THE COUNTER-PRODUCTIVITY OF ICSID DENUNCIATION AND PROPOSALS FOR CHANGE

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On January 24, 2012, Venezuela became the third country to withdraw from the International Centre for Settlement of Investment Disputes ("ICSID"), an arbitration forum affiliated with the World Bank. Venezuela, Ecuador, and Bolivia have denounced the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention") purportedly because they believe the system favors investors. This has triggered speculation that other states will follow suit, which could ultimately result in the collapse of the current international investment system. This article argues that denunciation will not change the current international investment regime because most states' bilateral investment treaties ("BITs") provide for alternative investor-state arbitration mechanisms. These non-ICSID alternatives can actually be more disadvantageous to states than ICSID arbitration. Thus, the denunciation of ICSID is counterproductive. BITs, rather than ICSID, are the sources of the extensive investment protections that form the basis of developing countries' objections to investor-state arbitration. Therefore, changing the current international investment regime would require the amendment of BITs.

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I. INTRODUCTION

During a six-hour long talk show on January 8, 2012, against the backdrop of a state-owned oil facility in Venezuela, President Hugo Chavez announced, "We have to leave ICSID and I say it right away, we will not recognize ICSID decisions."[1] Chavez was referring to the International Centre for Settlement of Investment Disputes ("ICSID"), where Venezuela is facing more than a dozen arbitration cases brought by foreign companies claiming compensation for, *inter alia*, expropriation.[2] ICSID is the main forum for settlement of disputes between foreign investors and host states.[3] It provides administrative support for arbitration of the disputes.[4] Venezuela did indeed withdraw from ICSID by giving notification on January 24, 2012,[5] making it the third Latin American country to do so, after Ecuador and Bolivia. These developments raise critical questions about the future of investor-state arbitration in Latin American.

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[1] *Chávez No Aceptará los Fallos de un Órgano Internacional contra sus Expropriaciones* [*Chavez Will Not Accept the Rulings of an International Body against his Expropriations*], BBC NEWS (Jan. 8 2012), http://www.bbc.co.uk/mundo/ultimas_noticias/2012/01/120108_ultnot_venezuela_chavez_petroleo_exxon_fp.shtml. Chavez stated in Spanish: "De ese CIADI tenemos que salirnos nosotros y yo lo digo de una vez, nosotros no reconoceremos decisiones de CIADI." *Id.*

[2] *Chavez: Venezuela Won't Recnognise Arbitration Body,* GUARDIAN (Jan. 9, 2012), http://www.guardian.co.tt/business/monday-january-9-2012/chavez-venezuela-won%E2%80%99t-recognise-arbitration-body.

[3] *See* JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 379 (2010).

[4] *See* K.V.S.K. NATHAN, THE ICSID CONVENTION: THE LAW OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES 51 (2000).

[5] Press Release, *Venezuela Submits a Notice Under Article 71 of the ICSID Convention*, INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES [ICSID] (Jan. 26, 2012), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement 100.

As of 2009, Ecuador was "facing $12 billion worth of arbitration complaints" arising out of disputes with foreign investors,[6] which is about twenty percent (20%) of its gross domestic product ("GDP").[7] Regardless of whether the complainants all prevail against Ecuador, the figures are shocking. These "arbitration complaints"[8] stem from investment disputes that have arisen under investment treaties and contracts between Ecuador and foreign investors.[9] In response to numerous investor complaints, in 2009 Ecuador withdrew from ICSID by giving notification of its denunciation[10] of the CONVENTION on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention").[11]

Bolivia was the first country to notify ICSID of its denunciation in 2006, protesting the numerous arbitrations initiated by investors.[12] The denunciations by Ecuador and Bolivia triggered speculation as to whether other developing countries might follow, which could eventually cause the current system of investor-state arbitration to unravel.[13]

The ICSID Convention, also known as the Washington Convention, is a multilateral treaty that created ICSID, or "the Centre," as a forum for resolving investment disputes.[14] ICSID is popular for investor-state arbitration. Bilateral investment treaties ("BITs") usually provide for ICSID as a mechanism for investment dispute settlement.[15]

The denunciation of ICSID has not prevented investors from initiating arbitrations against Bolivia and Ecuador. BITs contain mechanisms through which investors can initiate arbitration, and most BITs provide for alternatives to ICSID for settlement of investment disputes.[16] Therefore, investors from states that have BITs in force can still initiate arbitration through alternative mechanisms, such as ad hoc arbitration under the arbitration rules of the United Nations Commission on International Trade Law ("UNCITRAL").[17] Naturally, there are advantages and disadvantages to each dispute settlement mechanism.[18]

This Article argues that changing, eliminating, or withdrawing from ICSID will not change the current international investment regime. States' denunciation of ICSID is counter-

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[6] *Impact of Ecuador ICSID Exit*, LATIN BUSINESS CHRONICLE (June 30, 2009), http://www.latinbusinesschronicle.com/app/article.aspx?id=3502.

[7] Ecuador's 2010 GDP was $118.1 billion. *The World Factbook: Ecuador*, CENTRAL INTELLIGENCE AGENCY [CIA], https://www.cia.gov/library/publications/the-world-factbook/geos/ec.html.

[8] *Impact of Ecuador ICSID Exit*, *supra* note 6. **R**

[9] *See* Eric Gillman, *The End of Investor-State Arbitration in Ecuador? An Analysis of Article 422 of the Constitution of 2008*, 19 AM. REV. INT'L ARB. 269, 280-84 (2008).

[10] Press Release, *Ecuador Submits a Notice Under Article 71 of the ICSID Convention*, ICSID (Jul.9, 2009), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement20 [hereinafter Ecuador's Notification].

[11] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Oct. 17, 1966, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

[12] Ignacio Vincentelli, *The Uncertain Future of ICSID in Latin America*, 16 LAW & BUS. REV. AM. 409, 410 (2010).

[13] *See id*. at 411.

[14] *See id*.

[15] SALACUSE, *supra* note 3, at 137. **R**

[16] KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, & INTERPRETATION 434-435 (2010).

[17] *See* Tolga Yalkin, *Ecuador Denounces ICSID: Much Ado About Nothing?*, BLOG OF THE EUROPEAN JOURNAL OF INTERNATIONAL LAW (July 30, 2009), http://www.ejiltalk.org/ecuador-denounces-icsid-much-ado-about-nothing/.

[18] VANDEVELDE, *supra* note 16, at 452. **R**

productive because there are other investor-state arbitration forums to which Bolivia, Ecuador, and Venezuela are subject, and some aspects of these forums are disadvantageous to states. Other states that disapprove of investor-state arbitration should not withdraw from ICSID because it would be similarly counterproductive. The problems that Bolivia, Ecuador, and Venezuela complain of cannot be solved through new or different arbitration mechanisms because the roots of these "problems" are the investment protections found in BITs, not ICSID.

The following Parts II and III provide background information and an overview of relevant law. Denunciation of the ICSID Convention by Bolivia, Ecuador, and Venezuela and the options that foreign investors have in these countries are examined in Part IV. Investors can still initiate arbitration against these states when BITs that contain arbitration provisions remain in force.

Criticisms of investor-state arbitration and ICSID are examined in Part V. The benefits and drawbacks to the investor and to the state under different arbitration forums are analyzed in Part VI. This section further examines how some aspects of non-ICSID arbitration may be disadvantageous to states, illustrating how denunciation of the ICSID Convention is ultimately counterproductive when investment treaties are still in force.

Part VII examines options for changing the international investment regime. Modifying or denouncing ICSID would not change the current investment system. The only way to change the investment regime would be to amend the BITs, though the interpretation of BITs will always be problematic and create conflict between foreign investors and developing countries.

II. BACKGROUND

A. Overview of International Investment Law and ICSID

1. Importance of International Investment Law and Investor-State Arbitration

International investment law is important because the "financial volume" of foreign investment surpasses that of international trade.[19] States enter into investment treaties to encourage foreign direct investment and to protect their investors in other states.[20] Foreign investment quadrupled between 1990 and 2000, and was accompanied by the growth of BITs from 500 in 1990 to about 2,000 BITs in 2000.[21]

Modern investor-state arbitration developed from public international law and international commercial arbitration. It contains features of both commercial arbitration and interstate arbitration Dispute settlement clauses in investment treaties are the mechanisms through which the treaties are enforceable.[22] ICSID is a prominent forum for investor-state arbitration

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[19] *See* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 1-2 (2008).

[20] *See* SURYA P. SUBEDI, INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE 83-86 (2008).

[21] DOLZER & SCHREUER, *supra* note 19, at 1. R

[22] *See id*. at 137, 154.

that is often listed as a dispute resolution mechanism in BITs.[23] ICSID (also referred as "the Centre") is an international institution that administers conciliation and arbitration.[24]

A state party to the ICSID Convention is not compelled to accept jurisdiction of the Centre in investment disputes without further consent.[25] States often consent to ICSID jurisdiction in BITs.[26] If the investor's home state and the host state of the investment have consented, the foreign investor may initiate arbitration against the host state if there is a dispute between the investor and the host state,[27] such as a dispute over expropriation. If an ICSID arbitral tribunal awards damages to the investor, the host state must pay compensation.[28]

2. Overview of Criticism of ICSID

Criticism of the investor-state arbitration regime has been mounting, especially in the developing world, and much of this criticism is directed toward ICSID.[29] However, much of this criticism is misplaced.[30] Most criticism directed at ICSID actually stems from investment protections in treaties.[31] A common criticism of investor-state arbitration is that the system protects investors "from the exercise of public authority."[32] The system uses private arbitration "in the regulatory sphere," which conflicts with "principles of judicial accountability and independence in democratic societies."[33] In general, Latin American states have been respondents in many investor-state dispute arbitrations.[34]

B. Latin America and Action against Foreign Investment

Bolivia was the first to denounce ICSID, but Ecuador's denunciation may have been more significant because its economy is larger: Bolivia's GDP of $19.37 billion[35] is only about one-third of Ecuador's GDP of $58.91 billion.[36] Venezuela's economy dwarfs those of Bolivia and Ecuador, with its GDP exceeding $300 billion.[37] Venezuela's denunciation may

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[23] SALACUSE, *supra* note 3, at 137. **R**
[24] ARON BROCHES, ARBITRATION UNDER THE ICSID CONVENTION 1 (1993).
[25] ICSID Convention preamble, *supra* note 11, at Preamble. **R**
[26] *See* DOLZER & SCHREUER, *supra* note 19, at 238-239. **R**
[27] *See* THE INTERNATIONAL CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID): TAKING STOCK AFTER 40 YEARS (Rainier Hofmann & Christian J. Tams, eds., 2007).
[28] *Id*. at 19.
[29] *See* Vincentelli, *supra* note 12, at 410. *See also* Ibironke T Odumosu, *The Antimonies of the (Continued) Relevance of ICSID to the Third World*, 8 SAN DIEGO INT'L L.J. 345, 363-73 (2007). **R**
[30] *See* Stephen M. Schwebel, *A BIT About ICSID*, 23 ICSID REV. 1, 5-9 (2009).
[31] *See Id*. at 5-6.
[32] *Ben Juratowitch, The Relationship Between Diplomatic Protection and Investment Treaties,* 23 ICSID REV. 10, 28 (2009).
[33] GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 4 (2007).
[34] U.N. CONF. ON TRADE & DEV. [UNCTAD], *Latest Developments in Investor-State Dispute Settlement*, at 1, U.N. Doc. UNCTAD/WEB/DIAE/IA/2011/3 (Mar. 2011).
[35] *The World Factbook: Bolivia*, CIA, https://www.cia.gov/library/publications/the-world-factbook/geos/bl.html.
[36] *The World Factbook: Ecuador*, CIA, https://www.cia.gov/library/publications/the-world-factbook/geos/ec.html.
[37] *The World Factbook: Venezuela*, CIA, https://www.cia.gov/library/publications/the-world-factbook/geos/ve.html

be the most significant yet, since its economy is five times larger than that of Ecuador and more than fifteen times larger than that of Bolivia. The ramifications of withdrawal from ICSID may be more important now that Venezuela has denounced ICSID.

Latin America has been the geographic area most frequently sued in international investment disputes.[38] Bolivia and Ecuador have new constitutions that in some way resist foreign investment.[39] Venezuela long threatened to withdraw from ICSID and BITs,[40] and has now denounced the ICSID Convention.

