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# The International Centre for the Settlement of Investment Disputes and the Developing World: Creating a Mutual Confidence in the International Investment Regime

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**THE INTERNATIONAL CENTRE FOR THE  
SETTLEMENT OF INVESTMENT DISPUTES AND THE  
DEVELOPING WORLD: CREATING A MUTUAL  
CONFIDENCE IN THE INTERNATIONAL  
INVESTMENT REGIME**

**Elizabeth Moul\***

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## INTRODUCTION

Within the past two decades, there has been a significant increase in the number of international investment agreements providing for arbitration through the International Centre for the Settlement of Investment Disputes (ICSID).<sup>1</sup> This substantial growth in arbitration for investor-state disputes has led to concerns that the international investment system is business-biased and

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1. For a description of the Centre and the investor-state dispute process, see Background Information on the International Centre for Settlement of Investment Disputes (ICSID) (Jan. 20, 2013), <https://icsid.worldbank.org/apps/ICSIDWEB/about/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf> [hereinafter Background information on ICSID].

flawed.<sup>2</sup> Many powerful global corporations have been accused of taking advantage of developing countries through the international investment regime.<sup>3</sup> Developing countries agree to enter into investment agreements with private investors from wealthier nations in an effort to encourage foreign investment and ideally enhance economic development.<sup>4</sup>

However, critics claim that private investors utilize their superior bargaining power to negotiate unequal international investment treaties that favor the rights of investors.<sup>5</sup> These controversial international investment agreements protect the foreign investment and allegedly afford investors the power to sue governments if policy changes are deemed to negatively affect investors' profits.<sup>6</sup> Powerful corporate investors are then able to seek enforcement of these rights and protections through international arbitration tribunals, specifically ICSID.<sup>7</sup> There are growing concerns that ICSID prioritizes the rights and interests of corporate investors<sup>8</sup> at the expense of the social and environmental goals of the national governments and sovereign states.<sup>9</sup>

This comment will examine the inherent flaws within the current international investment process. First, this comment will present the background information on the foreign direct investment process; in general, the development of investment agreements and the shortcomings of the various alternative investment dispute mechanisms. This comment will describe the structure and purpose of ICSID as an organization established under the World Bank. Next, it will analyze the legal problems arising from the foreign investment process

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2. PIA EBERHARDT & CECILIA OLIVET, PROFITING FROM INJUSTICE: HOW LAW FIRMS, ARBITRATORS AND FINANCIERS ARE FUELLING AN INVESTMENT ARBITRATION BOOM, 7 (Helen Burley ed., Corporate Eur. Observatory and the Transnational Inst. 2012).

3. *Id.*

4. United Nations Conference on Trade and Development, New York and Geneva, *Course on Dispute Settlement: International Centre for Settlement of Investment Disputes*, UNCTAD/EDM/Misc.232, Module 2.1 (Oct. 3, 2003) (by Christoph Schreuer), available at [http://www.unctad.org/en/docs/edmmisc232overview\\_en.pdf](http://www.unctad.org/en/docs/edmmisc232overview_en.pdf) [hereinafter UNCTAD Course] (discussing the significance of foreign investment for development).

5. SARAH ANDERSON & SARA GRUSKY, CHALLENGING CORPORATE INVESTOR RULE 2 (Inst. for Policy Studies & Food and Water Watch eds., 2007).

6. EBERHARDT & OLIVET, *supra* note 2, at 7.

7. ANDERSON & GRUSKY, *supra* note 5, at 2.

8. *Id.*

9. *Id.* at 10.

today, which arguably favors corporate investors. This discussion will include criticism on the unequal international investment regime beginning with the creation of lopsided investment agreements, which are then enforced by a partial arbitration process. Finally, this comment will propose possible improvements for the international investment process to eliminate bias and provide investors and host states with a mutual confidence in ICSID as an impartial system for the settlement of investment disputes.

## I. BACKGROUND

### A. *Foreign Direct Investment*

Foreign direct investment (FDI) is a process by which a private company or entity invests in a business enterprise in another country, typically a developing country.<sup>10</sup> FDI potentially benefits both parties involved. While the investor profits from the expanded market and production networks, FDI also plays an important role for the developing country by enhancing economic development.<sup>11</sup> Foreign investment provides a developing country access to several options vital for development, such as capital, financing and technology.<sup>12</sup> These options can contribute to the improvement of a host country's infrastructure, provide employment opportunities and promote the welfare of their people.<sup>13</sup>

Before the 1960s, foreign investors were forced to comply with a variety of domestic government regulations to help ensure that the investment provided benefits to the host country.<sup>14</sup> For example, "foreign investors were subjected to . . . regulations, such as tariff protection, domestic content requirements, capital controls or controls on repatriation and other rules . . . ."<sup>15</sup> Investors, opposed to these constraints that protected the domestic industries, created international

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10. UNCTAD Course, *supra* note 4, at 5.

11. *Id.*

12. *Id.*

13. Omar E. García-Bolívar, *Defining an ICSID Investment: Why Economic Development Should be the Core Element*, 2 INVESTMENT TREATY NEWS, April, 13, 2012 <http://www.iisd.org/itn/2012/04/13/defining-an-icsid-investment-why-economic-development-should-be-the-core-element/> (explaining the intentions of states in international investment law).

14. ANDERSON & GRUSKY, *supra* note 5, at 4.

15. *Id.*

investment agreements to heighten the protections of their investment to ultimately maximize their profit.<sup>16</sup>

### *B. International Investment Agreements*

Today, international investment agreements, specifically either bilateral investment treaties (BITs) or free trade agreements (FTAs), predominantly govern foreign direct investments in developing countries. BITs are agreements between states that determine the terms and conditions for private foreign investors in the jurisdiction of another country.<sup>17</sup> FTAs, such as the North American Free Trade Agreement and the Central America Free Trade Agreement, are agreements that include chapters that provide for investor protections.<sup>18</sup> FTAs can be bilateral agreements, between two states, or multilateral agreements, between more than two states.<sup>19</sup>

International investment agreements began to emerge in the 1960s to provide greater protection for private investments under international law.<sup>20</sup> “The focus of the initial period of growth of investment treaties was singular: the protection of investor rights in foreign states.”<sup>21</sup> Investors consider various factors when pursuing an overseas investment including “the host country’s reputation, the profitability of a venture, low labor costs, availability of natural resources, tax advantages, etc.”<sup>22</sup> In addition to these factors, potential host countries offer international legal guarantees to investors through international investment agreements such as BITs and FTAs.<sup>23</sup> These agreements typically grant investors broad privileges by including provisions that govern four substantive areas: FDI admission, “fair and equitable treatment” to an investment,

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16. *Id.*

17. See Zachery Elkins, Andrew T. Guzman & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, 2008 U. ILL. L. REV. 265, 266 (2008).

18. ANDERSON & GRUSKY, *supra* note 5, at 3.

19. Background Information on ICSID, *supra* note 1, at 1.

20. Howard Mann, *Reconceptualizing International Investment Law: Its Role in Sustainable Development*, 17 LEWIS & CLARK L. REV. 521, 523 (2013).

21. *Id.* at 524.

22. Olivia Chung, Note, *The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration*, 47 VA. J. INT’L L. 953, 957 (2007).

23. UNCTAD Course, *supra* note 4, at 5–6.

adequate compensation for expropriation, and the settlement of disputes in international tribunals.<sup>24</sup>

By signing a BIT or FTA, the host government makes a credible commitment to treat foreign investors fairly. The enhanced security of a BIT and FTA is helpful as “a ‘confidence-building’ measure that sends a green light to the private investment community.”<sup>25</sup> Accordingly, governments with little credibility will sign BITs to give them a competitive advantage by reducing the risk of investing. Therefore, developing countries competing for foreign capital have a strong incentive to enter into foreign investment agreements.<sup>26</sup>

### C. *Alternative Methods of Investment Dispute Settlement*

An important aspect of the legal protection of foreign investments is the settlement of disputes between host states and foreign investors.<sup>27</sup> Therefore, when a dispute arises, a mechanism providing for an impartial and effective dispute settlement is a necessary element to protect both parties’ rights.<sup>28</sup> Until the creation of ICSID, the following methods available for the settlement of investment disputes were arguably inadequate.<sup>29</sup>

#### 1. *Domestic Court of Host State*

In the absence of other previously agreed upon arrangements for the settlement of the investment dispute, the host state’s domestic courts will commonly be employed to resolve the dispute.<sup>30</sup> However, from the investor’s

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24. See ANDERSON & GRUSKY, *supra* note 5, at 3. The terms “Fair and Equitable Treatment” are not defined and are thus subjective, providing arbitrators with broad discretion to interpret the meaning. Additionally, provisions granting adequate compensation if an investment is expropriated protects investors from either a physical taking of property, as well as government actions and regulations that reduce the value of a foreign investment.

