] On March 18, 2010, the tribunal confirmed jurisdiction over this case in a decision regarding provisional measures.[127] The tribunal addressed the controversial jurisdiction of Bolivia by holding that, "when the Request for Arbitration was registered by the ICSID Secretariat, Bolivia was still a signatory to the ICSID Convention […][t]hus, the Tribunal has prima facie jurisdiction rationae personae."[128]

In January 2009, Bolivia officially manifested its withdrawal from ICSID through domestic measures. As part of the ongoing nationalization of its natural resources, President Morales announced the victory of a national referendum for a new constitution that will "further solidify government control over the country's vast natural resources" while continuing to deny ICSID jurisdiction over investments in the hydrocarbon sector.[129]

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[120] *Id.*

[121] Damon Vis-Dunbar, et. al., *Bolivia Notifies World Bank of Withdrawal from ICSID*, Pursues BIT Revisions, INVESTMENT TREATY NEWS (May 9, 2007), http://www.iisd.org/pdf/2007/itn_may9_2007.pdf. Specifically, Bolivia wants to limit the definition of an investment to ones that generate value to the country. *Id.* On performance requirements, Bolivia seeks to set requirements for the use of domestic inputs and set rules for the transfer of technology. *Id.*

[122] Vis-Dunbar, et. al., *supra* note 120.

[123] *See* ICSID Convention, *supra* note 54, at art. 25(1). ICSID has jurisdiction over "any legal dispute arising directly out of an investment, between a Contracting State...and a national of another Contracting State . . . ", meaning that the State must be a signatory to the ICSID Convention. *See id.*

[124] *See* Elizabeth Whitsitt, *Bolivia Ordered to Suspend Criminal Proceedings in its Ongoing Dispute with Chilean Chemical Firm Quiborax*, INVESTMENT TREATY NEWS (April 8, 2010), www.investmenttreatynews.org (follow "News and Commentary", then search "Bolivia order to suspend", then follow hyperlink "Bolivia Order to Suspend Criminal Proceedings in its Ongoing Dispute with Chilean Chemical Firm Quiborax").

[125] *Id.*

[126] *Id.*

[127] *See* Quiborax S.A., et. al. v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Provisional Measures, at para. 109.

[128] *See id.*

[129] Fernando Cabrera Diaz, *Bolivian Voters Approve New Constitution as the Government Continues to Nationalize its Oil Assets*, INVESTMENT TREATY NEWS (February 2009), http://www.investmenttreatynews.org/documents/p/95.aspx. Over 60% of voters approved the

In 2007, Ecuador limited the scope of its participation in ICSID by filing an Article 25(4) notice, stating that certain classes of disputes are no longer subject to ICSID, including oil, mining, and other natural resources.[130] By September of 2008, Ecuador approved a new constitution that made it unconstitutional for the State to submit to arbitration outside of Latin America.[131]

In October 2008, Ecuador announced its intention to denounce nine of its twenty-five bilateral investment treaties with Cuba, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, the Dominican Republic, Romania, and Uruguay.[132] Moreover, Ecuador has since launched renegotiations with the governments of the remaining sixteen BITs.[133] Ecuador indicated that the terminations and renegotiations of the BITs are due to a review of its "legal system and its domestic as well as international policies in the matter of investments."[134] After an evaluation, Ecuador stated that the BITs were not reaching their fundamental objective of attracting foreign investment.[135]

On July 6, 2009, Ecuador filed its notification of withdrawal of the ICSID Convention effective January 7, 2010, becoming the second State to refuse to subject itself to ICSID's jurisdiction.[136] Ecuadorian President Rafael Correa claimed that it was necessary to withdraw from ICSID for "the liberation of our countries because [ICSID] signifies colonialism, slavery with respect to transnationals, with respect to Washington, with respect to the World Bank and we cannot tolerate this."[137]

Currently, Ecuador has been party to fourteen cases for ICSID arbitration, six of which are still pending.[138] Many of the cases are based on BIT arbitrations,

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new constitution, according to figures released by the National Electoral Court. *Id*. The vote has been considered free and fair by international observers. *Id.*

130 Press Release, International Centre for Settlement of Investment Disputes, Ecuador's Notification Under Article 25(4) of the ICSID Convention (Dec. 5, 2007), http//icsid.worldbank.org (follow "Publication" then follow "News Release" hyperlink, then follow "Ecuador's Notification under Article 25(4) of the ICSID Convention") (last visited April 21, 2010).