1. Bolivia

Beginning in 2005, Bolivia passed hydrocarbons laws that led to the nationalization of the hydrocarbons industry (natural gas and oil fields).[41] Since taking office in 2006, President Morales "has taken over oil and gas, mining and telecoms businesses."[42] Under the Morales administration, the nationalization of companies in politically sensitive industries has become "almost a ritual."[43]

Morales complained of ICSID that "[t]he governments of Latin America, and I think the world, never win the cases. The multinationals always win."[44] The lack of transparency in arbitration hearings in matters that involve the public interest was one reason Bolivia gave for denouncing ICSID.[45] Other reasons were ICSID's alleged bias in favor of corporations, the lack of an appeal mechanism, and other vague ideological reasons.[46] This criticism of ICSID will be examined in Part V.

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[38] Linda A. Ahee & Richard. E. Walck, *ICSID Arbitration in 2009*, 7 TRANSNAT'L DISP. MGMT. 3 (Apr. 2010). "Once again, Latin America was the area most frequently sued, with 40% of the total filings." *Id*.

[39] "Bolivia remains generally open to foreign direct investment, but the new constitution specifies that Bolivian investment will be prioritized over foreign investment (Article 320)." *Doing Business in Bolivia: A Country Commercial Guide*, U.S. DEP'T COMMERCE, 29 (Feb. 26, 2010), *available at* http://www.buyusainfo.net/docs/x_7662854.pdf (last visited Sept. 25, 2010). Ecuador's Constitution prohibits the country from entering into agreements that require international arbitration, which hurts foreign investment by trying to take away international arbitration as a dispute resolution mechanism. Gillman, *supra* note 9, at 287. R

[40] *See* Emmanuel Gaillard, *Anti-Arbitration Trends in Latin America*, N.Y.L.J. June 5, 2008, at 3. *See also* Alexis Mourre, *Perspectives of International Arbitration in Latin America*, 17 AM. REV. INT'L ARB 597, 608 (2006).

[41] *Background Note: Bolivia*, U.S. STATE DEP'T (Aug. 1, 2011), http://www.state.gov/r/pa/ei/bgn/35751.htm.

[42] *Another Bolivian Nationalisation: Power Grab*, ECONOMIST (May 6, 2010), http://www.economist.com/node/16064027?story_id=16064027&CFID=126619125&CFTOKEN=96005616.

[43] *Id*. "In one of Latin America's least predictable countries it has become almost a ritual: on May 1st each year Evo Morales sends troops to nationalise a batch of companies in politically sensitive industries." *Id*.

[44] *Id*.

[45] Fernando Cabrera Diaz, Bolivia Expounds on Reasons for Withdrawing From ICSID Arbitration System, INVESTMENT TREATY NEWS (May 27, 2007), http://www.iisd.org/itn/wp-content/uploads/2010/10/itn_may27_2007.pdf.

[46] Morales has said, "(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." *Latin Leftists Mull Quitting World Bank Arbitrator*, REUTERS (Apr. 29, 2007, 7:09 PM), http://www.reuters.com/article/2007/04/29/bolivia-venezuela-nationalizations-idUSN2936448520070429.

2. Ecuador

In 2006, Ecuador passed a new hydrocarbons law, known as "Law 42," that unilaterally modified the terms of oil production sharing contracts. In 2007, President Correa changed the law again to increase the government's share of revenues.[47] The law imposed a ninety-nine percent (99%) tax on "extraordinary income" of oil companies.[48] Foreign investors have ongoing disputes with Ecuador concerning this law.

Ecuador "has averaged a new constitution every ten years" since 1830, and adopted a new constitution in 2008 under President Rafael Correa.[49] Article 422 of the new Constitution "directly impacts foreign investments."[50] This article forbids Ecuador from entering into any agreement or treaty that would require Ecuador to subject it to an international arbitral tribunal.[51] Ecuador makes an exception for regional international arbitration in which only Latin American states are signatories and parties.[52] However, no such arbitration forum exists.

The plain language of Ecuador's constitution prohibits *future* agreements, but Ecuador also tried taking action against agreements already concluded. Ecuador has claimed for a number of years that it will denounce BITs, but Ecuador is still a party to at least sixteen BITs.[53] In 2007, "Ecuador signaled that it might not renew its BIT" with the United States, which has been the source of many investment disputes."[54] However, Ecuador has not yet denounced BITs with any major capital-exporting countries. In 2009, Ecuador's National Assembly considered terminating most of its BITs.[55] The Correa administration asked the National Assembly "to terminate thirteen bilateral investment treaties . . . including with the United States."[56] To date, the termination of most BITs has *not* been approved, and Ecuador

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[47] U.S. DEP'T STATE, *2009 Investment Climate Statement – Ecuador* (Feb. 2009), http://www.state.gov/e/eb/rls/othr/ics/2009/117668.htm.

[48] *Id*. "In 2005, President Palacio issued a decree requiring that all petroleum exploration and production contracts be renegotiated. In 2006 the Government of Ecuador made this decree law by amending its hydrocarbons law, unilaterally modifying the terms of oil production sharing contracts and imposing a 50% 'windfall' tax on private companies' extraordinary petroleum revenues. In 2007, President Correa issued a decree increasing the State's share of extraordinary petroleum revenues under the 2006 amendment to 99%." *Id*.

[49] *Ecuador's Constitution: Going Nowhere*, ECONOMIST (May 10, 2008), at 48, *available at* http://www.economist.com/node/11332947.

[50] Joshua Briones & Ana Tagvoryan, *Is International Arbitration in Latin America in Danger?*, 16 L. & BUS. REV. AM 131 (2010).

[51] Constitution of the Republic of Ecuador 2008, art. 422. states: "Ecuador cannot agree to (ratify) treaties or international agreements in which Ecuador cedes sovereign jurisdiction in instances of international arbitration, in contractual controversies or of commercial character, between the State and natural or legal persons. Treaties and international agreements that establish dispute resolution between Latin American States and citizens of Latin America in cases of regional arbitration or by jurisdictional organs designated by the signatory states are excepted."

[52] Gillman, *supra* note 9, at 287. **R**

[53] UNCTAD, *Country List of BITS* (June 1, 2011), http://www.unctad.org/sections/dite_pcbb/docs/bits_ecuador.pdf.

[54] CHRISTOPHER DUGAN ET AL., INVESTOR-STATE ARBITRATION 703-704 (2008) (citing Luke Peterson, *Ecuador Announces That It Wants Out of US Investment Treaty*, INT'L L. REP., May 9, 2007, at 5).

[55] U.S. DEP'T STATE, *2010 Investment Climate Statement – Ecuador* (March 2010), http://www.state.gov/e/eeb/rls/othr/ics/2010/138060.htm.

[56] *Id*.

has maintained its BITs with major capital exporting states.[57] Both Ecuador's hostile attitude toward foreign investment and the relatively large amount that Ecuador may owe to foreign investors are worrisome.

3. Venezuela

Venezuela's nationalization of the Cerro Negro oil project in 2007 gave rise to multiple actions against it, including a claim by Exxon Mobile that was recently concluded in the International Chamber of Commerce with an award ordering Venezuela to pay $908 million.[58] Venezuela is also a defendant in many other law suits as a result of the nationalization of several industries under President Hugo Chavez, including another multi-billion dollar claim by Exxon Mobile.[59] Chavez has "seized assets" in the telecommunications, mining, and hydrocarbons sectors.[60]

4. Ideology and Latin America

Regulatory expropriation cases can be contrasted with cases motivated by politics or economics. Venezuela, Bolivia, and now Ecuador have challenged "the current system as a whole for reasons that are as much political as economic."[61] The nationalization and renegotiation of oil concessions are not related to a crisis or state of emergency, rather they "can be explained by the new wealth brought to those countries by the sharp increase in oil prices."[62]

A state's right to control its natural resources presents a different type of dispute than the regulatory expropriation cases that Argentina and Mexico have faced.[63] Regulatory expropriation cases have posed problems in finding a "proper balance between investment protection and the State's legitimate right to regulate for the public good."[64]

Ignacio Vincentelli provides a good overview of the situation in Latin America in his article, *The Uncertain Future of ICSID in Latin America*.[65] Vincentelli shows that, among other motivations, Bolivia's and Ecuador's declarations and actions against ICSID and BITs are driven by an ideology that foreign direct investment is wrong, promotes imperialism, and does not deserve protection.[66] It is hard to argue in favor of ICSID on logical grounds if detractors disapprove of it on ideological grounds.

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[57] *Id.*

[58] *Venezuela Vows to Reject Arbitration in Exxon Case*, N.Y. TIMES (Jan. 8, 2012), http://www.nytimes.com/2012/01/09/business/venezuela-will-not-recognize-world-bank-ruling-in-exxon-case.html.

[59] *Chavez Says Venezuela Won't Accept World Bank Arbitration*, Bloomberg (Jan. 9 2012), http://www.bloomberg.com/news/2012-01-08/venezuela-won-t-accept-icsid-verdict-on-exxon-chavez-says.html.

[60] *Id.*

[61] Alexis Mourre, *Perspectives of International Arbitration in Latin America*, 17 AM. REV. INT'L ARB. 597, 612 (2006).

[62] *Id.* at 612-13.

[63] *Id.* at 612.

[64] *Id.*

[65] Vincentelli, *supra* note 12, at 409. R

[66] *Id.* at 423.

C. The Aftermath and Effects of ICSID Denunciation

Venezuela gave notification of its denunciation of the ICSID Convention on January 24, 2012, effective July 25, 2012.[67] Bolivia was the first state to withdraw from ICSID; it gave notice of its denunciation of ICSID in 2005, which became effective in 2006.[68]

In 2009, Ecuador gave notification of its denunciation of ICSID, with the denunciation taking effect in 2010.[69] On July 6, 2009, the World Bank received Ecuador's notice of denunciation of the ICSID Convention.[70] The ICSID website announced that under Article 71 of the ICSID Convention, the denunciation would take effect on January 7, 2010.[71]

Scholars have differing opinions as to what should happen if investors attempt to initiate arbitration against Bolivia or Ecuador through ICSID.[72] Now, Venezuela is in the same situation. Since Ecuador, Bolivia, and Venezuela have denounced ICSID, there has been some debate as to whether certain disputes are arbitrable under ICSID. Their denunciations have also sparked debate about whether the system of investor-state arbitration in Latin America will collapse.[73]

Investors may not be able to initiate arbitration against Bolivia or Ecuador under ICSID, but in some cases they can still initiate arbitration under other mechanisms such as the UNCITRAL Rules or the International Chamber of Commerce. Most BITs now contain alternatives to ICSID for dispute settlement mechanisms. For example, the U.S.-Ecuador BIT provides for dispute settlement through ICSID, the Additional Facility, or ad hoc UNCITRAL arbitration.[74] Therefore, many investors from states that have BITs in force can still initiate non-ICSID investor-state arbitration.

Most BITs have survival clauses that provide that the substance and protection of the BIT will remain in effect for at least ten years after the BIT is denounced. Even if a country denounces BITs, investors will still be able to invoke the dispute settlement mechanisms for many more years.[75]

The ICSID Additional Facility, which will be discussed further in Part III.C, is an option if only one party to an investment agreement is also a party to the ICSID Convention.[76] Scholars seem to disagree as to whether the Additional Facility is currently available for investors to initiate claims against Bolivia and Ecuador.

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[67] Press Release, , *Venezuela Submits a Notice under Article 71 of the ICSID Convention*, ICSID (Jan.26, 2012), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement100.

[68] Press Release, , *Bolivia Submits a Notice under Article 71 of the ICSID Convention*, ICSID (May 16, 2007), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement3 [hereinafter Bolivia's Notification].

[69] *See* Press Release, ICSID/World Bank, *supra* note 10. **R**

[70] *Id.*

[71] *Id.*

[72] Vincentelli, *supra* note 12, at 430-31. **R**

[73] *Id.* at 411.

[74] Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment art. VI.3, U.S.-Ecuador, Aug. 27, 1993, S. Treaty Doc. No. 103-15 (1993) [hereinafter U.S.-Ecuador BIT].