25. Timothy A. Canova, *Banking and Financial Reform at the Crossroads of the Neoliberal Contagion*, 7 U.S.-MEX. L.J. 85, 107 (1999)(quoting Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24:3 THE INT’L LAWYER 655, 661 (1990)).

26. Chung, *supra* note 22, at 957.

27. UNCTAD Course, *supra* note 4, at 6.

28. *Id.*

29. *Id.*

30. *Id.* at 7.

perspective, investment dispute settlement in the host state's court is disadvantageous. First, investors claim that the host states' courts lack impartiality because they fail to offer sufficient guarantees to protect the foreign investor.<sup>31</sup> For example, domestic courts are bound by domestic law.<sup>32</sup> Accordingly, the domestic law of the host state will be applied even if the investor's rights would otherwise be protected under international law.<sup>33</sup> Also, investors claim that the regular domestic courts are unable to provide the advanced technical expertise required for the equitable resolution of complex international investment disputes.<sup>34</sup>

### 2. *Domestic Court of Other State*

Investment disputes can also potentially be settled in domestic courts of the investor's states.<sup>35</sup> Parties can agree to a choice of forum clause pointing to either the investor's domestic court or the court of a third state.<sup>36</sup> However, this type of dispute settlement is not usually a realistic option.<sup>37</sup> Regardless of an agreed upon choice of forum clause, the domestic courts of other states typically lack territorial jurisdiction over the investment operations; "sovereign immunity or other judicial doctrines will usually make such proceedings impossible."<sup>38</sup>

### 3. *Diplomatic Protection*

Diplomatic protection is another method used in the settlement of investment disputes. Because foreign investors regard the host state's domestic court as inadequate for the settlement of the investor-state dispute, foreign investors can rely on their home country to exercise diplomatic protection.<sup>39</sup> Diplomatic protection is a means for the investor's home state to take action against the host state in pursuit of the investor's claim.<sup>40</sup> However, this method of dispute resolution also has

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31. *Id.*

32. *Id.*

33. UNCTAD Course, *supra* note 4, at 7.

34. *Id.*

35. *Contra id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. UNCTAD Course, *supra* note 4, at 7.

40. *Id.*



several disadvantages.<sup>41</sup> First, diplomatic protection is discretionary and the investor does not have an automatic right to employ this method of resolution.<sup>42</sup> Secondly, the investor is required to have exhausted all local remedies in the host state without a satisfactory result before this process is even a possibility.<sup>43</sup> This prerequisite is intended to reduce the number of international claims and to avoid the developed country's involvement by providing the host country an opportunity to remedy the foreign investor's claims.<sup>44</sup>

Additionally, diplomatic protection can potentially affect the political relations between the two countries involved in the dispute.<sup>45</sup> For example, some developed countries have been accused of exercising diplomatic protection, specifically by applying political pressure and threatening economic boycotts, before the exhaustion of local remedies.<sup>46</sup> Diplomatic protection, therefore, changes the investor-state dispute to a political dispute between the host country and the home country, and may result in tense international relations.<sup>47</sup>

#### 4. *Ad Hoc Arbitration*

Another alternative for investment dispute settlement is ad hoc arbitration between the host state and the foreign investor.<sup>48</sup> Ad hoc arbitration is a form of arbitration that is not supported by a particular arbitration institution.<sup>49</sup> While ad hoc arbitration permits the parties to tailor the arbitration process to the specific facts of their dispute, ad hoc arbitration lacks institutional support, which creates a number of procedural disadvantages and inefficiencies.<sup>50</sup> For example, once the parties have agreed on ad hoc arbitration, they are required to create an arbitration agreement that regulates several procedural issues.<sup>51</sup> The parties must agree on the

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41. *Id.*

42. *Id.*

43. *Id.*

44. Chen Huiping, *The Investor-State Dispute Settlement Mechanism: Where to Go in the 21st Century?*, 9 J. WORLD INV. & TRADE 467, 469 (2008).

45. *Id.*

46. *Id.*

47. *Id.*

48. UNCTAD Course, *supra* note 4, at 7.

49. *Id.*

50. *Id.*

51. *Id.*

location and language of the arbitration, the applicable law, and the selection of arbitrators.<sup>52</sup>

As the shortcomings of the existing structures available for the settlement of investment dispute became increasingly apparent, the World Bank created an initiative in the 1960s to provide an effective and impartial alternative for investment dispute settlement between host states and foreign investors.<sup>53</sup>

#### *D. ICSID as an Investor-State Dispute Mechanism*

##### *1. World Bank's Purpose and Structure*

The primary purpose of the World Bank is to end poverty and encourage shared prosperity by “promot[ing] environmental and social sustainability, and to pursue a fiscally responsible development path.”<sup>54</sup> The Bank operates as a form of democracy as the member nations are represented in the Board of Executive Directors.<sup>55</sup> The president of the World Bank is a citizen from the Bank's largest shareholder member and governs the five separate institutions currently established under the Bank.<sup>56</sup> In 1966, the World Bank created the independent international institution, the International Centre for the Settlement of Investment Disputes, to provide facilities for the conciliation and arbitration of international investment disputes.<sup>57</sup>

##### *2. Purpose of ICSID*

ICSID's founding documents reveal three main purposes the institution seeks to achieve.<sup>58</sup> First, ICSID was established to protect foreign investment through the facilitation of investment dispute settlement.<sup>59</sup> Secondly, the ICSID Convention seeks to promote investment flows to Third World

52. *Id.*

53. UNCTAD Course, *supra* note 4, at 9.

54. See Corporate Responsibility, THE WORLD BANK (visited Mar. 2014), <https://crinfo.worldbank.org/wberinfo/node/6> (stating the World Bank's mission is to end extreme poverty and promote shared prosperity).

55. Jennifer N. Weidner, *World Bank Study*, 7 BUFF. HUM. RTS. L. REV. 193, 193 (2001).

56. *Id.* at 197.

57. Background Information on ICSID, *supra* note 1, at 1.

58. See Ibironke T. Odumosu, *The Antinomies of the (Continued) Relevance of ICSID to the Third World*, 8 SAN DIEGO INT'L L.J. 345, 357 (2006–2007).

59. *Id.* at 358.

states.<sup>60</sup> According to the ICSID Report, guaranteeing investment protection by providing a mechanism for investor-state arbitration “would provide additional inducement and stimulate a larger flow of private international investment into its territories, which is the primary purpose of the Convention.”<sup>61</sup> Therefore, ICSID was established under the belief that protecting foreign investors would facilitate investment flows, and as a result, enhance economic development in Third World countries.<sup>62</sup>

Furthermore, ICSID’s third goal is to provide an “atmosphere of mutual confidence” for investors and host countries.<sup>63</sup> This third purpose incorporates both of the first two purposes because “[t]he 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.”<sup>64</sup>

### 3. *Evolution of ICSID*

Although ICSID’s mechanisms were rarely employed for the first thirty years of its existence, the Convention’s caseload has increased dramatically in the last fifteen years.<sup>65</sup> This increase is a result of the substantial growth of foreign investments coupled with the rising number of Bilateral Investment Treaties and other international investment agreements providing for arbitration proceedings for the investor-state dispute settlement.<sup>66</sup> International investment agreements commonly protect investor’s rights by providing access to direct remedies in international tribunals.<sup>67</sup> There are several international tribunals and rules that can be employed to resolve claims arising out of the investment, such as the United Nations Commission on International Trade

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60. *Id.*

61. Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 5 I.L.M. 524 ¶ 12 (Mar. 18, 1965) [hereinafter ICSID Report].