131 Fernando Cabrera Diaz, *Ecuador Continues to Exit from ICSID*, INVESTMENT TREATY NEWS (June 8, 2009), http://www.investmenttreatynews.org/documents/p/158.aspx [hereinafter *Ecuador Continues to Exit from ICSID*].

132 Mahnaz Malik, *Recent Developments in Regional and Bilateral Investment Treaties*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (2008), available at http://www.iisd.org/pdf/2008/dci_recent_dev_bits.pdf.

133 *Id.*

134 *Id.*

135 *Id.*

136 Press Release, International Centre for Settlement of Investment Disputes, Ecuador Submits a Notice Under Article 71 of the ICSID Convention (July 6, 2009), http://icsid.worldbank.org (follow "Publication" then follow "News Release" hyperlink, then follow "Denunciation of ICSID Convention by Ecuador") (last visited April 21, 2010).

137 *Ecuador Continues to Exit from ICSID, supra* note 130.

138 *See* International Centre for Settlement of Investment Disputes, Search ICSID Cases (last visited April 21, 2010), www.icsid.worldbank.org (follow "Search Cases" under "Cases" hyperlink"). Ecuador has had a total of fourteen cases at ICSID, eight of which have been concluded. *See id.*

which Ecuador believes are without merit.[139] Of the fourteen ICSID cases against Ecuador, ten involve the United States and are based on the US-Ecuador BIT.[140] In 2007, after it filed its Article 25(4) notification, Ecuador also sought to renegotiate its investment treaties and terminate its bilateral investment treaty with the United States.[141] Despite termination, the treaty provides that the US would be protected for an additional ten years after termination.[142] Despite Ecuador's desire to terminate its BIT with the US, Ecuador's Foreign Affairs Minister, Maria Espinosa, stated that Ecuador wished to explore other avenues for protection of EU-Ecuador investments.[143]

Although Venezuela has not formally withdrawn from the Washington Convention, it has indicated that it has similar concerns as Bolivia and Ecuador about ICSID.[144] Soon after Bolivia's announcement of withdrawal, Venezuelan President Hugo Chavez stated his intent to denounce the Washington Convention, claiming that it promotes modern day imperialism.[145] Although it has yet to take formal steps, Venezuela has nationalized several of its natural resource sectors, including its hydrocarbon industry.[146]

Recent negotiations of a BIT between Russia and Venezuela indicate the State's dissatisfaction with the ICSID tribunal.[147] Venezuela was under pressure to enter into BITs in order to attract much needed foreign investment.[148] Nevertheless, Venezuela was ensured that the new Russia-Venezuelan BIT would not include ICSID as a potential forum for settling disputes.[149]

Ironically, despite the fact that Argentina is the home country for the Calvo Doctrine, Argentina leads the BIT league table in Latin America.[150] Currently, Argentina has entered into at least fifty-eight bilateral investment

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[139] Luke Eric Peterson, *Ecuador Announces that it wants out of US Investment Treaty*, INVESTMENT TREATY NEWS (May 9, 2007), http://www.iisd.org/pdf/2007/itn_may9_2007.pdf [hereinafter *Ecuador Announces that it wants out of US Investment Treaty*].

[140] *See* International Centre for Settlement of Investment Disputes, Search ICSID Cases (last visited April 21, 2010), www.icsid.worldbank.org (follow "Search Cases" under "Cases" hyperlink").

[141] *Ecuador Announces that it wants out of US Investment Treaty*, *supra* note 138. The Ecuador-US BIT was signed in 1993, and entered into force on May 11, 1997. *Id.* The BIT allows for either party to give notice of termination after it has been in force for ten years. *Id.* The party wishing to terminate the treaty must give one year's notice. *Id*

[142] *Id.*

[143] *Id.*

[144] MARY H. MAURRA, LATIN AMERICAN INVESTMENT TREATY ARBITRATION: THE CONTROVERSIES AND CONFLICTS, at 66 (2008).