[75] *E.g.,* U.S.-Ecuador BIT art. XII. Article XII provides that if the BIT is terminated, "all existing investment would continue to be protected under the Treaty for ten years thereafter." *Id.*

[76] THE ICSID CONVENTION: A COMMENTARY 147 (Christoph M. Schreuer et al. eds., 2d ed. 2009).

The issue of ICSID denunciation is important because other states may withdraw from ICSID. Venezuela threatened to denounce ICSID for several years,[77] and now has finally done so. Nicaragua is another state which may denounce ICSID.[78] At one time, Argentina seemed ready to withdraw from the investor-state arbitration system after investors brought many claims against it as a result of measures it implemented in 2002 in response to its financial crisis.[79] There was speculation that Argentina would withdraw from the ICSID, "though it has not yet made official statements indicating such a drastic move."[80]

Additionally, the situation in Peru should be monitored because Peru's newly elected president, Ollanta Humala, wishes to impose a windfall tax on mining, and there have been conflicts related to foreign investment in the mining and hydrocarbon sectors.[81] President Humala "indicated that he would seek to impose a windfall tax on the key mining sector to help raise revenue for social spending,"[82] which may be similar to Ecuador's actions that led to some investor-state disputes.[83] However, Peru's Humala also said that he would keep existing free-market policies "intact."[84]

It is debatable whether the denunciation of ICSID benefits states. Investors are still able to initiate non-ICSID arbitration against states, and states do not have a greater chance of prevailing in non-ICSID arbitration.[85] Bolivia and Ecuador do not gain much of an advantage, if any, by forcing investors to initiate ad hoc arbitration under the UNCITRAL Rules instead of using ICSID.

In fact, there are disadvantages to non-ICSID arbitration. For example, the lack of transparency in investor-state arbitration is one oft-cited criticism of the system,[86] and there is even less transparency in ad hoc arbitration.[87] Bolivia, Ecuador, and now Venezuela may suffer from their denunciation of ICSID because of the disadvantages to non-ICSID arbitration, such as lack of transparency.

III. LEGAL LANDSCAPE

A. History of Foreign Investment Law

Expropriation was an impetus for the formulation of investment law.[88] Developed states proposed treaties to protect their nationals' foreign investments against uncompensated

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77 Gillman, *supra* note 9, at 285. **R**
78 Mourre, *supra* note 61, at 608.
79 *Id.* at 609. However, Argentina confirmed its commitment to the international investment system. *Id.*
80 Eric David Kasenetz, *Desperate Times Call for Desperate Measures: The Aftermath of Argentina's State of Necessity & the Current Fight in the ICSID*, 41 GEO. WASH. INT'L L. REV. 709, 745 (2010).
81 *Peru's New President: Promises and Premonitions*, ECONOMIST, July 23, 2011, at 34.
82 *Ollanta Humala is Sworn in as New Peru President*, BBC NEWS, July 28, 2011, *available at* http://www.bbc.co.uk/news/world-latin-america-14321996.
83 *See* Jane Monahan, *Ecuador Oil Policy Upsets Private Firms*, BBC NEWS, Oct. 3, 2006, *available at* http://news.bbc.co.uk/2/hi/business/5359458.stm.
84 *Ollanta Humala is Sworn in as Peru President*, *supra* note 82.
85 Susan Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards*, 51 VA. J. INT'L L. 825, 898 (2011).
86 *Investment, Arbitration & Secrecy: Behind Closed Doors*, ECONOMIST, Apr. 25, 2009, at 63.
87 VANDEVELDE, *supra* note 16, at 452. **R**
88 *Id.* at 48.

expropriation[89] because previous methods of protecting foreign investments through diplomatic espousal and the use of force were ineffective or became unacceptable.

The laws governing expropriation of an alien's property "have long been of central concern" to foreign investors.[90] The standard of treatment that a host country owes to aliens is a "fundamental, recurring issue" in international law, including investment law.[91] National treatment, based on the principal of equality, is one view of how aliens should be treated.[92] National treatment may be an unacceptably low standard if a country treats its own nationals poorly, so the idea of an international minimum standard evolved.[93] However, a minimum standard of treatment as part of customary international law was not welcomed by former colonies and other developing countries, and there has been disagreement about the content of customary international law.[94]

Diplomatic espousal is the concept that a state can espouse its nationals' claims against another state, which can be achieved through force or purely diplomatic means.[95] In the nineteenth and early twentieth century, European colonial powers sometimes used military force to protect their nationals' assets abroad.[96] When European investors believed that less powerful host states owed them compensation for some investment losses, European countries would often send "warships to moor off the coast of the host states until reparation was forthcoming."[97] Gunboat diplomacy was practiced by European powers "especially against the states in South America."[98] Protecting investments abroad in this way eventually became unacceptable.

Other recourse for investors, if they could not find relief in the domestic courts of the host state, would have been to ask the home state to espouse the claim. The home state would then bring a case against the host state.[99] However, diplomatic protection of investors is a "long, cumbersome, and generally ineffectual" procedure.[100] Even when a state is willing to espouse an investor's claim, many "barriers to compensation remain."[101]

In the twentieth century, states began using international forums such as the International Court of Justice ("ICJ") to bring claims on behalf of their investors against other states. In the famous *Barcelona Traction*[102] case of 1970, Belgium brought a case against Spain in the ICJ on behalf of a company's Belgian shareholders for payment that Spain owed the company.[103] The ICJ decided that Belgium lacked standing to espouse the claim because the

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[89] *Id.*
[90] DOLZER & SCHREUER, *supra* note 19, at 12. R
[91] SALACUSE, *supra* note 3, at 47. R
[92] *Id.*
[93] *Id.*
[94] DOLZER & SCHREUER, *supra* note 19, at 12 (discussing Carlos Calvo's perspective that "international rule should . . . be understood as allowing the host state to reduce the protection of alien property when also reducing the guarantees for property held by nationals," that foreigners must use domestic courts, and that capital-exporting countries imposed their view of international law on foreign governments). R
[95] *See* SUBEDI, *supra* note 20, at 11. R
[96] *Id.* at 11-12.
[97] *Id.*
[98] *Id.* at 97.
[99] *Id.* at 12.
[100] CHRISTOPHER DUGAN ET AL., INVESTOR-STATE ARBITRATION 28 (2008).
[101] *Id.* at 30.
[102] Barcelona Traction, Light & Power Co. Ltd. (Belg. v. Spain), Second Phase, 1970 I.C.J. 3.
[103] DUGAN ET AL., *supra* note 54, at 33.

company in question was incorporated in Canada.[104] This case illustrates possible difficulties in relying on diplomatic espousal and the ICJ for the settlement of investment disputes.

Diplomatic espousal has many disadvantages and can cause political tension between states.[105] Capital exporting states' espousal of their investors' claims has irritated developing countries.[106] Diplomatic protection in investment disputes has even been challenged under the Calvo Doctrine, discussed below, because Latin American countries opposed special protection for foreigners.[107] Thus, the depoliticization of investment disputes via investor-state arbitration is desirable.

The Calvo Doctrine was "conceived against the background of gunboat diplomacy."[108] This doctrine advocated the principle that foreigners should receive the same treatment as a host state's nationals, rather than special treatment.[109] The Calvo Doctrine originated in Latin America and was named after the Argentine jurist Carlos Calvo.[110] The Calvo doctrine is based on the principle of state territorial sovereignty and requires aliens to submit disputes to the host state's domestic courts and exhaust local remedies.[111] States should treat nationals and aliens equally and should not give special protection to foreign investors.[112] Principles of the Calvo Doctrine were even embodied in "numerous Latin American constitutions," such as those of Peru and Venezuela.[113]

Latin American countries have historically been wary of foreigners' protection of their investments.[114] Through most of the twentieth century, much of Latin America did not welcome foreign investment due to fear of foreigners controlling too much property.[115] Latin American countries tried to stimulate economic growth throughout much of the 1900s through protective measures associated with restrictions on foreign property ownership.[116] Latin American states remained opposed to minimum standards of treatment and investment arbitration through the 1960s and 1970s.[117] Many Latin American states suffer from "shortcomings" in governance and the rule of law, which create risks for foreign investors.[118]

In the last few decades Latin American countries have changed their policy towards trade, a shift that "has been accompanied by active encouragement of foreign investment."[119] The economic debt crisis of the 1980s "significantly accelerated" changes in law and interna-

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[104] *Id.*
[105] DOLZER & SCHREUER, *supra* note 19, at 212. R
[106] *Id.*
[107] *Id.*
[108] *Id.* at 12.
[109] *Id.*
[110] SUBEDI, *supra* note 20, at 14. R
[111] *Id.*
[112] *Id.*
[113] *Id.* at 14-15.
[114] M. C. MIROW, LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN SPANISH AMERICA 229 (2004).
[115] *Id.*
[116] *Id.*
[117] ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 50 (2009).
[118] 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, 323-25 (2004).
[119] MIROW, *supra* note 114, at 229. R

tional agreements in order to stimulate, *inter alia*, foreign investment.[120] Latin America had to accept foreign investment as an alternative to borrowing money.[121] Latin American states began acceding to the ICSID Convention and entering into BITs "*en masse*" in the 1990s.[122] However, this does not mean that Latin America embraced all aspects of foreign investment. Latin American states have recently reconsidered "their commitment to investor-state arbitration," due to their "renewed interest in nationalizing energy industries" and investment dispute claims against them.[123]

B. The International Investment and Treaty Regime

Investors and their home states desired a "means to protect their investments abroad from the injurious actions of host country governments," so they began to negotiate investment treaties.[124] The "existing body of investment treaties . . . constitutes a *regime*.[125] Investment treaties, such as BITs, are the "building blocks" of the international investment regime.[126]

The development of BITs and ICSID are intertwined. Investor-state arbitration, as a mechanism to enforce the substance of BITs, was one of the most important innovations in BITs.[127] The investor-state arbitration provisions in BITs allowed "aggrieved investors to bring claims directly against host governments in international arbitration for BIT violations."[128] The creation of ICSID was an "important institutional support for the enforcement of BIT[s]" because it created a forum for investor-state arbitration.[129]

1. The Emergence and Importance of Bilateral Investment Treaties

BITs evolved from Treaties of Friendship, Commerce, and Navigation ("FCNs"), but FCNs' lack of dispute resolution provisions was a weakness.[130] Some countries started entering into BITs in the 1960s, but developing BITs was "sporadic" until the 1980s.[131] Since then, there has been a "surge" in the number of international investment treaties, including BITs, which now number in the thousands.[132] Most capital-exporting states have a model

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[120] *Id.* at 230.

[121] *Id.*

[122] NEWCOMBE & PARADELL, *supra* note 117, at 50.

[123] *Id.* at 51.

[124] JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 77 (2009).

[125] Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 Harv. Int'l L.J. 427, 431 (2010) (emphasis in original).

[126] *See* SALACUSE, *supra* note 3, at 6.

[127] *Id.* at 92-93.

[128] *Id.* at 92.

[129] *Id.* at 93.

[130] CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 26 (2007).

[131] DUGAN ET AL., *supra* note 54, at 51.

[132] *Investment, Arbitration & Secrecy: Behind Closed Doors*, ECONOMIST, *supra* note 86.