62. Odumosu, *supra* note 58, at 359.

63. *Id.*

64. ICSID Report, *supra* note 61, ¶ 9.

65. ANDERSON & GRUSKY, *supra* note 5, at 3.

66. Background Information on ICSID, *supra* note 1, at 4.

67. ANDERSON & GRUSKY, *supra* note 5, at 3.

Law (UNCITRAL) and the International Chamber of Commerce (ICC).<sup>68</sup>

Today, the majority of investment agreements provide for ICSID arbitration, as ICSID was specifically established to facilitate the arbitration of disputes between states and investors.<sup>69</sup> As of June 2013, ICSID had registered a total of 433 cases under the ICSID Convention.<sup>70</sup> Over seventy percent of cases established ICSID jurisdiction on the basis of consent invoked by international investment agreements.<sup>71</sup>

#### 4. *Structure of ICSID*

The governing body of ICSID is the ICSID Administrative Council. The Administrative Council is comprised of one representative from each member state, with each representative having equal voting powers.<sup>72</sup> As of December 31, 2014, the Administrative Council was comprised of representatives from 150 Contracting States.<sup>73</sup> The chair of the Administrative Council is the president of the World Bank and has no vote.<sup>74</sup> The Administrative Council is responsible for electing the Secretary-General and the Deputy Secretary General, adopting the annual budget, adopting the rules and regulations for the institution and the procedure for the arbitration proceedings, and approving the annual report on the Centre's operation.<sup>75</sup>

The ICSID Secretariat is comprised of a Secretary-General, one or more Deputy Secretary-Generals, and staff.<sup>76</sup> The Secretariat is responsible for overseeing individual disputes on a day-to-day basis, providing institutional support

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68. *Id.*

69. *Id.*

70. See ICSID, *The ICSID Caseload – Statistics*, Issue 2013–2, at 23 (June 30, 2013), <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/2012-2%20%20-%20English.pdf> [hereinafter ICSID, *Statistics 2013*].

71. Background Information on ICSID, *supra* note 1, at 2. The remainder of ICSID cases established jurisdiction on the basis of Investor-State dispute settlement provisions in domestic investment legislation or contracts.

72. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. VII, Mar. 18, 1965, 17 U.S.T. 1270, *available at* [https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf) [hereinafter ICSID Convention].

73. Background Information on ICSID, *supra* note 1, at 1.

74. ICSID Convention, *supra* note 72, art. V.

75. ICSID Convention, *supra* note 72, art. XI.

76. *Id.* art. IX.

for the initiation and conduct of ICSID proceedings, assisting in the constitution of conciliation commissions, arbitral tribunals and ad hoc committees, and administering the proceedings and finances of each case.<sup>77</sup>

#### 5. *Choice of ICSID Dispute Settlement Methods*

There are two possible methods of dispute settlement provided by the ICSID Convention: conciliation and arbitration.<sup>78</sup> Conciliation is designed to assist the parties in reaching a mutually acceptable agreement.<sup>79</sup> Both parties must willingly agree to pursue this method of dispute resolution.<sup>80</sup> If the parties reach an agreement, the Commission creates a report noting the issues in the dispute and records the parties' agreed upon decision.<sup>81</sup> Conciliation is considered to be a more informal and flexible approach, and the report generated as a result of the conciliation is not binding on the parties.<sup>82</sup>

Arbitration, on the other hand, is a more formal process of dispute resolution.<sup>83</sup> If the parties fail to reach an agreed settlement, the tribunal determines an award that is binding and enforceable on both parties.<sup>84</sup> The vast majority of cases brought under the ICSID Convention use arbitration proceedings.<sup>85</sup> In a case where the parties have submitted to both conciliation and arbitration, the party initiating the proceedings decides which method will be used.<sup>86</sup> That party will typically choose arbitration, as this will ensure the efforts and costs of the dispute settlement will result in a binding decision.<sup>87</sup>

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77. *Id.*

78. UNCTAD Course, *supra* note 4, at 13.

79. *Id.*

80. *Id.*

81. ICSID Convention, *supra* note 72, art. XXXIV.

82. UNCTAD Course, *supra* note 4, at 13.

83. UNCTAD Course, *supra* note 4, at 13.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

## 6. ICSID Arbitration

### a. Proceedings

As mentioned above, ICSID specializes in the settlement of investment disputes. Therefore, to be within ICSID's jurisdiction, there must first be a legal dispute arising directly out of an investment.<sup>88</sup> While the ICSID Convention did not define what constitutes an investment, many investment agreements will provide a definition of investment.<sup>89</sup> Also, the ICSID Convention does not contain any substantive rules but instead offers a procedure for the settlement of investment disputes.<sup>90</sup> Pursuant to the ICSID Convention, the tribunals are to follow the law agreed upon by the parties.<sup>91</sup> However, in the absence of an agreed choice of law, the Tribunal shall apply the law of the host State, as well as any applicable international law.<sup>92</sup> International law includes international agreements, such as BITs and FTAs, and customary international law.<sup>93</sup> Also, if authorized by both parties, a tribunal has the authority to decide a case *ex aequo et bono*, meaning "on the basis of equity rather than law."<sup>94</sup>

ICSID arbitration proceedings are initiated by the submitting a Request for Arbitration to the Secretary-General of ICSID.<sup>95</sup> The request describes the facts and issues of the particular case.<sup>96</sup> The next step in the procedure is selecting the arbitral tribunal.<sup>97</sup> Within sixty days after the tribunal has been established, an initial session is held to discuss preliminary questions of procedure.<sup>98</sup> The proceedings then comprise of a written procedure, followed by an in-person oral hearing where the parties present their case.<sup>99</sup> Subsequently, the tribunal will deliberate and render an award.<sup>100</sup>

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88. *Id.*

89. UNCTAD Course, *supra* note 4, at 13.

90. UNCTAD Course, *supra* note 4, at 14.

91. ICSID Convention, *supra* note 72, at art. XLII.

92. *Id.*

93. UNCTAD Course, *supra* note 4, at 14.

94. *Id.*

95. Background Information on ICSID, *supra* note 1, at 3.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

*b. Tribunal Selection*

Independent tribunals decide the international investment disputes under ICSID arbitration proceedings.<sup>101</sup> In most instances, the tribunals are comprised of one arbitrator appointed by the investor, one arbitrator appointed by the state, and one presiding arbitrator, or tribunal president, appointed through the consent of both parties.<sup>102</sup> ICSID maintains a list of individuals who may be named as arbitrators in ICSID proceedings known as the ICSID Panel of Conciliators and of Arbitrators.<sup>103</sup>

Each ICSID Member State may designate four arbitrators to the Panel and the Chairman of the Administrative Council, the president of the World Bank, may designate ten arbitrators to the panel.<sup>104</sup> While this list provides a useful source from which parties may select arbitrators, the parties are not obligated to select an arbitrator from the list.<sup>105</sup> Parties are free to appoint any person they deem suitable who is of “high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment”<sup>106</sup> to facilitate in the resolution of the dispute. If the parties to a dispute fail to appoint conciliators or arbitrators to a tribunal, the Chairman of the Administrative Council has the authority to appoint conciliators, arbitrators or ad hoc committee members for the ICSID proceedings.<sup>107</sup>

Before the arbitration proceedings commence, the ICSID Arbitration Rules require each arbitrator to sign a declaration acknowledging that the arbitrator “shall judge fairly as between the parties, according to the applicable law . . . .”<sup>108</sup> Also, each arbitrator is required to attach a written statement of any past or present relationships with the parties and any other circumstance that may cause doubt as to that particular

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101. Background Information on ICSID, *supra* note 1, at 3.

102. *Id.*

103. *Id.*

104. ICSID Convention, *supra* note 72, at art. XIII.

105. Background Information on ICSID, *supra* note 1, at 3.

106. ICSID Convention, *supra* note 72, at art. XIV(1).

107. *Id.* at art. XXXIX.