[145] *Id.*; Fernando Cabrera Diaz, *Venezuela Consents to Arbitration in New BIT with Russia*, INVESTMENT TREATY NEWS (July 2009), http://www.investmenttreatynews.org/documents/p/172.aspx [hereinafter *Venezuela Consents to Arbitration*].

[146] MAURRA, *supra* note 143, at 66.

[147] *Venezuela Consents to Arbitration*, *supra* note 144.

[148] *Id.*

[149] *Id.*

[150] Wenha Shan, *From "North-South Divide" to "Public-Private Debate": Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law*, 27 NW. J. INT'L L. & BUS. 631, 635-36 (2007).

treaties and has the highest number of cases pending in ICSID.[151] This is largely due to the country's financial crisis in 2001, where the government declared a state of emergency until 2003.[152] During this financial crisis, Argentina was forced to freeze local tariffs and abolish the one-to-one ratio of US-Peso convertibility.[153] These measures had a negative impact on foreign investments within Argentina; thus, many investors sought access to ICSID through State-investor arbitration clauses in many bilateral investment treaties.[154] Despite Argentina's many attempts to challenge ICSID's jurisdiction in the BITs, the government failed to win a single jurisdictional challenge.[155] For example, in the case of *Lanco International Inc. v. Argentine Republic*, a U.S. investor sued Argentina at ICSID based on a "fork-in-the-road clause" in a 1991 U.S.-Argentina BIT, allowing a choice among local remedies, agreed channels, and international arbitration.[156] Argentina vehemently argued that it had not given the necessary written consent required in Article 25(1) of the Convention.[157] The tribunal disagreed with Argentina and held that, for the purposes of Article 25, the BIT constituted consent in this case.[158]

B. *Alternatives to ICSID: Regional Investment Arbitration*

Not only have two countries formally withdrawn from ICSID, but so too have several States discussed creating an alternative to ICSID. Ecuadorian President Correa claimed that his government was working on a regional alternative involving the Union of South American Nations (UNASUR).[159] In June of 2009, at the 39th Session of the General Assembly of the Organization of American States, Ecuador's Foreign Minister, Fander Faconi, officially proposed the creation of an arbitration tribunal under the auspices of UNASUR.[160]

While Ecuador and UNASUR move forward with their plans, other regional initiatives are also under way. Members of the Bolivarian Alliance for the Peoples of Our America (ALBA) are moving forward with a plan to create a regional arbitration tribunal intended to replace ICSID.[161] In October 2009, ABLA held a summit in Cochabamba, Bolivia in order to "advance its work on

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[151] *Id.* at 636.
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.* at 637.
[156] Lanco International, Inc. v. Argentine Republic (Case No. ARB/97/6), Preliminary Decision on Jurisdiction of Dec. 8, 1998, 40 I.L.M. 457 (2001), at §20, citing Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (Nov. 14, 1991), art. 7, §§ 2-3.
[157] *Id.* at §6.
[158] *Id.* at §§22-23.
[159] *Ecuador Continues to Exit from ICSID, supra* note 130.
[160] Fernando Cabrera Diaz, *ALBA Moves Forward with Plan to Create Regional Investment Arbitration Alternative to ICSID at 7th Summit*, INVESTMENT TREATY NEWS (November 2009), http://www.investmenttreatynews.org/documents/p/239.aspx.
[161] *Id.*

the issue and develop concrete proposals in the near term."[162] The creation of the tribunal was originally intended only to hear cases from foreign investors, but there have been discussions regarding the expansion of its jurisdiction to other types of disputes.[163]

V. ICSID's JURISDICTIONAL JURISPRUDENCE AND EFFECTS ON ITS LEGITIMACY

A. *Defining Legitimacy with Respect to International Arbitration Tribunals*

The type of adjudicative body will affect the "legitimacy-influencing factors" that must be considered when determining the legitimacy of an institution.[164] Thus, it is important to discuss the type, purpose, and function of the adjudicative body in order to consider what affects its legitimacy.