BIT, which serves as a prototype to begin negotiations.[133] Most Latin American states have entered into BITs with capital-exporting countries in order to attract investment.[134]

Investment treaties are important because investors need a predictable, efficient, and fairly implemented legal system.[135] Unpredictability is a problem in some states because the host state may change the law, thereby changing "the rules of the game" and, as a result, investors' expectations "may be undermined at any stage."[136] Creating international rules for dispute settlement is an "important strategy in the protection of foreign investment."[137]

Dispute settlement through arbitration is important because investors want to submit disputes to independent tribunals instead of local courts which are seen as partial to the government.[138] The "inadequacies" in domestic legal systems in Latin America make them "an undependable means of safeguarding investments."[139] Professor Vandevelde identifies reasons why international arbitration is preferable to using domestic courts.[140] Through arbitration, investment disputes are resolved by arbitrators who are experts in the field, rather than a domestic judge who may not have experience in the relevant area of law.[141] Also, arbitrators "may" have greater impartiality than host state judges.[142]

Arbitration may provide the only neutral forum to resolve investment disputes and "the only means to obtain a remedy enforceable across borders."[143] Awards issued by arbitral tribunals are usually enforceable via the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"),[144] or through the ICSID Convention, if arbitration is conducted pursuant to that Convention.[145]

2. The Substance of BITs

BITs secure general obligations toward investments by the host state.[146] Modern BITs from different countries have developed similar provisions.[147] "Virtually all" investment treaties provide for most favored nation treatment ("MFN") and fair and equitable treatment ("FET").[148]

The most-favoured nations principle typically orders a state to grant the most advantageous treatment to nationals of one contracting state as it does towards nationals from other

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[133] 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, 309 (2004).
[134] *See* SUBEDI, *supra* note 20, at 98-99. **R**
[135] *See* Salacuse, *supra* note 3, at 80-81
[136] M. SORNARAJAH, THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES 14 (2000).
[137] *Id*. at 15.
[138] *See* SUBEDI, *supra* note 20, at 55-56. **R**
[139] Garcia, *supra* note 133, at 307.
[140] VANDEVELDE, *supra* note 16, at 430. **R**
[141] *Id*.
[142] *Id*.
[143] NOAH RUBINS & N. STEPHAN KINSELLA, INTERNATIONAL INVESTMENT, POLITICAL RISK, AND DISPUTE RESOLUTION 261 (2005).
[144] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 3 [hereinafter New York Convention].
[145] VANDEVELDE, *supra* note 16, at 430. **R**
[146] *See* DUGAN ET AL., *supra* note 100, at 52.
[147] *Id*.
[148] LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT 113 (Daniel D. Bradlow & Alfred Escher eds., 1999).

contracting states in like situations. Exceptions are often made for free trade areas and customs unions.[149]

BITs typically also include the principle of national treatment, which requires the host state to treat foreign investors at least as well as it treats its nationals.[150] MFN and national treatment both encompass the idea of non-discrimination.[151] Additionally, BITs usually provide for "the minimum standard of treatment provided under international law."[152]

An important issue in foreign investment law is expropriation.[153] Under most BITs, a host country has a duty to compensate a foreign investor if an investment is expropriated.[154] "One of the principal goals of bilateral investment treaties is to protect the investor from expropriation of investment property and to ensure adequate compensation when expropriations occur."[155]

"To give foreign investors assurance of a predictable and stable legal framework," BITs establish an initial time period for which the treaty will be in force and "specify how long the treaty will continue following the expiration of its initial period or its termination."[156] The duration of a BIT varies. Some continue indefinitely until one state party denounces the treaty, while others stipulate the time period during which the BIT will be in force, often a period of ten years.[157] Most BITs have a survival clause, also called a "continuing effects" clause,[158] which provides that the substantive provisions of the BIT, including the dispute resolution mechanisms, will remain in force for a certain period of time after denunciation, usually ten, fifteen, or even twenty years.[159] Investments made while the treaty is in force will be entitled to the protections provided by the BIT for the time period specified in the survival clause.[160]

3. Dispute Settlement Mechanisms

The substantive rights and protections in BITs "are effective only to the extent that they are enforceable through the BITs' dispute resolution provisions."[161] "[F]irmly established and trusted arbitration mechanisms" are necessary for any country trying to attract foreign investment.[162] An "effective and efficient" dispute settlement mechanism is one of the most important functions of BITs.[163] Binding arbitration is the most common mechanism contained in BITs to settle disputes between an investor and a state.[164]

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[149] *Id.* at 61.
[150] *Id.*
[151] *Id.*
[152] *Id.* at 113.
[153] *See* SALACUSE, *supra* note 3, at 135.
[154] *See id.*
[155] LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT, *supra* note 148, at 115.
[156] SALACUSE, *supra* note 3, at 351. **R**
[157] LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT, *supra* note 148, at 123.
[158] SALACUSE, *supra* note 3, at 351. **R**
[159] *Id.* at 351-52. *See also* LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT, *supra* note 148, at 123.
[160] LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT, *supra* note 148, at 123.
[161] VANDEVELDE, *supra* note 16, at 427. **R**
[162] Joshua Briones & Ana Tagvoryan, *Is International Arbitration in Latin America in Danger?*, 16 L. & BUS. REV. AM 131, 131 (2010).
[163] LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT, *supra* note 148, at 119.
[164] SALACUSE, *supra* note 3, at 137. **R**

The basis of arbitration is consent of the parties, and investor-state arbitration is no exception.[165] The ICSID Convention drafters envisaged the possibility of states giving consent to ICSID jurisdiction through domestic investment legislation, although now such consent is usually given through BITs.[166]

A state's consent to arbitration for investment disputes may be contained in a contract or an investment treaty, such as a BIT.[167] "The consent to international arbitration given by governments in BITs is a key factor accounting for the recent explosion of foreign investment disputes."[168] Investors typically consent when they submit a dispute to arbitration or give notification thereof.[169]

When a valid arbitration agreement exists, the state cannot unilaterally revoke its consent by changing its laws.[170] Additionally, a state cannot oppose arbitration on the basis of state sovereignty because "it is generally accepted" that a state's agreement to arbitration "constitutes an exercise, not a derogation, of state sovereignty."[171]

BITs usually give investors a choice of forums or rules under which they can initiate arbitration.[172] Earlier BITs provided only for ICSID arbitration, but "by the 1990s it was common to provide investors with a choice of arbitral mechanisms."[173] This often includes ICSID; the ICSID Additional Facility, if one state is not a party to the ICSID Convention; *ad hoc* arbitration using the UNCITRAL rules; and sometimes the International Chamber of Commerce or the Stockholm Chamber of Commerce.[174]

The U.S. Model BIT gives investors the options of ICSID, the ICSID Additional Facility if ICSID is not available, or *ad hoc* arbitration under the UNCITRAL Rules.[175] ICSID is the most common forum for investor-state arbitration and has greatly influenced arbitration in this field.

C. International Centre for Settlement of Investment Disputes

The International Bank for Reconstruction and Development, now called the World Bank, developed ICSID as a forum for arbitration specifically between investors and states.[176]

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165 *See* RUBINS & KINSELLA, *supra* note 143, at 261.

166 CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 26 (1007).

167 *See* RUBINS & KINSELLA, *supra* note 143, at 261.

168 FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS, AND COMMENTARY 10 (R. Doak Bishop et al. eds., 2005).

169 *See* RUBINS & KINSELLA, *supra* note 143, at 261 (citing LUCY REED, JAN PAULSSON & NIGEL BLACKABY, GUIDE TO ICSID ARBITRATION 35 (2004)).

170 RUBINS & KINSELLA, *supra* note 143, at 262.

171 *Id*. at 263.

172 LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT, *supra* note 148, at 121.

173 VANDEVELDE, *supra* note 16, at 464. **R**

174 MCLACHLAN ET AL., *supra* note 166, at 52.

175 U.S. State Dep't, 2004 Model Bilateral Investment Treaty (2004), Article 24(3), *available at* http://www.state.gov/documents/organization/117601.pdf [hereinafter U.S. Model BIT].

176 NATHAN, *supra* note 4, at 51. **R**

1. The History and Importance of ICSID

The ICSID Convention established ICSID as the first institution designed specifically as a forum to settle investment disputes between a state and private investors of another state.[177] ICSID "was designed to provide a neutral forum" for investor-state arbitration.[178] No "appropriate forum" previously existed to handle investment disputes between foreign investors and states.[179]

The depoliticization of investment disputes is another purpose of ICSID.[180] When the ICSID Convention was being drafted, the "exclusion of diplomatic protection was explained . . . in terms of the removal of the dispute from the realm of politics and diplomacy into the realm of law."[181] These objectives must be kept in mind. Although investor-state arbitration is an imperfect system, it is preferable to regressing to the older method of diplomatic espousal to settle investment disputes.

Stimulating private international investment in countries "in need of such capital" was another objective of the Convention.[182] It was thought that "clear-cut facilities for conciliation and arbitration" would encourage capital-exporting countries to invest in capital-importing countries.[183] The goal was to provide "an atmosphere of mutual confidence" in order to stimulate a greater flow of private capital into countries wishing to attract it.[184]

ICSID was "intended to be an agency independent of the World Bank," but "there is considerable overlap in the administration of the two institutions."[185] ICSID is "maintained by" and subsidized by the World Bank to cover the Centre's "fixed costs."[186] Due to the connection between the World Bank and ICSID, there is "a strong belief that non-compliance with an ICSID award by a member state may result in that state being unable to obtain loans and credits from the Bank."[187] The significance of ICSID being subsidized by the World Bank will be discussed further in Part VI.

ICSID is very important for several reasons. ICSID created the "novel feature" of a tribunal in which "the foreign investor has standing."[188] An individual investor bringing a claim against a state in an international forum was previously unthinkable.[189] This is significant because investor-state arbitration "did not become a feature of the BITs until" after the ICSID Convention was concluded.[190] ICSID arbitration clauses in BITs create "in the inves-

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[177] THE ICSID CONVENTION: A COMMENTARY, *supra* note 147, at 82.
[178] *Id.*
[179] THE ICSID CONVENTION: A COMMENTARY, *supra* note 147, at 82.
[180] DOLZER & SCHREUER, *supra* note 19, at 213. **R**
[181] *Id.*, citing *History of the Convention*, Vol. II, Part 1, at 242, 273, 303, 372 & 464.
[182] GEORG SCHWARZENBERGER, FOREIGN INVESTMENTS AND INTERNATIONAL LAW 138 (1969).
[183] *Id.* at 135.
[184] NEWCOMBE & PARADELL, *supra* note 117, at 27 (2009), citing *Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention of the Settlement of Investment Disputes between States and Nationals of Other States*, 1 ICSID Rep. 23 [hereinafter Report of the Executive Directors].
[185] NATHAN, *supra* note 4, at 52. **R**
[186] *Id.*
[187] *Id.* at 53.
[188] SORNARAJAH, *supra* note 136, at 165.
[189] *Id.*
[190] VANDEVELDE, *supra* note 16, at 43. **R**

tor a unilateral right to take the host state to ICSID arbitration. . ."[191] ICSID and BITs mutually helped each other gain importance.[192] Investor-state arbitration clauses became common in BITs because of the invention of ICSID, the only forum exclusively for investor-state disputes, and ICSID clauses became widespread because of their inclusion in BITs.[193] ICSID was "dormant" from its creation in 1965 until the 1990s in that it did not become a common dispute settlement forum until the explosion of BITs in the 1990s which provided for ICSID dispute settlement.[194] As of 2012, more than one hundred states are parties to the ICSID Convention.[195]

2. Jurisdiction and Operation of ICSID

ICSID is a forum for arbitration. ICSID "does not itself arbitrate the disputes;" rather, it provides administrative support for arbitral tribunals and has adopted certain rules for arbitration.[196] ICSID "provides a legal and organizational framework for the arbitration of disputes" between states and investors who are nationals of other ICSID Convention contracting states.[197] During arbitration proceedings, the parties may attempt to settle the case through conciliation.[198]

Simply being a state party to ICSID does not mean that the state must consent to the Centre's jurisdiction in investment disputes. The Preamble of the ICSID Convention states that "no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration."[199]

As a prerequisite to use the Centre, the home state (the investor's state) and the host state must both be state parties to the ICSID Convention.[200] Being a state party by itself does not give ICSID jurisdiction over investor-state disputes. Consent is necessary for all types of arbitration. Article 25 of the ICSID Convention provides that the Centre has jurisdiction over a "legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre."[201] After the parties have consented, "no party may withdraw its consent unilaterally."[202]

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[191] SORNARAJAH, *supra* note 136, at 168.

[192] *See* VANDEVELDE, *supra* note 16, at 431. **R**

[193] *See id.*

[194] DOLZER & SCHREUER, *supra* note 19, at 2. **R**

[195] *List of Contracting States & Other Signatories of the Convention*, ICSID (May 5, 2011), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English (listing 157 States that have signed the Convention and 147 States that have deposited their instruments of ratification).

[196] VANDEVELDE, *supra* note 16, at 431. **R**

[197] NEWCOMBE & PARADELL, *supra* note 117, at 28.

[198] THE ICSID CONVENTION: A COMMENTARY, *supra* note 147, at 106.

[199] ICSID Convention, *supra* note 11, preamble. **R**

[200] THE ICSID CONVENTION: A COMMENTARY *supra* note 147, at 144.