108. ICSID, Rules of Procedure for Arbitration Proceedings, R.6(2) (Mar. 18, 1965), available at [https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf) [hereinafter ICSID Arbitration Rules].

arbitrator's reliability for independent judgment.<sup>109</sup> Additionally, arbitrators have a continuing obligation to investigate any conflict of interest that may arise throughout the proceedings.<sup>110</sup> A party may propose to disqualify an arbitrator on the grounds that the particular arbitrator lacks the qualities required and therefore is ineligible for appointment to the Tribunal.<sup>111</sup>

*c. Confidentiality*

The ICSID Rules specifically provide for confidentiality with regards to the proceedings. Each arbitrator is required to sign a declaration that he will keep all information regarding the arbitration proceedings and contents of any award confidential.<sup>112</sup> Also, only the members of the Tribunal, the parties, and the parties' agents, counsel, witnesses and experts may be present at the hearings.<sup>113</sup> In 2006, ICSID amended the rules of the Convention to permit third parties to attend oral hearings upon consent by both parties.<sup>114</sup> Lastly, only the Tribunal is permitted to participate in the deliberations, unless the Tribunal decides otherwise, and "the deliberations of the Tribunal shall take place in private and remain secret."<sup>115</sup>

Pursuant to the ICSID Convention, the tribunal is prohibited from publishing the award without the consent of the parties.<sup>116</sup> However, the Centre typically obtains the consent of the parties for such publication.<sup>117</sup> The ICSID Rules previously provided ICSID Tribunals with discretion to publish excerpts of awards that revealed the Tribunal's legal reasoning behind their decision.<sup>118</sup> In an effort to increase transparency, the 2006 amended rules now require ICSID to "promptly include in its publications excerpts of the legal

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109. *Id.*

110. *Id.*

111. ICSID Convention, *supra* note 72, at art. LVII.

112. ICSID Arbitration Rules, *supra* note 108, at R. 6(2).

113. *Id.* at R. 32.

114. *Id.*

115. *Id.* at R. 15(1).

116. ICSID Convention, *supra* note 72, at art. XLVIII(5).

117. ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration* 8 (Discussion Paper, 2004), available at [https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Possible\\_Improvements\\_of\\_the\\_Framework\\_of\\_ICSID\\_Arbitration.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Possible_Improvements_of_the_Framework_of_ICSID_Arbitration.pdf).

118. *Id.* at 8–9.



reasoning of the Tribunal.”<sup>119</sup> Therefore, the 2006 amendments make the reasoning behind the tribunal’s holding more accessible to the public.<sup>120</sup> However, consent by both parties is nonetheless still required for the publication of the award.<sup>121</sup>

The ICSID Rules are silent regarding whether the parties to a proceeding have an implied duty of confidentiality.<sup>122</sup> In one dispute, the Tribunal held that “both parties should refrain, in their own interest, from doing anything that could aggravate or exacerbate the dispute.”<sup>123</sup> However, tribunals have acknowledged that under the ICSID Rules, parties are allowed to freely disseminate any information relevant to the arbitration proceedings.<sup>124</sup> Accordingly, parties to international arbitration will often contract for confidentiality in investment agreements, thereby adding protections beyond the rules of the arbitral tribunal.<sup>125</sup>

#### *d. Awards*

Pursuant to Article 53 of the ICSID Convention, “[e]ach party shall abide by and comply with the terms of the award . . . .”<sup>126</sup> Therefore, ICSID awards are binding and final and the award debtor is obligated to comply.<sup>127</sup> Pecuniary obligations arising from awards are to be enforced like final domestic judgments in all Member States of the Convention.<sup>128</sup> Accordingly, recognition and enforcement may be sought either in the host state, in the investor’s state, or in any state that is a party to the ICSID Convention.<sup>129</sup>

The procedure for the enforcement and execution of the award is “governed by the laws concerning the execution of judgments in force in the State where such execution is

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119. ICSID Arbitration Rules, *supra* note 108, at R. 48(4).

120. *Id.*

121. ICSID Secretariat, *supra* note 117, at 8.

122. *See generally* ICSID Convention, *supra* note 70.

123. Amanda L. Norris & Katrina E. Metzidakis, *Public Protests, Private Contracts: Confidentiality in ICSID Arbitration and the Cochabamba Water War*, 15 HARV. NEGOT. L. REV. 31, 47 (2010) (quoting Margrete Stevens, *Confidentiality Revisited*, NEWS FROM ICSID, Spring 2000, at 9).

124. Norris & Metzidakis, *supra* note 123, at 48.

125. *Id.*

126. ICSID Convention, *supra* note 72, at art. LIII(1).

127. *Id.*

128. *Id.* at art. LIV.

129. UNCTAD Course, *supra* note 4, at 18.

sought.”<sup>130</sup> ICSID awards are not subject to scrutiny by domestic courts.<sup>131</sup> As a result, a domestic court is not permitted to examine jurisdiction of the ICSID tribunal, procedure, or substantive validity of an award.<sup>132</sup>

After an award is rendered, the parties may request an interpretation, revision, or annulment of the award.<sup>133</sup> The ICSID Convention offers its own system for review by which a party may seek annulment of the award by an ad hoc committee.<sup>134</sup> The ad hoc committee consists of three persons, appointed by the Chairman of ICSID.<sup>135</sup> In accordance with Article 52 of the ICSID Convention, a party may request annulment of the award only on the following conditions: (a) the Tribunal was not properly constituted, (b) the Tribunal manifestly exceeded its powers, (c) corruption by a Tribunal member, (d) a serious departure from a fundamental rule or procedure, or (e) the award did not state the reasons for the decision.<sup>136</sup>

If the ad hoc committee upholds the request for the annulment, the original award is invalidated.<sup>137</sup> However, the ad hoc committee does not have the authority to replace the award with a new decision on the merits.<sup>138</sup> To receive a valid award for that particular claim, the parties must request that the dispute be submitted to a new tribunal.<sup>139</sup>

## II. LEGAL PROBLEMS WITH THE INTERNATIONAL INVESTMENT PROCESS

The substantial increase in the number of international investment agreements has led to a growing concern the international investment regime is adverse to developing countries. Foreign direct investment is essential for enhancing economic development in developing countries.<sup>140</sup> However, in the competition to attract investment, developing countries are

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130. ICSID Convention, *supra* note 72, art. LIV(3).

131. UNCTAD Course, *supra* note 4, at 18.

132. *Id.*

133. ICSID Convention, *supra* note 72, at art. L-LII.

134. ICSID Arbitration Rules, *supra* note 108, R. 52(1).

135. ICSID Convention, *supra* note 72, at art. LII(3).

136. *Id.* at art. LII(1).

137. ICSID Convention, *supra* note 72, at art. LII.

138. *Id.*

139. *Id.*

140. Odumosu, *supra* note 58, at 359.

in a disadvantaged bargaining position during the investment agreement negotiation process.<sup>141</sup> As a result of these unequal investment agreements, developing countries are not receiving the potential benefits of the foreign direct investment process.<sup>142</sup>

Additionally, foreign investors often request to include a provision in the investment agreement stipulating that ICSID shall govern the resolution of any dispute arising out of an investment.<sup>143</sup> Because ICSID was established under the belief that protecting foreign investors would facilitate investment and ultimately enhance economic development in Third World countries, there is a concern that ICSID dispute settlement inequitably prioritizes the protection of investors' rights regardless of any potentially adverse consequences on the developing country.

As developing countries begin to question the legitimacy of the international investment process as a biased system favoring investors, they will seek ways to avoid the international investment regime.<sup>144</sup> In 2012, Venezuela became the third country, following Ecuador and Bolivia, to have denounced its membership from ICSID.<sup>145</sup> Venezuela's exit from ICSID signals the growing loss of faith in the system and raises questions about the Convention's legitimacy and purpose to provide an unbiased investment dispute resolution forum.<sup>146</sup> Accordingly, there are concerns "that other states will follow suit, which could result in the collapse of the current international investment system."<sup>147</sup> Bolivia, Ecuador and Venezuela's withdrawal from ICSID demonstrates that changes are imperative to prevent the current international investment regime from potential collapse.

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141. Chung, *supra* note 22, at 958.

142. *Id.*

143. Background Information on ICSID, *supra* note 1, at 2.

144. Chung, *supra* note 22, at 969.

145. Diana Marie Wick, *The Counter-Productivity of ICSID Denunciation and Proposals for Change*, 11 J. INT'L BUS. & L. 239, 241 (2012).