ICSID is an "international adjudicative body," which has been defined as "a dispute resolution mechanism that decides disputes between litigants, at least one of whom is a State."[165] The ICSID tribunal has been described as a "hybrid" – an adjudicative body created by a traditional treaty which establishes "mechanisms to facilitate the creation and function of ad hoc arbitral panels in a particular substantive area."[166] More specifically, "the ICSID Convention establishes a secretariat and methodology for choosing arbitrators, contemplates the creation of uniform procedural rules, and provides administrative support for disputes involving investors and States under bilateral investment treaties."[167] The tribunal dissolves "once the dispute between the litigating parties is decided."[168]

Before defining legitimacy and determining its influencing factors with regard to an international adjudicative body, it is important to understand the distinction between the functions and purpose of domestic courts and international courts. For domestic courts, the purpose is to resolve conflicts, enforce social control or regime, and to make laws.[169] However, literature that addresses the function of international courts assumes that it "is to resolve the disputes presented to them."[170] Some texts describe the function of international courts

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[162] *Id.*

[163] *Id.*

[164] Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT'L L. REV. 101, 105 (2010).

[165] *Id.*

[166] *Id.* at 107. Professor Grossman distinguishes "international adjudicative bodies" into three different groups – ones that are established by treaty, by parties on an ad hoc basis, or a hybrid of both treaty and ad hoc tribunals. *Id*. at 106-07.

[167] *Id.* at 105. *See* ICSID Convention, *supra* note X, arts. 1, 3, 6, 12-16.

[168] Grossman, *supra* note 163, at 107. *See* INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES [ICSID], *Rules of Procedure for Arbitration Proceedings (Arbitration Rules)*, *in* ICSID CONVENTION, REGULATIONS, AND RULES 99, 124-26 (Rs. 50-52) (2006), *available at* http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

[169] David D. Caron, *Towards a Political Theory of International Courts and Tribunals* 24 BERKELEY J. INT'L L. 401, 406 (2006).

[170] *Id*. at 408.

and tribunals as institutions tasked not only with the "resolution of particular disputes through the application of law" but also, "as devices to increase the credibility of international commitments."[171] David Caron believes that States often decide "to create an international court or tribunal for reasons other than those associated with resolving a particular conflict or the function of resolving a conflict."[172] Caron claims that the political circumstance that motivates the decision to create an international court or tribunal ultimately becomes the "unstated purpose" of an international court or tribunal.[173]

In ICSID's case, beyond the function of resolving investment disputes, the decision to create the Centre was to protect foreign investment, stimulate international capital for developing States, and to promote mutual confidence between investors and developing States.[174] However, the political circumstances (at least one main circumstance) that motivated the decision to create the Centre was to assist in balancing the two fundamental principles of sovereignty and nationality. The creation of ICSID came during a time where foreign investors were struggling to protect their property abroad, while developing states were battling for their sovereignty at home. Thus, in addition to the explicit and stated functions of ICSID, the continuous balance of these principles is paramount to the tribunal's purpose.

Another important difference between international courts and domestic courts is that many international courts are relatively young, thus, "more dependent on continuing political support from member States."[175] In contrast, "domestic courts are (for the most part) so deeply woven into the social fabric that their continued existence is not seriously threatened by short term political changes in domestic legislative and executive institutions."[176] This is a significant distinction when determining the effectiveness of international courts and whether the institution has served its purpose; without the support of its members, international courts hold no value to its community.[177]

One last notable difference between domestic and international courts is that "jurisdiction of domestic courts is compulsory" while the "jurisdiction of international adjudicative bodies has historically depended on […] consent."[178] Most importantly, the principle of consent "is a corollary of the principles of sovereignty and equality of states."[179]

A working definition of legitimacy is critical to understanding the factors that influence it. The term "legitimacy" has been thoroughly debated, and political philosophers and social scientists have proposed countless theories