[201] ICSID Convention, *supra* note 11, at art. 25. **R**

[202] *Id.*

Some scholars opine that ICSID arbitration arising under an investment treaty is unfair because it is "arbitration without privity," due to the state's "unilateral consent."[203] Professor Jan Paulsson, a well-known scholar in this field, introduced the term "arbitration without privity" in the 1990s.[204] It refers to investor-state arbitration in which the consent of the state and the investor are contained in separate instruments at different times,[205] such as a state giving consent in a BIT and an investor consenting at a later date in a separate instrument.

Consent is an important issue when a state denounces the ICSID Convention, which will be discussed below. Scholars have differing opinions on whether an ICSID arbitration clause in a BIT is consent to ICSID jurisdiction or merely an offer to consent. Aron Broches, called the "father of the [ICSID] Convention," said that the consent contained in a BIT is a mere offer to consent, subject to acceptance by the investor.[206] Other scholars look at the language of the arbitration clauses. Professor Emmanuel Gaillard is of the opinion that the drafters of the ICSID Convention would have referred to a state's "agreement to consent" rather than just "consent" if they had so intended.[207] Professor Gaillard further argues that consent contained in BITs should be divided into "unqualified consent" and "agreements to consent."[208] Gaillard contrasts the language in BITs: the wording "shall"[209] constitutes unqualified consent and the wording "may"[210] constitutes an agreement to consent.[211] In this author's opinion, determining consent based on such exact wording is inadvisable because BITs are usually entered into between countries that speak different languages; thus, different conclusions may be reached depending on how the language is translated.

Two jurisdictional requirements are that the investor must be a national of an ICSID Convention member state, and that the state where the investment was made must be a member state.[212] An issue concerning an investor's nationality that is "particularly relevant in Latin America" is the practice of "treaty shopping" and "corporate engineering."[213] Transactions are structured so that the investor has some corporate form in a state which has a BIT with the host state.[214] If an investor's home state does not have a BIT with the country in which an investment will be made, the investor will incorporate in a country that does have a BIT with the host state, in order to take advantage of the investment protections.[215]

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[203] *See* Ibironke T. Odumosu, *The Antinomies of the (Continued) Relevance of ICSID to the Third World*, 8 SAN DIEGO INT'L L.J. 345, 356 & 361 (2007).

[204] Vincentelli, *supra* note 12 at 412, citing Jan Paulsson, *Arbitration Without Privity*, 10 FOREIGN INV. L.J., 2 (1995). **R**

[205] *Id*.

[206] *Id*. at 432.

[207] *Id*. at 434.

[208] *Id*., citing Emmanuel Gaillard, *The Denunciation of the ICSID Convention*, N.Y.L.J., June 26, 2007, at 3.

[209] An example of "unqualified consent" is "found in the language of § 11 of the Bolivia-Germany BIT (use of the word 'shall')." *Id*. at 434.

[210] An example of "qualified consent" is "found in §8 of the Bolivia-United Kingdom BIT (use of the word 'may')." *Id*. at 434-435.

[211] *Id*.

[212] *Id*.

[213] Vincentelli, *supra* note 12, at 413. **R**

[214] *Id*. at 414.

[215] *Id*.

3. Enforcement of ICSID Awards

An award for damages is the most typical type of arbitral award, and the "only realistic type of award."[216] An award for damages can more realistically be enforced than an award for specific performance or a mere declaratory award.[217]

Enforcement of arbitral awards is addressed in Article 54 of the ICSID Convention.[218] Awards issued by ICSID tribunals have been perceived to be easily enforceable, which is a key factor in ICSID's efficacy.[219] ICSID awards are supposed to be "automatically enforceable," and they "do not require the recognition of domestic courts."[220] Awards are enforceable in any state party to the ICSID Convention.[221] Due to the large number of awards that have been rendered against Argentina after its 2001 financial crisis, there has been some concern regarding the enforcement of awards against Argentina.[222] However, that issue is beyond the scope of this Article.

4. The ICSID Additional Facility

ICSID's Additional Facility may be used when one state is a party to the ICSID Convention, but the other is not.[223] The Additional Facility serves the purpose of filling a "jurisdictional gap" when either the host state or the investor's home state is not a party to the ICSID Convention.[224] It is important to note that the Additional Facility was *not* created by the ICSID Convention.[225] Rather, the Administrative Council of the Centre adopted the Additional Facility Rules on September 27, 1978.[226] The Additional Facility Rules "are designed to open access to the Centre in certain situations" when ICSID's jurisdictional requirements are not met.[227]

The Additional Facility is useful because arbitration in this forum receives "institutional support from ICSID in a similar way as proceedings under the ICSID Convention."[228] Article 2 of the Additional Facility Rules authorizes the Secretariat of the Centre to administer conciliation or arbitration proceedings between a state and a national of another state when only one state involved is an ICSID contracting state.[229] As of January of 2010, twenty-eight arbitrations had been filed in the Additional Facility, twenty-one of which were filed since the

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216 SORNARAJAH, *supra* note 136, at 282.
217 *Id.*
218 ICSID Convention, *supra* note 11, at art. 54. **R**
219 *See* LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT *supra* note 148, at 44.
220 *Id.*
221 *Id.*
222 *See* George K. Foster, *Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards & Court Judgments Against States & their Instrumentalities, & Some Proposals for its Reform*, 25 ARIZ. J. INT'L & COMP. L. 665, 705 (2008).
223 NEWCOMBE & PARADELL, *supra* note 117, at 29.
224 THE ICSID CONVENTION: A COMMENTARY, *supra* note 76, at 147.
225 *See* SALACUSE, *supra* note 3, at 380. **R**
226 DOLZER & SCHREUER, *supra* note 19, at 224. **R**
227 THE ICSID CONVENTION: A COMMENTARY, *supra* note 147, at 84.
228 DOLZER & SCHREUER, *supra* note 19, at 225. **R**
229 THE ICSID CONVENTION: A COMMENTARY, *supra* note 147, at 84.

year 2000.[230] Venezuela's denunciation of the Convention may bring about more arbitration in the Additional Facility.

5. Denunciation of the ICSID Convention

Denunciation of the ICSID Convention involves Articles 25, 71, and 72. The right to denounce the Convention is contained in Article 71, and Article 72 explains the effect of denunciation.[231]

Article 25 of the ICSID Convention addresses consent to ICSID jurisdiction.[232] Consent is "the cornerstone of the jurisdiction of the Centre."[233] Consent to arbitration is the most important element of an investor-state dispute settlement agreement.[234] As discussed above, ICSID can exercise jurisdiction when the states involved are parties to the Convention and the parties to the dispute (the investor and the state) have both consented to ICSID arbitration. Being a Contracting State to the Convention is "an absolute requirement" for ICSID jurisdiction.[235] Traditional consent to arbitration is an agreement or contract between the host state and the investor. Withdrawing consent or an offer to consent contained in a treaty is "considerably more difficult" than withdrawing consent contained in domestic legislation.[236] The "vast majority of cases" are based on consent through the indirect means of BITs, which some call "arbitration without privity."[237] "There is little reference to [BITs] in the *travaux préparatoires* to the Convention" because concluding BITs was a fairly new practice when the Convention was drafted.[238]

Consent to treaty-based investment arbitration is perfected when the investor consents to arbitration, which the state has already consented to in a treaty or other international agreement. . The date on which an investor consents is significant when a state denounces the ICSID Convention.

A state party must give notification of its denunciation.[239] Under Article 71 of the Convention, a contracting state may terminate its status by written notice to the World Bank.[240] Denunciation takes effect six months after a state gives the Centre notification.[241]

Denunciation "does not affect consent to the jurisdiction of the Centre given prior to the denunciation."[242] Thus, the time period in which consent to arbitration is perfected affects whether ICSID has jurisdiction over a state that has denounced ICSID or given notification thereof.

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[230] LUCY REED, JAN PAULSSON & NIGEL BLACKABY, GUIDE TO ICSID ARBITRATION 18 (2d ed. 2010).
[231] ICSID Convention, *supra* note 11, at art. 71-72. **R**
[232] *Id*. at art. 25.
[233] THE ICSID CONVENTION: A COMMENTARY, *supra* note 147, at 190.
[234] VANDEVELDE, *supra* note 16, at 433.
[235] THE ICSID CONVENTION: A COMMENTARY, *supra* note 147, at 144.
[236] *Id*. at 1281.
[237] *Id*. at 191.
[238] *Id*. at 205.
[239] ICSID Convention, *supra* note 11, at art. 171. **R**
[240] THE ICSID CONVENTION: A COMMENTARY, *supra* note 147, at 1278.
[241] *See* Emmanuel Gaillard, *Anti-Arbitration Trends in Latin America*, N.Y.L.J. June 5, 2008, at 8.
[242] THE ICSID CONVENTION: A COMMENTARY, *supra* note 76, at 144 (citations omitted).

Under Article 72,[243] denunciation of ICSID "does not affect pending proceedings" or "rights and obligations arising from consent to ICSID's jurisdiction given before receipt of the notice."[244] During the drafting of the Convention, "it was made clear that rights and obligations arising from existing consent to jurisdiction would be preserved."[245] The intention of Article 72 was that, if a state had consented to arbitration, the state's denunciation of the Convention "would not relieve it from its obligation to go to arbitration if a dispute arose," because an "arbitration clause in an agreement with the investor would remain valid for the duration of the agreement."[246]

According to Professor Schreuer, the application of Article 72 to a state which is no longer a party to the Convention "leads to some unusual results."[247] The "rights and obligations" of a state "undoubtedly" include ICSID arbitration and conciliation.[248] Articles 71 and 72 are meant to work together, but they may create confusion because Article 71 states that denunciation takes effect six months after a state gives notification, while Article 72 provides that a state's notification does not affect the "rights and obligations" of the state "*before* such notice was received by the depositary."[249] In other words, it is unclear whether an investor may accept a state's offer to arbitrate after a state gives notification of denunciation.

There is disagreement on whether the Centre has jurisdiction over claims submitted after a state has given notice of denunciation.[250] Scholars do not agree as to whether investors can submit disputes during the six-month notification period.[251]

There are at least three possible views on how denunciation affects ICSID jurisdiction: (1) that both the state and the investor must consent *before* the state gives notification of denunciation; (2) that consent can be perfected during the six-month notification period; and (3) that consent may be perfected at any time during the duration of a BIT or other agreement that contains a state's consent.[252] The view that investors can file claims in ICSID during the six-month notification period, but not after, seems to have prevailed.[253]

Bolivia notified the World Bank of its denunciation of ICSID on May 2, 2007.[254] Under the six-month notification rule in Article 71 of the Convention, the last day Bolivia was a contracting state was on November 2, 2007.[255] E.T.I. Euro Telecom International N.V.

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[243] "Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary." ICSID Convention, *supra* note 11, at art. 72. **R**

[244] THE ICSID CONVENTION: A COMMENTARY, *supra* note 76, at 1278 (citation omitted).

[245] *Id.* at 1279.

[246] *Id.*

[247] *Id.* at 1281.

[248] *Id.* at 1282.

[249] *Id.* at 144 (emphasis added); *see also* : ICSID Convention, *supra* note 11, at art. 72 (emphasis added).

[250] Christian Tietje et al., *Once and Forever? The Legal Effects of a Denunciation of ICSID*, Institute of Economic Law of the Martin Luther University Halle-Wittenberg School of Law (2008), at x, *available at* http://www.Wirtschaftsrecht.uni-halle.de/Heft74.pdf.

[251] *Id.*

[252] *Id.* at 8-9.

[253] *See* Gaillard, *Anti-Arbitration Trends in Latin America*, *supra* note 40, at 8.

[254] THE ICSID CONVENTION: A COMMENTARY, *supra* note 147, at 1278. The World Bank received Bolivia's notice of denunciation on May 2, 2007, and Bolivia's "denunciation took effect six months after the receipt of Bolivia's notice" on November 3, 2007. *Id.*

[255] *Id.*

filed a case in ICSID against Bolivia on October 31, 2007.[256] Some authors disagree about whether May 2 or November 2 was the last date by which investors could submit claims under ICSID. This issue will be discussed in Part V. Bolivia requested that the *E.T.I. Euro Telecom* case be moved to ad hoc arbitration, to which the claimant agreed.[257] There has been no decision by an ICSID tribunal on the question of whether ICSID has jurisdiction over a case filed within the six-month notification period.