146. *Id.*

147. *Id.*

## III. ANALYSIS

A. *Criticism of International Investment Agreements*1. *Unequal Bargaining Power*

With the recognition of FDI's importance as a significant means of financing development, many developing countries have worked to increase their chances of attracting investments.<sup>148</sup> However, in the competition to attract investment, developing countries are allegedly coerced into forfeiting concerns about economic sovereignty and capital controls in exchange for greater incentives to investors.<sup>149</sup> Because the market for foreign direct investment in developing countries is competitive, potential host countries often concede many of their rights to the investor in an effort to out bid other competitors.<sup>150</sup>

Consequently, the winner of the investment has typically relinquished all possible benefits of the foreign investment that would have aided in the development and promotion of the welfare of their people.<sup>151</sup> "The benefits to the country generated by the investment (in the form of employment, technology transfers, tax revenues, and so on) [would] be offset by the incentives and concessions that were needed to attract the firm (tax breaks, reduced pollution controls, relaxed employment regulations, and so on)."<sup>152</sup> Therefore, developing countries are in a disadvantaged position when negotiating investment agreements and are often pressured to acquiesce to investor's demands, gaining very little if anything from the investment.<sup>153</sup>

2. *Broad Rights of Investors*

Investors, through their superior bargaining power, are able to successfully protect their interests during the investment agreement negotiation.<sup>154</sup> Thus, investment

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148. Chung, *supra* note 22, at 957.

149. Chung, *supra* note 22, at 958.

150. Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 672 (1997-1998).

151. *Id.*

152. *Id.*

153. *Id.*

154. Chung, *supra* note 22, at 957.

agreements have grown to impose broad obligations on the host country thereby inviting a wide variety of investor claims.<sup>155</sup> The broad, open-ended definitions included in investment agreements subject host states to claims they did not anticipate at the time they entered into the treaty.<sup>156</sup>

A case is within the jurisdiction of ICSID only if both parties consent to the Centre's jurisdiction in writing and only if the dispute directly arises out of an investment.<sup>157</sup> The ICSID Convention, however, fails to provide any definition of what constitutes an "investment" or "investor."<sup>158</sup> In the absence of definitions, these concepts have been given wide and open-ended meanings and have resulted in the protection of a variety of activities in a large number of economic fields.<sup>159</sup> To interpret these terms, many ICSID tribunals turn to the language used in the governing treaties.<sup>160</sup> The language incorporated in the treaties is also commonly broad leaving much room for interpretation by the arbitrators.<sup>161</sup> For example, the U.S. Model BIT defines an investment as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."<sup>162</sup>

An ICSID case, *Tokios Tokelés v. Ukraine*,<sup>163</sup> demonstrates the problems that can arise from an open-ended and broad definition. In this ICSID case, the investor-claimant, Tokios Tokelés, was a wholly owned subsidiary established in Ukraine by a Lithuanian company.<sup>164</sup> When Tokios Tokelés submitted its dispute with Ukraine to ICSID, Ukraine objected to

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155. *Id.*

156. *Id.* at 960.

157. ICSID Convention, *supra* note 72, at art. XXV(1).

158. *See generally* ICSID Convention, *supra* note 72.

159. Chung, *supra* note 22, at 959.

160. *Id.*

161. *Id.* at 960.

162. 2012 U.S. Model Bilateral Investment Treaty Concerning the Encouragement and Reciprocal Protection of Investment, art.I, 2012, *available at* <http://www.state.gov/documents/organization/188371.pdf>.

163. *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (Apr. 29, 2004), <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/02/18&tab=DOC>.

164. *Id.* at ¶ 1–2.

jurisdiction.<sup>165</sup> Ukraine contended that the Tokios Tokelés was not a foreign investor because Ukrainian nationals owned ninety-nine percent of outstanding shares in Tokios Tokelés and comprised two-thirds of the management.<sup>166</sup> However, the Ukraine-Lithuania BIT broadly defined investor as “any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations.”<sup>167</sup> Therefore, because the Ukrainian subsidiary was incorporated under the laws of Lithuania, the ICSID Tribunal concluded the Lithuanian company was an investor within the meaning of the BIT’s definition.<sup>168</sup> This language that both parties agreed to in the Ukraine-Lithuania BIT is broader than the language provided in the majority of other treaties.<sup>169</sup> However, this case serves as an example of the consequences of open-ended definitions in a treaty.<sup>170</sup>

## *B. Criticism of the ICSID Arbitration System*

### *1. Biased Tribunals*

Critics allege that biased arbitrators decide investor-state dispute settlement cases.<sup>171</sup> This claim that ICSID tribunals favor investors is attributable to several features inherent in the arbitration system.

#### *a. Small Clique of Arbitrators*

Among the hundreds of people who serve as investment arbitrators, there exists a group of fifteen arbitrators who have been involved in the majority of investor-state arbitration.<sup>172</sup> This elite group of arbitrators has the heaviest caseload as arbitrators in investment-treaty disputes and has handled the majority of the biggest cases in terms of award amount being claimed.<sup>173</sup> The arbitrators most frequently selected to decide

165. *Id.* at ¶ 11.

166. *Id.* at ¶ 21.

167. *Id.* at ¶ 18.

168. Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, ¶ 71 (Apr. 29, 2004), <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/02/18&tab=DOC>.

169. Chung, *supra* note 22, at 960.

170. *Id.*

171. EBERHARDT & OLIVET, *supra* note 2, at 38.

172. EBERHARDT & OLIVET, *supra* note 2, at 38.

173. *Id.*

cases are men from developed countries.<sup>174</sup> Eighty-three percent of all cases held at ICSID involve arbitrators from Western Europe and North America and only four percent of arbitrators are women.<sup>175</sup> Therefore, the concentration of cases handled by this elite group inevitably creates a significant career interest for these arbitrators.<sup>176</sup> Also, the reoccurring use of the same arbitrators limits the possibility of diverse viewpoints and perspectives.

*b. Multiple Roles of Arbitrators*

Furthermore, many of these specialists serving as arbitrators also act as advocates in other disputes.<sup>177</sup> The possibility of serving multiple roles creates a risk of conflict of interest and raises doubts about the arbitrator's independence and impartiality.<sup>178</sup> For example, an arbitrator may be asked to render a decision on an issue he has previously acted as an advocate for in a prior case.<sup>179</sup> In these situations, an arbitrator's integrity might be compromised, as it is difficult for a lawyer to remain neutral when deciding an issue in which he has previously argued in support of one side.<sup>180</sup> Before the arbitration proceedings begin, an arbitrator has a duty to disclose any relationship with the parties or any other circumstance that might cause doubt as to his ability to remain impartial.<sup>181</sup> However, these vague disclosure obligations permit the arbitrators to act with considerable discretion.<sup>182</sup>

*c. Lavish Arbitrator Fees*

Arbitrators may lack impartiality as a result of the significant financial interest in the existence of investment arbitration.<sup>183</sup> Unlike judges, arbitrators do not earn a flat salary and therefore have a financial stake in the arbitration

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174. *Id.* at 36.

175. *Id.*

176. *Id.* at 35.

177. *Id.* at 43.

178. EBERHARDT & OLIVET, *supra* note 2, at 43.

179. *Id.*

180. *Id.*

181. ICSID Arbitration Rules, *supra* note 108, at R. 6(2).

182. See Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT'L L. 53, 117 (2005).

183. EBERHARDT & OLIVET, *supra* note 2, at 35.

system.<sup>184</sup> Arbitrators' fees can range anywhere from \$375 to \$700 per hour.<sup>185</sup> On average, an arbitrator earns \$350,000 per case.<sup>186</sup> Earnings could be far greater depending on where the arbitration takes place, the case's length, and the case's complexity.<sup>187</sup> ICSID has capped the amount of fees an arbitrator can earn at \$3000 per day of work.<sup>188</sup> However, the fee amount an arbitrator earns on a particular case is potentially correlated to the substantive outcome of their decisions.<sup>189</sup> For example, decisions finding a lack of arbitral jurisdiction will likely result in no fees for the arbitrator.<sup>190</sup> Therefore, when asked to rule on jurisdiction of the case, or disqualify themselves due to a conflict of interest, arbitrators are necessarily required to act contrary to their own financial interest.<sup>191</sup> Disclosing a conflict of interest or narrowing the standard of permitted cases under ICSID could result in the loss of thousands of dollars in potential fees.<sup>192</sup> Accordingly, arbitrators have a strong incentive to expand the interpretation of investment rules to increase the number of cases falling under ICSID jurisdiction.