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171 *Id.*
172 *Id.* at 409.
173 *Id.* at 409-10.
174 *See* REED, ET. AL., *supra* note 1, at 2.
175 Caron, *supra* note 168, at 410.
176 *Id.*
177 *See id*. at 410.
178 Cesare P.R. Romano, *The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent* 39 N.Y.U. J. INT'L L. & POL. 791, 792 (2007).
179 *Id*. at 793.

regarding the term.[180] However, in the context of this article, legitimacy shall be defined as "the justification of authority."[181] The concept of legitimacy can have "both a sociological and normative dimension."[182] An authority can have "popular legitimacy if the subject to whom it is addressed accepts it as justified."[183] Thus, "the more positive the public's attitudes about an institution's right to govern, the greater its popular legitimacy."[184] An authority can also have "normative legitimacy" if its authority is "well founded" or is justified in an "objective sense."[185]

The difference between the two dimensions of legitimacy raises an important distinction between domestic courts and international courts. Because international courts are more dependent on "continuing political support from its member States," the issue of popular legitimacy is also a constant concern for international courts. It is critical for the existence of international courts that its member States accept its authority as justified. The jurisdiction of international courts is typically not compulsory; thus, member States may withdraw its consent from the institution. Without the support (through consent to jurisdiction of the court) of member States, the international court's existence is threatened.

There are differences between the dimensions of legitimacy and the factors that influence "the justification of authority."[186] Professor Grossman has set out three factors that should be considered when determining the legitimacy of an international adjudicative body: "(1) fair and unbiased, (2) interpreting and applying norms consistent with what States believe the law is or should be, and (3) transparent and infused with democratic norms."[187] For the purposes of this article, the only factor that will be discussed is whether ICSID is "interpreting and applying norms consistent with what States believe the law is or should be."[188]

Professor Grossman states that "international actors will not perceive a tribunal to possess justified authority if the underlying normative regime lacks 'currency.'"[189] "Currency" is defined with regard to an international actor's belief of whether "the regime is consistent with its view of what the law is or should be."[190] There are two currency-influencing factors: (1) whether the normative regime is in accord with an international actor's values and interests, and (2) whether the decisions of the tribunal are legally sound.[191]

B. *ICSID's Departure from the Values and Interests of Host States*

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[180] *See id.*
[181] Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?* 93 AM J. INT'L L. 596, 601 (1999).
[182] *Id.* According to Bodansky, the empirical issue is one for social scientists and the normative issue is one for political theorists and philosophers. *Id.* at 602.
[183] *Id.* at 601.
[184] *Id.*
[185] *Id.*
[186] Grossman, *supra* note 163, at 109.
[187] *Id.*
[188] *Id.*
[189] *Id.* at 137.
[190] *Id.*
[191] *Id.* at 137-38.

ICSID's jurisdictional jurisprudence has shifted from basing consent in a direct agreement between the host State and investor to basing consent in a bilateral investment treaty.[192] This shift can be explained by the proliferation of BITs and the number of BITs that have been created in the past two decades.[193] However, the current BIT regime is a product of the shift from "preserving national sovereignty to attracting foreign investors, with developing States effectively cashing in their sovereignty in exchange for credibility as a site for investment."[194] Moreover, the current influx of BITs is a result of the overarching perception that "BITs would promote the inflow of FDI, underscored by a tacit mutual understanding that foreign investment was vital to development and modernization."[195]

The assumption that BITs attract and promote FDI has been seriously called into question in recent years. Critics of the BIT regime "have long doubted the positive effects of BITs on FDI location, suggesting that the legal institutional climate of a country matters more than the presence of a treaty."[196] Two U.N. studies and one World Bank report found no direct link between BITs and FDI, stating that the treaties have played a "minor and secondary role to FDI flows."[197] This conclusion is also supported by an examination of the number of BITs signed by countries that are the largest recipients of FDI.[198] For example, Japan is the second largest source of FDI in the world, and has only entered into about a dozen BITs, while Brazil, which has one of the highest FDI inflows, has not signed a single BIT.[199]