D. The Law of Treaties and Treaty Interpretation

States are confronted with tension between their perceived national interests and their treaty obligations.[258] Conflicts may arise as to how to interpret treaties, and there are rules that govern treaty interpretation.

The Vienna Convention on the Law of Treaties ("VCLT") is used to interpret treaties.[259] Since the VCLT was concluded in 1969, it can be used to interpret investment treaties that were concluded after that date. Since the ICSID Convention was concluded prior to the VCLT, the VCLT cannot be used to interpret the ICSID Convention.[260] Some argue that the VCLT is a reflection of customary international law that can aid in interpreting treaties concluded before 1969 and treaties with states that did not ratify the VCLT.[261]

Article 31 of the VCLT provides that a treaty is to be interpreted in accordance with the ordinary meaning given to the terms of the treaty in light of its object and purpose.[262] Tribunals typically invoke Article 31 of the VCLT to interpret treaties.[263] The VCLT expressly includes a treaty's preamble as a part of the context for treaty interpretation.[264] The "object and purpose" of a treaty is an important means of treaty interpretation, which tribunals have frequently used to interpret investment treaties, sometimes by looking at a treaty's preamble.[265] Under Article 32 of the VCLT, tribunals may also refer to "supplementary means of interpretation," which includes preparatory work, or *travaux préparatoires*, "in order to confirm the meaning"[266] of the treaty after applying Article 31.[267] ICSID tribunals often resort to the drafting history of the ICSID Convention because it "is documented in detail, readily available, and easily accessible . . . ."[268] In contrast, tribunals usually cannot rely on

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[256] E.T.I. Euro Telecom Int'l N.V. v. Plurinat'l State of Bol., ICSID Case No. ARB/07/28 (Oct. 31, 2007), *available at* http://icsid.worldbank.org/ICSID/FrontServlet (search for "Bolivia"; then click on "Case No. ARB/07/28").

[257] Carl Magnus Nesser et al., *International Courts*, 44 INT'L LAW. 129, 140 (2010).

[258] SALACUSE, *supra* note 3, at 340. R

[259] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

[260] *See Id*. at art. 4. Article 4 provides for non-retroactivity of the Vienna Convention. *Id*.

[261] *See* Tietje et al., *supra* note 250, at 13.

[262] Vienna Convention, *supra* note 259, at art. 31. R

[263] DOLZER & SCHREUER, *supra* note 19, at 31. R

[264] LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT, *supra* note 148, at 110.

[265] DOLZER & SCHREUER, *supra* note 19, at 32. Dolzer and Schreuer say that interpreting investment treaties "in the light of their object and purpose" has typically "led to an interpretation that is favourable to the investor," but that this "has also come under criticism." *Id*. R

[266] Vienna Convention, *supra* note 259, at art. 32. R

[267] DOLZER & SCHREUER, *supra* note 19, at 32. R

[268] *See id*. at 33.

the preparatory work of BITs because their negotiating history "is typically not documented."[269]

The interpretation of investment treaties "takes place mostly by ad hoc tribunals," which "makes it considerably more difficult to develop a consistent case law than in a permanent judicial institution."[270] To aid in the interpretation of a BIT, "states parties to a treaty may express an opinion on its proper interpretation in the course of arbitration proceedings," and "may issue a joint, non-binding statement on a question of interpretation pending before a tribunal."[271] In actual investment dispute arbitration, "the VCLT is only of limited use in giving guidance to a tribunal" because it is "capable of supporting a wide range of potential interpretations."[272]

Tension that arises after concluding a treaty can be resolved by conducting negotiations to amend or modify the treaty.[273] As indicated by their bilateral nature, BITs involve only two states. Most BITs provide for consultations between the states, but do not have provisions on amendment or modification.[274] Article 39 of the VCLT provides that a treaty "may be amended by agreement between the parties."[275]

Treaty modifications can be accomplished through formal renegotiations or more informal mechanisms.[276] An example of a less formal process involved the case of *CME v. Czech Republic*, in which the Czech government was dissatisfied with how a tribunal interpreted the Czech-Netherlands BIT.[277] Delegations from the two governments met in 2002 "to arrive at a common understanding" on certain issues that had arisen in the case, and they agreed on a "common position" that they submitted to the tribunal "as a binding statement of the meaning and application of the treaty."[278]

In 2010, Professor Salacuse wrote that "the world appears to have had no experience with investment treaty termination."[279] Venezuela has changed this by terminating an investment treaty with the Netherlands, which will be discussed in Part IV.B below.

IV. EFFECTS OF ICSID DENUNCIATION BY BOLIVIA, ECUADOR, AND VENEZUELA

A. ICSID Arbitration After Denunciation of the Convention?

ICSID's approach to the temporal component of denunciation discussed above is unclear because the Centre registered the case *E.T.I. Euro Telecom International N.V. v. Bo-*

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269 *Id.*
270 *Id.* at 31.
271 *Id.* at 34.
272 MCLACHLAN ET AL., *supra* note 166, at 67.
273 *See* SALACUSE, *supra* note 3, at 350. R
274 *See id.*
275 *Id.*
276 *See id.*
277 *See id.*
278 *See id.*
279 *Id.* at 352.

livia during the six-month notification period, and the arbitral tribunal[280] did not issue a decision on jurisdiction because the proceedings were discontinued at the request of the claimant.[281] As a rule, the Secretary-General of ICSID does not make decisions on jurisdiction, and only declines registration when the case is manifestly outside of the Centre's jurisdiction.[282] Interestingly, the case of *Pan American Energy LLC v. Bolivia* was registered on April 12, 2010,[283] which was obviously after Bolivia withdrew from ICSID. An arbitral tribunal has not yet been constituted in this case, so no decision on jurisdiction has been made.[284] Although the extent of ICSID jurisdiction is unclear, a case being filed after a state has denounced ICSID is apparently *not* manifestly outside of the Centre's jurisdiction.

No ICSID tribunals have yet made decisions on the jurisdiction of claims filed in ICSID after Bolivia and Ecuador gave notification of denunciation. Some of the cases filed after Bolivia's and Ecuador's notifications of denunciation were discontinued at the request of the parties or were continued in a non-ICSID arbitral forum.

B. Consent to Arbitration Contained in Bolivia's, Ecuador's, and Venezuela's BITs

This section will examine consent to arbitration given by Bolivia, Ecuador, and Venezuela in relevant BITs. An offer of consent contained in a treaty that has not been accepted by the investor "does not create any rights or obligations under the Convention."[285] Further, "[a]ny rights and obligations that may arise from an offer of consent contained in a BIT would arise from the BIT but not under the Convention."[286]

According to the UNCTAD website, Bolivia is a party to at least eighteen BITs that are still in force.[287] Bolivia is also a party to the New York Convention, which is important for the enforcement of any non-ICSID arbitral awards, such as awards under the UNCITRAL Rules.[288]

The following section will examine the BITs in force with Venezuela, the latest state to denounce the Convention. Ecuador's BITs will then be examined in detail as examples of typical BIT provisions.

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[280] The arbitrators included Bruno Simma and Philippe Sands. *See* E.T.I. Euro Telecom International N.V. v. Bol., ICSID Case No. ARB/07/28 (Oct. 31, 2007), *available at* http://icsid.worldbank.org/ICSID/FrontServlet (search for "Bolivia" and click on "Case No. ARB/07/28").

[281] *See Id*.

[282] *See* BROCHES, *supra* note 24, at 6.

[283] Pan Am. Energy v. Bol., ICSID Case No. ARB/10/8 (registered Apr. 12, 2010), *available at* http://icsid.worldbank.org/ICSID/FrontServlet.

[284] This fact is true as of Apr. 4, 2012. *Id*.

[285] THE ICSID CONVENTION: A COMMENTARY, *supra* note 147, at 1280.

[286] *Id*.

[287] Bolivia has BITs in force with Argentina, Austria, Belgium-Luxembourg, Chile, Denmark, Ecuador, France, Germany, Italy, the Republic of Korea, the Netherlands, Peru, Spain, Sweden, Switzerland, the United Kindom, and the United States. *See Country List of BITs*, UNCTAD (June 1, 2011), http://www.unctad.org/sections/dite_pcbb/docs/bits_bolivia.pdf.

[288] *See Status of Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Aug. 9, 2011).

1. Venezuela's BITs: Many BITs in Force Provide for Alternatives to ICSID

Venezuela famously terminated its BIT with the Netherlands in 2008.[289] The Netherlands' BITs have been used for "treaty shopping" for investment protection.[290] The Netherlands-Venezuela BIT provides for arbitration through ICSID or the Additional Facility.[291] The survival clause provides protection for investments made before termination for a period of fifteen years.[292] Thus, Dutch investments made prior to May 2008 benefit from the BIT protection for fifteen years, but investments made afterwards are not protected.

Venezuela still has BITs in force with many countries, though it has never entered into a BIT with the United States. The Canada-Venezuela BIT provides for dispute settlement through ICSID, the Additional Facility, or ad hoc arbitration under the UNCITRAL Rules.[293] The Germany-Venezuela BIT initially only provided for ICSID arbitration, but a Protocol provides for arbitration through the Additional Facility if Venezuela is not a party to the ICSID Convention, and ad hoc arbitration under the UNCITRAL Rules if neither ICSID nor the Additional Facility is available.[294] This BIT was initially in force for fifteen years, and contained a survival clause of fifteen years.[295] The UK-Venezuela BIT provides for dispute settlement through ICSID, the Additional Facility, ad hoc arbitration under the UNCITRAL Rules, or a tribunal "appointed by a special agreement . . . ."[296] It was to remain in force for an initial period of ten years, and afterwards until either party terminates it, but the provisions will continue in effect for fifteen years after termination of the agreement.[297]

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[289] *See* Luke Eric Peterson, Investment Arbitration Reporter, *Venezuela Surprises the Netherlands with Termination Notice for BIT; Treaty Has Been Used by Many Investors to "Route" Investments into Venezuela*, IAREPORTER (May 16, 2008), http://www.iareporter.com/articles/20091001_93.

[290] Roeline Knottnerus & Roos Van Os, *The Netherlands: A Gateway to 'Treaty Shopping' for Investment Protection*, INVESTMENT TREATY NEWS (Jan. 12, 2012), http://www.iisd.org/itn/2012/01/12/the-netherlands-treaty-shopping/.

[291] Agreement on Encouragement & Reciprocal Protection of Investments between the Kingdom of the Netherlands & the Republic of Venezuela, Neth.-Venez., art. 9(1)-(2), *available at* http://www.unctad.org/sections/dite/iia/docs/bits/netherlands_venezuela.pdf [hereinafter Netherlands-Venezuela BIT].

[292] Netherlands-Venezuela BIT, art. 14(3).

[293] Agreement Between the Government of Canada & the Government of the Republic of Venezuela for the Promotion & Protection of Investments, Can.-Venez., art. 4(1)-(2) & art. 5 (July 1, 1996) *available at* http://www.unctad.org/sections/dite/iia/docs/bits/canada_venezuela.pdf [hereinafter Canada-Venezuela BIT].

[294] Tratado entre law República Federal de Alemania y la República de Venezuela para la Promoción y Protección Recíproca de Inversiones, Ger.-Venez., art. 10(2) (May 14, 1996), & Protocol (Apr. 22, 1998) *available at* http://www.unctad.org/sections/dite/iia/docs/bits/germany_venezuela_esp_gr.pdf [hereinafter Germany-Venequela BIT].

[295] Germany-Venezuela BIT, art. 12.2-12.3

[296] Agreement between the Governement of the United Kingdom of Great Britain & Northern Ireland and the Government of the Republic of Venezuela for the Promotion and Protection of Investments art. 8(2), UK-Venez., (entered into force Aug. 1, 1996).

[297] UK-Venezuela BIT, art. 15.