*d. Arbitrators Favor Investors to Promote Investments*

Because the majority of arbitrators come from developed countries,<sup>193</sup> it is likely they will have a biased viewpoint towards the corporate world thus favoring the protection of investors' profits. As mentioned above, arbitrators have a significant financial interest in the arbitration system. Given the fact that investors initiate the majority of ICSID claims, arbitrators might strategically rule in favor of the investor to

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. The World Bank Group, *Memorandum on the Fees and Expenses of ICSID Arbitrators*, WORLD BANK.ORG (July 6, 2005), <https://icsid.worldbank.org/apps/ICSIDWEB/icsidocs/Pages/—Memorandum-on-the-Fees-and-Expenses-English.aspx>.

189. See Rogers, *supra* note 182, at 71, for a description of the features in the arbitration system which contribute to the notion that arbitrators are less impartial than judges.

190. *Id.* at 72.

191. *Id.*

192. *Id.*

193. EBERHARDT & OLIVET, *supra* note 2, at 36.



promote an increased caseload.<sup>194</sup>

Also, “the primary purpose behind the creation of ICSID was the promotion of foreign investment.”<sup>195</sup> “The Report of the Executive Directors on the Convention emphasized promoting global economic development through private international investment.”<sup>196</sup> Therefore, under the belief that protecting foreign investments would facilitate investment flows and enhance economic development in Third World countries,<sup>197</sup> arbitrators have an incentive to favor the protection of investors’ rights to encourage the growth of international investment.

*e. Inadequate Qualification Requirements*

Under the current rules, a person is qualified to be an arbitrator if they possess a “high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.”<sup>198</sup> To be qualified as an arbitrator, a person is not required to be registered anywhere or possess any legal training.<sup>199</sup> This provision was written to ensure arbitrators met the necessary qualifications envisioned for commercial disputes.<sup>200</sup> However, as public interests have become increasingly prevalent in international law, other legal disputes commonly arise out of an investment.<sup>201</sup> ICSID arbitrators are therefore not always qualified to address human rights and environmental questions arising out of an investment dispute.<sup>202</sup>

*2. Lack of Transparency*

One of the most controversial aspects of international arbitration is the confidential protection afforded to parties

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194. *Id.* at 38.

195. ICSID Report, *supra* note 61, ¶ 12.

196. Charity L. Goodman, *Unchartered Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina*, 28 U. PA J. INT’L ECON. L. 449, 457 (2007).

197. ICSID Report, *supra* note 61, ¶ 12.

198. ICSID Convention, *supra* note 72, at art. XIV(1).

199. *Id.*

200. Odumosu, *supra* note 58, at 382.

201. *Id.*

202. *Id.* at 382–83.

before ICSID.<sup>203</sup> ICSID arbitration is a matter of contract between the parties involved in the dispute.<sup>204</sup> Therefore, it is arguably reasonable for the parties involved in the proceedings to assume that the public should be excluded from the proceedings.<sup>205</sup> Accordingly, the ICSID Arbitration Rules create a presumption in favor of confidentiality.<sup>206</sup>

There are some arguments to support the concept of confidentiality in arbitration proceedings. By choosing arbitration as opposed to judicial proceedings, parties have thereby rejected public courts and have elected to keep their dispute private.<sup>207</sup> One of the primary reasons parties claim they elect to settle their dispute through arbitration is the confidentiality protection.<sup>208</sup> Therefore, rescinding confidentiality is potentially detrimental to the arbitration process, as arbitration proceedings would inevitably become more like traditional litigation.<sup>209</sup> Also, many foreign investors claim, “that confidentiality is necessary to protect intellectual property, trade secrets, or business information that may be disclosed as part of the arbitration proceedings.”<sup>210</sup> Investors argue that removing confidentiality protections would cause public disclosure of private technical data.<sup>211</sup>

However, while confidentiality does provide some benefits to investor-state dispute resolution, there are also several arguments for transparency in investment arbitration proceedings. First, confidentiality protects the arbitrators by concealing the proceedings and award from public scrutiny.<sup>212</sup> This lack of historical information about each arbitrator hinders the parties from selecting the most appropriate and qualified arbitrator for the particular dispute in question.<sup>213</sup> Also, without access to prior award information, there is no precedent, thereby making it difficult for the parties to predict

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203. Norris & Metzidakis, *supra* note 121, at 31.

204. *Id.*

205. *Id.*

206. *Id.* at 46.

207. *Id.*

208. *Id.* at 50.

209. Norris & Metzidakis, *supra* note 123, at 54.

210. *Id.* at 53.

211. *Id.*

212. *Id.* at 60.

213. *Id.*

the outcome of their dispute.<sup>214</sup> “When awards are not published, it is difficult to analyze how the law is applied.”<sup>215</sup> International arbitrators may therefore be applying the law inconsistently creating an uncertainty in international business transactions.<sup>216</sup>

Because the “lack of transparency . . . inhibits the creation of precedent in international law,” arbitral proceedings are arguably less efficient.<sup>217</sup> For example, a party is more likely to settle if the outcome of the dispute was more predictable.<sup>218</sup> Furthermore, the unpredictability of international business transactions complicates business planning when considering investment in a particular country.<sup>219</sup> Businesses pursuing international investment are unable to accurately set prices and allocate risk without any certainty as to the law governing their particular deal.<sup>220</sup>

Even though a tribunal’s award would not carry precedential value, the case would carry persuasive weight with other arbitral tribunals resolving similar claims.<sup>221</sup> However, the process of arbitration is not intended to apply beyond only the particular facts and circumstances of the instant case.<sup>222</sup> Parties consenting to arbitration have chosen this method despite the lack of predictability that may be afforded in a court decision with more developed bodies of law.<sup>223</sup>

Critics allege that the confidentiality rules of ICSID harm the legitimacy of the institution itself.<sup>224</sup> Because of ICSID’s structure and association with the World Bank, parties may be skeptical of the tribunal’s reliability in rendering an objective decision given the Bank’s close relations with large corporations.<sup>225</sup> The “requirement that an award [shall] not be published without the consent of the parties will limit the

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214. *Id.*

215. Norris & Metzidakis, *supra* note 123, at 61.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. Norris & Metzidakis, *supra* note 123, at 62.

221. *Id.*

222. *Id.*

223. Norris & Metzidakis, *supra* note 123, at 62.

224. *Id.*

225. *Id.* at 63.

public's access to the award and contribute to the mystification of ICSID."<sup>226</sup> Parties new to the ICSID convention may attribute "ICSID's reluctance to publish awards . . . to the unreliability of the tribunals' decisions."<sup>227</sup> This uncertainty concerning the integrity of the process could weaken public acceptance of arbitral tribunals' awards and operations.<sup>228</sup>

Additionally, investor-state disputes, compared to traditional international commercial arbitration, justify the need for transparency for the arbitration proceedings and award. Unlike traditional international commercial arbitrations, investor-state disputes involve governments as parties. The confidentiality protections might limit scrutiny of government decision-making.<sup>229</sup> "Democratically elected governments are accountable to their electorate and should come under scrutiny in the political process if they are engaged in conduct contrary to their international obligations."<sup>230</sup> Investor-state disputes involve issues that must be decided in accordance with a treaty or public international law.<sup>231</sup> The results of these decisions could potentially have a significant effect extending beyond the two parties involved in the dispute. Therefore, it is inappropriate to conduct confidential arbitrations involving public interests.<sup>232</sup>

Moreover, confidential awards could "undermine, and perhaps even reverse . . . legislative victories that have provid[ed] legal protection for the rights of these communities."<sup>233</sup> As discussed above, foreign direct investment is important for economic development in developing countries.<sup>234</sup> Therefore, the government's need to maintain a reputation as an attractive environment for foreign investors inevitably weakens the government's bargaining power.<sup>235</sup> Thus, investors who take advantage of weaker national

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226. Benjamin H. Tahyar, *Confidentiality in ICSID Arbitration after AMCO Asia Corp. v. Indonesia: Watchword or White Elephant?*, 10 *FORDHAM INT'L L.J.* 93, 116 (1986).

227. *Id.* at 116–17.

228. *Id.* at 116.; Norris & Metzidakis, *supra* note 123, at 64.

229. Norris & Metzidakis, *supra* note 123, at 65.

230. *Id.* at 64.

231. *Id.*

232. *Id.* at 64–65.

233. *Id.* at 65–66.

234. *See supra* Background Part I.

235. *Id.* at 65.

governments could potentially abuse the process.