From the development of recent studies, many scholars believe that developing States were compelled, even coerced, to enter into BITS.[200] BITs rarely contain any obligations for the investor's country to promote investment flows.[201] Instead, the great majority of BITs "focus on the protection of existing investments, rather than the promotion of new FDI."[202] Developed States used BITs "as a point of leverage for extracting political, economic, military, or other forms of cooperation from developing States."[203] Some scholars have argued that, because of both the bias of BITs and the fact that developing States were

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192 *See supra* Part III.D.
193 *See supra* Part III.D.2.
194 Kaushal, *supra* note 6, at 501.
195 *Id.* at 502.
196 *Id.*
197 UNCTAD, Bilateral Investment Treaties in the Mid-1990s, at 122, U.N. Doc. UNCTAD/ITE/IIT/7 (1998); UNCTAD, Transnational Corporations in World Development: Trends and Prospects, at 337, U.N. Doc. ST/CTC/89 (1998); World Bank, Global Economic Prospects of Developing Countries, xvii (2003).
198 Kaushal, *supra* note 6, at 509.
199 *Id.* 509-10.
200 *See* Ryan, *supra* note 116, at 80-81.
201 Kaushal, *supra* note 6, at 508.
202 *Id.*
203 *Id.*

coerced into entering into BITs, the agreement to arbitrate was not truly consensual.[204]

As an international tribunal, express consent to ICSID arbitration was critical to the whole dispute settlement system.[205] Article 25 of the Convention requires that consent be given in writing to submit to ICSID arbitration.[206] However, ICSID tribunals have continuously found jurisdiction in bilateral investment treaties and have assumed that the generic consent to the *option* of ICSID arbitration equals consent under Article 25 of the Convention.[207] According to Professor Grossman, "if a tribunal consistently makes decisions that do not coincide with international actors' interests and values, they will likely cease to perceive the tribunal as possessing justified authority."[208] Thus, ICSID's consistent holdings of jurisdiction based on consent of the host State in bilateral investment treaties do not coincide with developing States' value of sovereignty. Furthermore, host States that have objected to ICSID jurisdiction, do believe that the tribunals' decisions are legally sound.[209]

ICSID consistently bases consent of the host State on bilateral investment treaties, which are not only biased in favor of investors, but are also a point of leverage for developed countries to extract cooperation from developing States. As recent studies have indicated, the majority of cases brought before ICSID are BIT-based jurisdiction cases.[210] Although the overrepresentation of BITs can be explained by the considerable number of BITs between States, the facts specify that the *percentage* of denials of jurisdiction is higher among direct agreements, rather than BITs.[211] ICSID's jurisdictional findings of consent of host States from bilateral investment treaties have become standard practice.[212] This practice has affected ICSID's legitimacy as an international, arbitral tribunal – both Bolivia and Ecuador have denounced ICSID, Venezuela has denied ICSID jurisdiction through its constitution, and Argentina continues to battle ICSID's jurisdiction.[213] As an international court, ICSID needs the support of its members; if ICSID lacks popular legitimacy it will lose its purpose and eventually its existence.[214]

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[204] *See* Ryan, *supra* note 116, at 80-81.
[205] *See* Romano, *supra* note 177, at 793.
[206] *See* ICSID Convention, *supra* note 54, at art. 25(1).
[207] *See* Raul Emilio Vinuesa, *Bilateral Investment Treaties and the Settlement of Investment Disputes under ICSID: The Latin American Experience* 8 L. & BUS. REV. AM. 501, 503-04 (2002); *supra* Part IV.A. *See e.g.* Lanco International, Inc. v. Argentine Republic (Case No. ARB/97/6), Preliminary Decision on Jurisdiction of Dec. 8, 1998, 40 I.L.M. 457 (2001), at §20.
[208] Grossman, *supra* note 163, at 138.
[209] *See* Vinuesa, *supra* note 206.
[210] McArthur & Ormachea, *supra* note 4, at 568.
[211] *Id.*
[212] Andreas F. Lowenfeld, *The ICSID Convention: Origins and Transformation* 38 GA. J. INT'L & COMP. L. 47, 56 (2009).
[213] *See supra* Part IV.A.
[214] *See* Bodansky, *supra* note 180, at 601-02.