2. Ecuador: An Examination of BITs

Ecuador has BITs in force with at least fifteen countries.[298] Similar to the rest of Latin America, the vast majority of Ecuador's BITs were concluded in the 1990s.[299] Most BITs have a "survival clause" or "continuing effects clause" that provides protection to investments for a certain period of time after the investment treaty is terminated, usually ten to fifteen years.[300] An examination of Ecuador's BITs shows that most BITs that provide for ICSID arbitration also provide for another arbitration mechanism.[301] However, Ecuador's BITs with France, Germany, and the United Kingdom surprisingly only provide for ICSID arbitration.

a. Most of Ecuador's BITs Provide for ICSID Arbitration and an Alternative to ICSID.

The U.S.-Ecuador BIT provides that the investor, called the "national or company concerned," may choose to submit the dispute "for settlement by binding arbitration" to (i) ICSID; (ii) "to the Additional Facility of the Centre, if the Centre is not available"; (iii) "in accordance with" the UNCITRAL arbitration rules; or (iv) "to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute."[302] Thus, even though Ecuador has denounced ICSID, a U.S. investor can still initiate arbitration under the ICSID Additional Facility or under the UNCITRAL Rules. The provision stating that disputes can be submitted "to the Additional Facility of the Centre, if the Centre is not available" could be interpreted to mean that Ecuador has consented to arbitration in the Additional Facility.

The Netherlands-Ecuador BIT states that an investment dispute can be submitted to "the competent tribunals" of the host state "or to international arbitration."[303] The investor can choose to submit the case to ICSID or "an ad hoc arbitration tribunal, which unless otherwise agreed by the parties to the dispute, is to be established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)."[304]

Canada's BIT with Ecuador[305] is interesting for a few reasons. It specifically provides for state sovereignty in regulation that is necessary to protect the environment and

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[298] As of June 18, 2011 Ecuador had entered into BITs with Argentina, Bolivia, Canada, Chile, China, France, Germany, the Netherlands, Peru, Spain, Sweden, Switzerland, the UK, the U.S., and Venezuela. UNCTAD, *Country List of Bits* (June 1, 2011), http://www.unctad.org/sections/dite_pcbb/docs/bits_ecuador.pdf.

[299] Sixteen of Ecuador's BITs were entered into in the 1990s, two were entered into before the 1990s, and four were entered into after the year 2000. *See* http://icsid.worldbank.org/ICSID/FrontServlet, (click on "Bilateral Investment Treaties").

[300] SALACUSE, *supra* note 3, at 427.

[301] All of Ecuador's BITs are available online. UNCTAD, Investment Treaties Online: Bilateral Investment Treaties, http://www.unctadxi.org/templates/docsearch____779.aspx.

[302] U.S.-Ecuador BIT art. VI.3, *supra* note 74.

[303] Agreement on the Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Ecuador art. 11.2, Neth.-Ecuador, June 27 1999, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/ecuador_netherlands.pdf [hereinafter Ecuador-Netherlands BIT].

[304] Ecuador-Netherlands BIT art. 11.2(a)-(b).

[305] Agreement for the Promotion and Reciprocal Protection of Investments, Can.-Ecuador, Apr. 29, 1996, 2027 U.N.T.S. 196, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/canada_ecuador.pdf [hereinafter Canada-Ecuador BIT].

human rights.[306] It is also interesting because it is more precise and clear than other states' BITs with Ecuador.

The Canada-Ecuador BIT provides that ICSID is an option if both contracting states are parties to the ICSID Convention, and that the Additional Facility is an option if only one state is a party to the ICSID Convention.[307] The investor may choose the arbitration forum, and may submit a dispute to "an international arbitrator or ad hoc arbitration tribunal established under" the UNCITRAL Arbitration Rules.[308] Canada's BIT is very clear on consent. It states that the consent contained in the BIT satisfies ICSID jurisdiction and constitutes an "agreement in writing" under Article II of the New York Convention.[309] Arbitration must take place in a state which is a party to the New York Convention.[310] The survival clause states that the BIT protections will remain in force for fifteen years after the denunciation of the BIT.[311]

Although the Canada-Ecuador BIT lists ICSID as an option for dispute resolution,[312] Canada has never been a contracting party to the ICSID Convention. Canada signed the ICSID Convention on December 15, 2006, but did not ratify the convention.[313] Thus, ICSID was never an option for Canadian investors in Ecuador, and, since Ecuador denounced ICSID, the Additional Facility is no longer an option. Therefore, Canadian investors *must* use ad hoc UNCITRAL arbitration if they would like to settle a dispute through arbitration. As discussed, there is no registry for ad hoc UNCITRAL arbitration, so the existence of investor-state arbitration between Canadian investors and Ecuador may not become public knowledge.

b. Some of Ecuador's BITs Do Not Provide for an Alternative to ICSID for Dispute Settlement.

The France-Ecuador BIT[314] and the UK-Ecuador BIT provide for ICSID as the only international forum for dispute settlement.[315]

As discussed in Part V.B, if a BIT contains consent to ICSID arbitration, but one party denounces the Convention, the consent may be "effectively meaningless" and an ICSID tribunal cannot exercise jurisdiction.[316] According to Vandevelde, if a state consents to ICSID in a BIT, but later denounces ICSID, the other state may submit a claim for state-state dispute resolution.[317] This would, unfortunately, defeat the aim of depoliticization of disputes. Applying this to France, it can submit a claim to state-to-state dispute resolution since

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[306] Canada-Ecuador BIT art. VII.
[307] *Id*. at art. XIII.
[308] *Id*. at art. XIII.3-XIII.4.
[309] *Id*. at art. XIII.5-XIII.6.
[310] *Id*. at art. XIII.6
[311] *Id*. at art. XVIII.2
[312] *Id*. at art. XIII.3.
[313] *List of Contracting States and Other Signatories to the Convention*, ICSID http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main.
[314] Agreement on the Reciprocal Promotion and Protection of Investment art. 9, Fr.-Ecuador, Sept. 7, 1994, 1980 U.N.T.S. 33847 [hereinafter France-Ecuador BIT].
[315] Agreement between the Government of the United Kingdom and Northern Ireland and the Government of the Republic of Ecuador for the Promotion and Protection of Investments art. 8, UK-Ecuador, May 10, 1994, 1996 U.K.T.S. No. 18.
[316] VANDEVELDE, *supra* note 16, at 434. R
[317] *Id*.

the only option, ICSID, is no longer available.[318] This raises the question of what action French investors can take if they have disputes with Ecuador. The survival clause in the France-Ecuador BIT purportedly protects investors for a period of fifteen years after denunciation.[319]

Some believe that arbitration in the ICSID Additional Facility is possible when a state has consented to ICSID jurisdiction and then subsequently denounces the Convention.[320] If this is correct, French investors could initiate arbitration against Ecuador in the Additional Facility. However, others claim that it is not available because a state must specifically consent to arbitration under the Additional Facility. The issue of Additional Facility jurisdiction is beyond the scope of this Article.

3. States with BITs in Force Are Typically Still Subject to Investor-State Arbitration, Even After Denunciation of the ICSID Convention.

This section has shown that Bolivia, Venezuela, and Ecuador still have BITs in force with many capital-exporting countries. Thus, Bolivia and Ecuador are still subject to non-ICSID investment dispute arbitration because they have consented to such arbitration in many BITs, although, there are a few BITs that do not provide for any other type of investor-state arbitration. This section will examine the possible reasons for states' denunciation of the ICSID Convention.

V. CRITICISM OF THE ICSID SYSTEM AND INVESTOR-STATE ARBITRATION

Opinions of investor-state arbitration differ substantially. Numerous articles and scholars criticize investor-state arbitration,[321] while others think it is indispensable for attracting investment.

Attitudes towards foreign investment are shaped by conflicting legal paradigms in investment disputes, according to Professor Sornarajah.[322] These paradigms are deeply rooted in conflicts between the United States and Latin American because they historically "developed in the context of the disputes between the United States and Latin American states."[323] The paradigm of the free market being beneficial to economic development[324] clashes with the paradigm of state sovereignty and the state's ability to regulate all economic activity.[325] A new paradigm has also emerged which represents the international community's interests in human rights and the environment.[326]

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[318] *Id*.
[319] France-Ecuador BIT, *supra* note 314, at art. 14.
[320] Mourre, *supra* note 61, at 613 (citing Emmanuel Gaillard, *La denunciation de la Convention CIRDI par certains Etats d'Amerique Latine*, *in* COLLECTION GUIDE – ANNUAIRE DECIDEURS 187 (2007)).
[321] *See, e.g.*, Odumosu, *supra* note 203, at 345.
[322] SORNARAJAH, *supra* note 136, at 77.
[323] *Id*.
[324] *Id*. at 79.
[325] *Id*. at 81-82.
[326] *Id*. at 83.

Some scholars believe that "the business goals of foreign investors and the development goals of capital-importing countries are reconcilable to their common advantage."[327] This may be so, but it is hard to advocate this view when some criticism of ICSID is ideological. The actions of Bolivia and Ecuador in denouncing ICSID, denouncing some BITs, and nationalizing and expropriating foreign assets have "an ideological explanation."[328] There is a perception in some of Latin America that the current international investment regime is a modern version of "gunboat diplomacy against national sovereignty" that favors multinational corporations and ignores labor and environmental regulations.[329]

Some criticism of investor-state arbitration applies equally to *all* types of investor-state arbitration, such as encroachment on state sovereignty and interference with a state's regulatory function. This Article first looks at criticism that applies both to ICSID and non-ICSID arbitration forums, then focuses on aspects of investor-state arbitration that may produce different results under ICSID and other arbitration. The effects of denunciation and the counter-productivity of denouncing ICSID will be discussed further in Parts V and VI respectively.

A. Criticism that Applies Equally to All Types of Investor-State Arbitration

States withdraw from ICSID because detractors allege shortcomings in the system, but, to the extent that certain shortcomings exist, they exist across the board. Encroachment on state sovereignty is an aspect of investor-state arbitration that applies equally to all types of investor-state arbitration, not just ICSID.

Investor-state arbitration encroaches on state sovereignty in that it limits a state's ability to regulate.[330] States exercise sovereignty by entering into investment treaties,[331] but also relinquish some sovereignty by agreeing to investor-state arbitration as a dispute settlement mechanism. It is "beyond dispute" that the current investment regime diminishes sovereign authority "in matters over which national law otherwise grants complete dominion."[332] This criticism should not be directed towards ICSID, however, as interference with state sovereignty arises from a BIT or other investment treaty, *not* from arbitration forums.

Many criticize the investment dispute system for not respecting the sovereignty of states and exhibiting bias in favor of multinational corporations and developed states.[333] In the 1990s, some investor-state arbitrations arose from claims that certain environmental measures in host states violated investment treaties, including Chapter 11 of NAFTA, which is very similar to a BIT.[334] Some claims submitted to investor-state arbitration involved "regulatory measures that diminished the value of investment."[335] Even developed countries did not consider some of these claims "meritorious."[336]

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[327] LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT, *supra* note 148, at 27-28.
[328] Vincentelli, *supra* note 12, at 423. R
[329] Alexis Mourre, *Perspectives of International Arbitration in Latin America*, 17 AM. REV. INT'L ARB 597, 608 (2006).
[330] *See id*. at 612.
[331] RUBINS & KINSELLA, *supra* note 143, at 263.
[332] Garcia, *supra* note 133, at 310.
[333] *See* SORNARAJAH, *supra* note 136, at 160.
[334] VANDEVELDE, *supra* note 16, at 448. R
[335] *Id*.
[336] *Id*.

Some innovations in investment treaties have developed to address such criticism. For example, the U.S.-Uruguay BIT, which is based on the 2004 U.S. Model BIT,[337] provides that state parties can mutually agree to decide issues involving the interpretation of the BIT, and that this joint decision is binding on investor-state arbitral tribunals.[338]

Interference with a state's sovereignty results from all types of investor-state arbitration. ICSID does not interfere with sovereignty any more than other institutional arbitration or *ad hoc* arbitration. Therefore, criticism that ICSID encroaches on state sovereignty more than other arbitral forums is unwarranted.

ICSID has also been criticized as being biased in favor of multi-national corporations. Since ICSID is affiliated with the World Bank, some developing countries perceive ICSID as biased in favor of investors.[339] Studies have shown that respondent states actually do not fare worse in ICSID than in other arbitration forums, and that investors do not always win.[340] Since investors do not fare better in ICSID arbitration than in other types of investor-state arbitration, the criticism of bias applies equally to all investor-state arbitration, not just to ICSID arbitration.