Lastly, confidential proceedings may be used to conceal any abuse of the system by foreign governments.<sup>236</sup> “In the past six years, the World Bank received more than 2,000 allegations of corruption and found a ‘recurring pattern of bribery, kickbacks, front companies, and shell companies.’”<sup>237</sup> Confidential arbitration proceedings, in an environment where the risk of corruption is allegedly prevalent, raise the possibility of illegal practices and fraud between governments and foreign companies.<sup>238</sup> Critics argue that investors are able to use their rights to conspire with governments to force “dangerous investments on unwilling populations.”<sup>239</sup>

For example, in the case of *Metalclad v. Mexico*,<sup>240</sup> Metalclad Corporation, an American waste disposal company, filed a complaint with ICSID alleging that the Mexican state of San Luis Potosí violated provisions of the North American Free Trade Agreement. The Governor of San Luis Potosi prohibited Metalclad’s waste disposal plant after an environmental impact assessment revealed that the Metalclad facility site was an ecologically sensitive zone.<sup>241</sup> Accordingly, Metalclad claimed that the Governor’s action expropriated Metalclad’s future profits, resulting in ninety million dollars in damages.<sup>242</sup> However, the Mexican federal government allegedly encouraged Metalclad to pursue arbitration before ICSID in order to “‘force’ the government to open a waste disposal plant opposed by environmentalists.”<sup>243</sup>

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236. Norris & Metzidakis, *supra* note 123, at 68.

237. Norris & Metzidakis, *supra* note 123, at 68 DOC 37 (quoting Edward T. Pound & Danielle Knight, *Cleaning Up the World Bank*, U.S. & NEWS & WORLD REPORT, Apr., 3, 2006).

238. Norris & Metzidakis, *supra* note 123, at 68.

239. Norris & Metzidakis, *supra* note 123, at 69.

240. *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, Waste Disposal Enterprise, (Aug. 30, 2000), 5 ICSID Rep. 212 (2002), <http://www.italaw.com/sites/default/files/case-documents/ita0181.pdf>.

241. Global Trade Watch, Public Citizen, *Our Future Under the Multilateral Agreement on Investment*, [http://www.citizen.org/trade/article\\_redirect.cfm?ID=1175](http://www.citizen.org/trade/article_redirect.cfm?ID=1175) (last visited Apr. 19, 2015).

242. *Id.*

243. See Norris & Metzidakis, *supra* note 123, at 68 (citing FIONA BEVERIDGE, *THE TREATMENT AND TAXATION OF FOREIGN INVESTMENT UNDER INTERNATIONAL LAW* 155 (2000)) DOC 43; see also Global Trade Watch, Public Citizen, *Our Future Under the Multilateral Agreement on Investment*, [http://www.citizen.org/trade/article\\_redirect.cfm?ID=1175](http://www.citizen.org/trade/article_redirect.cfm?ID=1175) (last visited Dec. 30,

Therefore, even though there are some benefits to maintaining confidentiality in arbitration proceedings, greater transparency is necessary for arbitration proceedings where the government is a party, as in all arbitrations before ICSID. Accordingly, the confidentiality rules of ICSID inappropriately permit private arbitrations to be conducted for claims involving public interests and harm the legitimacy of the ICSID institution.

### 3. *Inequitable and Excessive Award*

As investors continue to be successful in securing monetary awards through the arbitration process, the number of cases is rising significantly.<sup>244</sup> “In 70% of the public decisions addressing the merits of the dispute, investors’ claims were accepted, at least in part.”<sup>245</sup>

The prospect of winning excessive awards encourages investors to file claims under ICSID. Accordingly, the vast majority of new cases filed in 2012 were filed by investors from developed countries against developing countries.<sup>246</sup> In *CME Czech Republic B.V. v. Czech Republic*,<sup>247</sup> the investor was awarded significantly more than the actual value of the investment.<sup>248</sup> In this case, the tribunal held that the Czech Republic violated the Czech-Netherlands BIT when the government amended their media regulatory controls.<sup>249</sup> The tribunal then declared that the Czech Republic was responsible for CME’s losses and awarded the investor over \$270 million.<sup>250</sup> This award amount was calculated using a

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2013).

244. See Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration*, 16 *FLA. J. INT’L L.* 301, 306 (2004).

245. United Nations Conference on Trade and Development, *Recent Developments in Investor-State Dispute Settlement (ISDS)*, No. 1, at 1 (May 28–29, 2013) [hereinafter *Recent Developments in ISDS*], available at [http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf).

246. *Recent Developments in ISDS*, *supra* note 245, at 1.

247. See *CME Czech Republic B.V. v. Czech Republic (Final Award)* (separate opinion of Ian Brownlie), UNCITRAL Award, 2003 WL 24070172 ¶ 74 (Mar. 14, 2003).

248. See Tai-Heng Cheng, *Power, Authority and International Investment Law*, 20 *AM. U. INT’L L. REV.* 465, 496 (2005).

249. See *CME Czech Republic B.V. v. Czech Republic (Final Award)* (separate opinion of Ian Brownlie), UNCITRAL Award, 2003 WL 24070172 ¶ 74 (Mar. 14, 2003).

250. *Id.*

discounted cash flow, which included the value of the investor's actual investment, as well as forecasted cash flows.<sup>251</sup> The tribunal's decision placed a high financial cost on the Czech government to regain authority to enact new regulatory controls.<sup>252</sup> Therefore, the investor's award is often arguably inequitable as it not only prohibits a state from regulating key domestic affairs, but also potentially subjects the state to paying excessive monetary awards.<sup>253</sup>

#### 4. *ICSID Annulment Mechanism*

There has been an emerging trend toward challenging international arbitration awards.<sup>254</sup> As mentioned above, ICSID offers its own system of review by which a party can annul an award.<sup>255</sup> However, annulment proceedings review only the legitimacy of the decision's process.<sup>256</sup> Unlike an appeal, an annulment does not review the substantive validity of the award rendered.<sup>257</sup> Therefore, there is currently no cure for an award decided on a substantively invalid basis.

While most states have complied with ICSID awards, in recent years, some states, including Argentina, Congo and Zimbabwe, have refused to comply with an award.<sup>258</sup> Several procedural issues result from the States' failure to comply with ICSID awards, which undermines "the value of ICSID arbitration as a meaningful mechanism for the resolution of investment disputes."<sup>259</sup>

### IV. PROPOSALS FOR CHANGE

#### A. *Modifications to Investment Agreements*

##### Investor rights and protections applied in investment

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251. *Id.*

252. See Tai-Heng Cheng, *Power, Authority and International Investment Law*, 20 AM. U. INT'L L. REV. 465, 496 (2005).

253. *Id.*

254. Charles B. Rosenberg, *The Intersection of International Trade and International Arbitration: Suspending Trade Benefits to "Encourage" Compliance with ICSID Awards*, Transnational Dispute Management, Oct. 2013, at 4.

255. See ICSID Convention, *supra* note 72, art. LII(1).

256. *Id.*

257. *Id.*

258. Rosenberg, *supra* note 254.

259. *Id.* at 5 (citing Siemens AG. v. Argentine Republic, United States Submission regarding Articles 53 and 54 of the ICSID Convention, ICSID Case No. ARB/02/8, (May 1, 2008), at 1).

dispute settlements are most commonly established in investment agreements.<sup>260</sup> Therefore, to change the investor-state arbitration regime, it is necessary to first amend investment agreements to reconcile the business interests of foreign investors with the economic and sustainable development concerns of host countries.<sup>261</sup> As mentioned above, investment agreements were historically created to provide foreign investors greater protection in foreign states.<sup>262</sup> However, recent evidence negates the reason for developing countries to join investment treaties.<sup>263</sup> The presumed benefit of foreign direct investments for developing countries to aid in economic development has not been materializing because developing countries are pressured into negotiating broad investment liberalization rights.<sup>264</sup>

Furthermore, these developing countries have been exposing themselves to the increased risks of international arbitrations.<sup>265</sup> Therefore, investment treaties must make a fundamental shift to diminish the focus on investor rights and to expressly endorse sustainable development as the broader goal of investment agreements.<sup>266</sup> The purpose of the investment regime must be altered to recognize that states have a right to pursue investments that ensure a positive contribution to their sustainable development.<sup>267</sup>

To make this shift, investment agreements must expressly endorse sustainable development as a goal of the investment agreement, as opposed to only referring to the investor's rights and protections.<sup>268</sup> Including a binding obligation on the part of the foreign investor to protect human rights and the environment will transform the scope of the treaty to promote sustainable development.<sup>269</sup> This shift in focus within the investment agreement will create a more balanced approach that recognizes state rights and responsibilities within the

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260. Wick, *supra* note 145, at 289.