Prior to 1987, ICSID's main source of jurisdiction was through direct agreements between the host State and the investors.[215] Direct agreements are contracts regarding a specific investment between the host State and investor and are only applicable to the specific investment at hand.[216] Direct agreements allow host States to individually negotiate each foreign investment project within its borders, whereas bilateral investment treaties are between two States, typically apply to a vast number of investments, and are effective for ten to twenty years.[217] The Centre must shift away from BITs not only to restore the balance of sovereignty and nationality, but also to restore its legitimacy.

C. *Alternative Explanations*

A possible explanation of the rise in the overrepresentation of BIT-based claims is the surge in BITs that began in the late 1980s.[218] Current estimates indicate that there are approximately over 2,600 BITs.[219] Scholars identify the proliferation of BITs as the source of ICSID's growing caseload, and could explain the shift from cases that derive jurisdiction from consent in a contract versus to consent in a bilateral investment treaty.[220] Nevertheless, the number of BITs does not explain ICSID's legal reasoning regarding jurisdictional claims. Regardless of the number of BITs, ICSID must follow both international standards for international courts, returning ICSID to a consensual jurisdiction institution and not a compulsory jurisdiction. Further, ICSID must be careful in determining consent in BITs that only create an option to arbitrate.

Another factor that could be affecting ICSID's legitimacy is the surge in nationalization in Latin American countries.[221] The return of the Calvo doctrine could explain the decline in popularity of ICSID and foreign investment in general.[222] After the surge of bilateral investment treaties, and the unequal bargaining power for developing states, scholars believed that the doctrine was dead.[223] With more States declaring economic liberalization, the restoration of the Calvo doctrine seems imminent. However, the return of the doctrine and the nationalization in Latin America could be a factor in ICSID's jurisdictional jurisprudence. ICSID's implicit support for BITs indicates a bias in the system – one that developing countries will no longer tolerate.

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[215] *See supra* Part II.B.
[216] *See supra* Part II.C.
[217] *See* REED, ET. AL., *supra* note 1, at 61.
[218] McArthur & Ormachea, *supra* note 4, at 570.
[219] Damon Vis-Dunbar and Henrique Suzy Nikiema, *Do Bilateral Investment Treaties Lead to More Foreign Investment?*, INVESTMENT TREATY NEWS (April 30, 2009), www.investmenttreatynews.com (search "Do Bilateral Investment Treaties Lead to More Foreign Investment?", then follow "Do Bilateral Investment Treaties Lead to More Foreign Investment?" hyperlink).
[220] *Id.*
[221] *See* Kevin T. Jacobs & Matthew G. Paulson, *The Convergence of Renewed Nationalization, Rising Commodities, and Americanization in International Arbitration and the Need for More Rigorous Legal and Procedural Defenses* 43 TEX. INT'L L.J. 359, 381 (2008).
[222] *See id.*
[223] *See* Shan, *supra* note 149, at 633.

VI. CONCLUSION

There are currently 130 cases pending for ICSID arbitration, and the tribunal "is the leading forum for the adjudication of disputes between private international investors and the sovereigns that play host to their investments."[224] The number of cases has dramatically increased in the past two decades.[225] Many of the cases were submitted to ICSID based on consent from bilateral investment treaties.[226] Globalization will continue to increase international investment activity, with the possibility of increasing the number of disputes that arise between investors and host States.

During this critical juncture, the Centre must realign its purpose and function – to promote investment flows for developing countries while protecting investors and their property – and fulfill its unstated objectives of balancing the sovereignty of developing States while protecting the nationality of investors from developed countries. Further, the tribunal must recant its current compulsory jurisdiction trends and regain its "popular legitimacy" through the practice of consensual arbitration. Without support from Contracting States of the ICSID Convention, the entire existence of the tribunal is futile.

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[224] McArthur & Ormachea, *supra* note 4, at 561; ICSID CASELOAD STATISTICS, *supra* note 72.
[225] *See id.*
[226] *See* Shan, *supra* note 149, at 633.