261. *Id.*

262. Mann, *supra* note 20, at 524.

263. *Id.* at 531.

264. *Id.*

265. *Id.* at 529.

266. *Id.* at 530.

267. *Id.* at 531.

268. *Id.* at 537.

269. Mann, *supra* note 20, at 537.



presence of investor rights.<sup>270</sup>

Currently, many investment agreements rely on vague terms, which are broadly interpreted to afford investors' expansive rights.<sup>271</sup> Investment treaties should therefore be amended to limit the scope of investors' rights by using clear, definitive language. The terms "investor" and "investment" should be clearly defined within the investment agreement to refer only to investments made by the particular private investor from one state within a foreign host state.<sup>272</sup> Narrowing the definitions of these terms will limit the arbitrator's ability to widely interpret the scope of the investment agreement.<sup>273</sup> Ultimately, this clarification will prevent investors from enforcing broad obligations on the host state and will reduce the risk to the host state by preventing a wide variety of unforeseeable investor claims.

#### *B. Reform the ICSID Arbitration Process*

In April 2006, ICSID made some limited changes to its arbitration rules.<sup>274</sup> These amendments demonstrate that it is possible for ICSID to make the necessary adjustments to meet the evolving needs of investors and host countries. While these changes were a step in the right direction, there have not been any additional changes to ICSID since 2006.<sup>275</sup> The ICSID Administrative Council has the authority to amend ICSID Rules.<sup>276</sup> Any revision must be consistent with the ICSID Convention and must be approved by a majority of two-thirds vote by the Administrative Council.<sup>277</sup> With the growth of international investment agreements and the resulting growth of investor-state arbitrations, additional changes to the arbitration process are necessary to increase legitimacy and deter other countries from withdrawing from the ICSID Convention.

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270. *Id.*

271. *Id.*

272. *Id.* at 538.

273. *Id.*

274. ANDERSON & GRUSKY, *supra* note 5, at 26.

275. ICSID Arbitration Rules, *supra* note 108, at 5.

276. ICSID Convention, *supra* note 72, art. LXV.

277. See NATHALIE BERNASCONI-OSTERWALDER, LISE JOHNSON & FIONA MARSHALL, ARBITRATOR INDEPENDENCE AND IMPARTIALITY: EXAMINING THE DUAL ROLE OF ARBITRATOR AND COUNSEL 43 (Int'l Inst. for Sustainable Dev. ed., 2011).

*1. Revise Requirements for Arbitrator's Qualification and Disclosure*

As mentioned above, a small clique of arbitrators typically decides investor-state dispute settlement cases.<sup>278</sup> Accordingly, the arbitrator's potential conflict of interest and extravagant fees, undermines the arbitrator's ability to make an unbiased and neutral decision. The ICSID Arbitration Rules stipulating the required qualifications of the arbitrators should be revised to increase legitimacy and promote mutual confidence in the system.

The ICSID Arbitration Rules should be amended to include more stringent restrictions regarding conflicts of interest. The disclosure obligations stated in ICSID's Arbitration Rules should list specific categories of information subject to disclosure by the arbitrator.<sup>279</sup> For example, the rule should explicitly require disclosure of any social relationships between the arbitrator and lawyer, as well as any previous disputes in which the arbitrator was involved in with either party.<sup>280</sup> The rule should also prohibit lawyers from crossing over roles as arbitrators in some disputes and advocates in other disputes. An independent and transparent tribunal should solve investment disputes.<sup>281</sup>

Additionally, Article 14 of the ICSID Convention, which addresses the required qualifications and knowledge of an arbitrator, should be revised to require that arbitrators be persons of recognized competence in the fields of both environmental and human rights law.<sup>282</sup> Arbitrators possessing the expertise to address public interest disputes arising out of investments would enhance ICSID's effectiveness and promote "mutual confidence" within the system.

*2. Increase Transparency*

Because the decisions of investor-state disputes could have significant impacts on broad public welfare issues, it is not appropriate for such cases to be resolved in privatized

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278. See *supra* Analysis Part III.

279. *Id.* at 44.

280. Rogers, *supra* note 182, at 118.

281. EBERHARDT & OLIVET, *supra* note 2, at 72.

282. Odumosu, *supra* note 58, at 382.

commercial arbitration. While the 2006 amendments to the ICSID Convention Rules improved transparency by permitting third parties to attend hearings and publication of the award, both of the new rules are dependent upon consent of the parties.<sup>283</sup> In cases involving public interests, tribunals should be required to hold open hearings, disclose documents, and accept amicus briefs.

Also, prior awards do not bind a tribunal, which creates the potential for contrasting results for the same issue.<sup>284</sup> The lack of uniformity introduces a higher risk to both parties and ultimately threatens the legitimacy of ICSID.<sup>285</sup> Increasing transparency will facilitate in the creation of precedent thereby allowing parties to more adequately set prices to allocate risk. Therefore, a system of precedent should be introduced to prevent inconsistencies and create a more predictable and apparently fair outcome.

### 3. *Create an Appeals Process*

While an award can be annulled for procedural inefficiencies, there is currently no recourse for rulings that are substantively flawed or inconsistent.<sup>286</sup> The current annulment process is not able to reconcile any legal errors made in the resolution process.<sup>287</sup> An appellate system should be created to permit the correction of legal errors “which might otherwise inappropriately bankrupt developing nations, stifle legitimate regulatory activity, or deprive investors of their legitimate expectations.”<sup>288</sup>

### 4. *Promote Mutual Confidence*

As foreign investors have initiated the vast majority of ICSID cases against developing countries, it is evident that

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283. ICSID, Administrative and Financial Regulations, Reg.22, (Mar. 18, 1965), *available at* [https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf).

284. Eric David Kasenetz, Note, *Desperate Times Call for Desperate Measures: The Aftermath of Argentina's State of Necessity and the Current Fight in the ICSID*, 41 GEO. WASH. INT'L L. REV. 709, 735.

285. *Id.*

286. *Id.* at 734.

287. *Id.*

288. Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1625 (2004–2005).

ICSID has successfully fulfilled its promise of affording greater investment protection.<sup>289</sup> Although it is difficult to determine whether ICSID successfully contributed to increasing investment flow, it is evident ICSID tribunals have prioritized investment protections as they have predominantly engaged in settling disputes with foreign investors as claimants.<sup>290</sup> While it is important to protect foreign investment to promote foreign investment flow, it is equally important to ensure the investment has a positive effect on the enhancement of the Third World's development.<sup>291</sup> Therefore, ICSID should concentrate on promoting "mutual confidence," as this is a necessary element to maintain ICSID's relevancy in developing countries. To encourage "mutual confidence," ICSID must consider ways to address the needs of the Third World.<sup>292</sup>

*5. Broaden the Investment Dispute Scope to  
Include Public Interest Analysis*

Since ICSID's inception over forty years ago, international law has continuously changed and developed.<sup>293</sup> International environmental law and human rights have evolved into a prominent area of international law today.<sup>294</sup> Therefore, ICSID should consider extending the ICSID Convention's scope of review to issues of international public interests.<sup>295</sup> ICSID tribunals should not refrain from considering developing countries' interests if they constitute a "legal dispute arising directly out of an investment" as stipulated by Article 25 of the ICSID Convention.<sup>296</sup> Addressing these issues, such as human rights, economic development or environmental issues, in the tribunal's evaluation of the legal investment dispute would enhance ICSID's legitimacy and encourage international cooperation for economic development.<sup>297</sup>

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289. Odumosu, *supra* note 58, at 362.

290. *Id.*

291. *Id.* at 360.

292. *Id.*

293. *Id.* at 373.

294. *Id.* at 374.

295. Odumosu, *supra* note 58, at 350.

296. *Id.*

297. *Id.*

## CONCLUSION

The significant increase in the number of disputes within ICSID jurisdiction based on international investment agreements confirms the legitimacy of the investor-state dispute mechanism. However, even though the number of cases initiated by developing countries increased in 2012, the majority of investment disputes originated from developed countries. Given the arguments that the current international investment regime favors investors, amendments should be made to the international investment agreements and the ICSID Convention to establish mutual confidence of both investors and states that will stimulate foreign investment and enhance economic development.