B. Criticisms of Investor-State Arbitration that Apply Disparately to Different Arbitration Forums

This Article argues that denunciation of ICSID is counterproductive because a comparison of the shortcomings in different arbitration forums shows that non-ICSID arbitration forums produce worse results than ICSID arbitration. Some criticisms of investor-state arbitration do not apply equally to all arbitral forums. Certain perceived problems are worse in some arbitration forums than in others, as the "differences among the various arbitral processes can be significant."[341] This section will examine aspects of investor-state arbitration that differ among forums. This will be discussed further in the context of the denunciation of ICSID in Part VI.

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[337] Article 30(3) of the 2004 U.S. Model BIT provides that a "joint decision of the Parties. . . declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision"; it also "provides for a mechanism similar to the one in the NAFTA," which has a mechanism whereby a body composed of representatives of the states parties can adopt "binding interpretations of the treaty," even though BITs "do not normally have institutional mechanisms to obtain authentic interpretations of their meaning." DOLZER & SCHREUER, *supra* note 19, at 35. **R**

[338] VANDEVELDE, *supra* note 16, at 450. **R**

[339] *Id.* at 438.

[340] Susan Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards*, *supra* note 85, at 898-99 ("There were no general differences between ICSID and non-ICSID cases in amounts claimed and outcomes. When refining the analyses to address three variables of interest, ICSID was still not reliably linked to either amounts claimed or outcomes. First, there was no reliable relationship between ICSID and Energy disputes for either amounts claimed or outcomes. Second, although there was a relationship between amounts claimed against Latin American respondents in non-ICSID awards, there was no reliable relationship among ICSID, Latin American respondents, and outcomes. Third, there was no reliable relationship for either amounts claimed or outcome, as a function of Development Status and all ICSID awards (that is, ICSID Convention and Additional Facility awards). As a general matter, this meant that, for the pre-2007 population data, the claims and outcomes of arbitration awards at ICSID were not statistically different, and the evidence did not suggest that ICISD was any worse (or any better) than other arbitration forums. That evidence supported neither the contention that ICSID was biased nor the hypothesis that ICSID arbitration awards were meaningfully different.").

[341] VANDEVELDE, *supra* note 16, at 438. **R**

ICSID has been criticized for the absence of an appeals process, the alleged lack of impartiality purportedly evidenced by the perception that most ICSID cases are decided in favor of the investor,[342] and the high cost of ICSID litigation.[343]

1. Lack of Appeals Process

Carlos Garcia, who has represented the government of Mexico in investor-state arbitration,[344] identifies "some inherent procedural and systemic flaws" with how investor-state disputes are adjudicated under arbitration.[345] Since "any adjudicative panel can err," an opportunity for review is desirable, and Garcia identifies this "lack of any effective and consistent review or appeal mechanism" as a "glaring" defect of investor-state arbitration.[346] The lack of a review mechanism "adds to the general uncertainty in deciphering the scope of the treaty rights."[347] In this author's opinion, the problem with advocating a review mechanism is that it is impractical. There are thousands of investment treaties that are similar, but not exactly the same. It would be difficult, if not impossible, to create a review mechanism that added certainty to interpreting treaty rights, since different treaties confer different rights. The different methods of reviewing arbitral awards will be discussed in Part VI. This analysis is relevant to denunciation because ICSID and non-ICSID review mechanisms are different.

2. Cost of Investor-State Arbitration

"Investment claims are notoriously drawn out and expensive,"[348] and investor-state arbitration is criticized as "neither speedy nor cost effective."[349] ICSID arbitration is actually less expensive than other investor-state arbitration because ICSID's costs are contained,[350] while the cost of ad hoc arbitration is unpredictable.[351]

Some claim that even if "arbitrators conduct themselves in good faith, the compensation regime runs the risk of creating the impression that decisions may be affected by the arbitrators' own personal financial interests."[352] Arbitrators' fees and other costs of arbitration in different forums will be discussed in Part VI.B. In terms of cost, ICSID actually has an advantage over non-ICSID arbitration.

3. Lack of Transparency

Many criticisms of investor-state arbitration, such as interference with a state's ability to regulate, rely on transparency to a certain extent. Transparency in arbitral proceedings

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[342] This is not true based on Susan Franck's article on investor-state arbitration statistics. Susan Franck, *Empirically Evaluating Claims about Investment Treaty Arbitration*, 86 N.C. L. REV. 1 (2007).
[343] Vincentelli, *supra* note 12, at 423. *See also* Gillman, *supra* note 9, 273. **R**
[344] Garcia, *supra* note 133, at 301.
[345] *Id.* at 339.
[346] *Id.* at 340.
[347] *Id.*
[348] *Id.* at 355.
[349] *Id.* at 356.
[350] NATHAN, *supra* note 4, at 53. **R**
[351] Garcia, *supra* note 133, at 352.
[352] *Id.*

is an important issue. A criticism of BITs "has been that the investor-state disputes provision created by the BITs lacked sufficient transparency."[353] Whether the procedures created by BITs are sufficiently transparent is debatable.[354]

Transparency in investor-state arbitration is fundamental in order to analyze the shortcomings of the system. Claims that investors are favored in arbitration cannot even be examined if there is no transparency. If the investor-state arbitration system does need to become more equitable, transparency is required before one can examine the proceedings in order to correct any deficiencies in the system.

ICSID is more transparent than other types of arbitration. It is "next to impossible" to determine the number of investment treaty-based cases because those submitted pursuant to non-ICSID regimes, such as UNCITRAL, "may be entirely unknown except to the parties, their lawyers and tribunals members."[355] The "hearings, pleading, and very existence of a case," may be kept confidential in non-ICSID cases.[356]

Criticizing the lack of transparency in investor-state arbitration is a reason to submit arbitrations to ICSID, rather than to other forums or to ad hoc arbitration. Transparency is an advantage to ICSID that will be discussed in Part VI.B.

4. Summary of Criticism that Led to Denunciations of the ICSID Convention

This section has looked at shortcomings of investor-state arbitration in general and criticism of ICSID in particular. Some perceived problems with investor-state arbitration, such as encroachment on state sovereignty, apply equally to all investor-state arbitration. Other perceived problems with investor-state arbitration and ICSID, such as the lack of transparency and the cost of investor-state arbitration, are actually more problematic in non-ICSID arbitration than in ICSID arbitration. The following section will examine whether this criticism supports legitimate reasons to denounce the ICSID Convention.

VI. DENUNCIATION OF ICSID IS COUNTERPRODUCTIVE

A. Non-ICSID Arbitration Is Still Available to Investors.

As discussed, BITs usually contain a few options for dispute settlement mechanisms, which are sometimes called "cafeteria-style" clauses.[357] The variety of dispute resolution mechanisms in BITs has been described as a "bewildering array of methods for settling disputes."[358]

Although not the sole forum, ICSID is the most common forum for investor-state arbitration.[359] Professor Salacuse points out that, although ISCID is important, there are many other options for settling investment disputes.[360] ICSID was once the only arbitration

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[353] VANDEVELDE, *supra* note 16, at 399. **R**
[354] *Id.*
[355] Garcia, *supra* note 133, at 337.
[356] *Id.* at 355.
[357] MCLACHLAN ET AL., *supra* note 166, at 47.
[358] *Investment, Arbitration & Secrecy: Behind Closed Doors*, *supra* note 86.
[359] DOLZER & SCHREUER, *supra* note 19, at 222 & 225. **R**
[360] Salacuse, *supra* note 3, at 446.

forum listed in the dispute settlement provisions of BITs, but alternative forums are now also commonly listed in BITs.[361] Most investor-state arbitrations are brought under ICSID, followed by arbitration under the UNCITRAL Rules.[362] A common alternative to ICSID is ad hoc "non-institutional" arbitration using the UNCITRAL Rules.[363] Other common forums include the Additional Facility, the Stockholm Chamber of Commerce, and the International Chamber of Commerce in Paris.[364] As of 2008, of the 317 disputes submitted to investor-state arbitration under a BIT, 202 were submitted to ICSID and 83 were submitted under the UNCITRAL Rules.[365]

In 2010, "the number of known *treaty-based* investor-state dispute settlement . . . cases filed under international investment agreements" increased by at least twenty-five.[366] This figure does "not include cases that are exclusively based on investment contracts . . . ."[367] Additionally, "[s]ince most arbitration forums do not maintain a public registry of claims, the total number of actual treaty-based cases could be higher."[368] In 2010, at least three treaty-based cases were filed against Bolivia, three against Venezuela, and two against Peru.[369] A total of sixteen cases have been filed against Ecuador, which is a relatively high number.[370]

A criticism of ICSID is that states rarely prevail in investor-state arbitration, but the statistics show otherwise. Of the known concluded treaty-based investor-state dispute settlement cases, forty percent were decided in favor of the state, thirty percent were decided in favor of the investor, thirty percent were settled, and approximately fifteen percent had an unknown outcome.[371]

As discussed above, a minority of BITs, such as the France-Ecuador BIT, provide only for ICSID as a dispute settlement forum. If a state is a party to one BIT that lists one forum and another BIT which lists multiple forums, the question has been raised as to whether the most favored nation principle ("MFN") can also extend to arbitration forums.[372] In other words, an argument could be made that if Bolivia or Ecuador has a BIT with a state that lists ICSID as the only arbitration mechanism, such as the France-Ecuador BIT, and another BIT with a different state that lists multiple forums, such as the U.S.-Ecuador BIT, investors might attempt to claim that MFN applies in order to expand the number of arbitration mechanisms available.

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[361] VANDEVELDE, *supra* note 16, at 464. **R**

[362] DUGAN ET AL., *supra* note 54, at 77.

[363] NEWCOMBE & PARADELL, *supra* note 117, at 73.

[364] VANDEVELDE, *supra* note 16, at 436. **R**

[365] *Id*. at 435; *see also* UNCTAD, *Latest Developments in Investor-State Dispute Settlement*, at 2, U.N. Doc. UNCTAD/WEB/DIAE/IA/2009/6/Rev1 (2009).

[366] UNCTAD, *Latest Developments in Investor-State Dispute Settlement* (2011), supra note 34, at 1 (emphasis added).

[367] *Id*. at 1, n.1.

[368] *Id*. at 1.

[369] *Id*. at 2.

[370] *Id*. Only Argentina, Mexico, and the Czech Republic have had more known claims filed against them than Ecuador. *See id*.

[371] *See id*. The cited data represents treaty-based investment dispute settlement, not contract-based investment disputes.

[372] *See* Tietje et al., *supra* note 250, at 30.

B. Comparison of Investor-State Dispute Resolution Mechanisms

The availability of alternatives to ICSID raises the question of whether a state's denunciation of ICSID really affects investors. Is ICSID arbitration more advantageous to investors? Is non-ICSID arbitration more advantageous to states? This section will evaluate whether a state's denunciation of ICSID truly affects investment dispute settlement when an applicable BIT containing an arbitration clause is in force. This section will examine whether states have an advantage in non-ICSID arbitration and whether states' objectives in denouncing ICSID are being met.

There are advantages to ICSID arbitration. ICSID rules "are specifically tailored for arbitration with the participation of a government party."[373] UNCITRAL Rules were developed for commercial arbitration, and are thus much broader. In general, ICSID is better suited for investor-state arbitration.[374] However, the fact that ICSID is better suited for investor-state arbitration does not necessarily mean that this forum is beneficial to the investor. Moreover, "[t]here may well be considerations militating in favor of other dispute resolution options," such as ad hoc UNCITRAL arbitration "or arbitration under institutional rules other than those of ICSID."[375] Both states and investors alike may see some of the same advantages and disadvantages.

ICSID differs from UNCITRAL arbitration in that ICSID requires states to be contracting parties to the ICSID Convention, while there is no such convention to which a state must be a party to in order to participate in UNCITRAL arbitration.[376] As Professor Vandevelde states, "[a]rbitration under the UNCITRAL rules does not require that the home and host states adhere to any convention and is not precluded by their adherence to any convention."[377]

It is difficult to examine non-ICSID investment arbitrations because even the mere existence of such arbitration may never become public knowledge. Salacuse says that "the precise number of cases and the specific nature of their decisions are difficult to determine because of the number of potential arbitral forums open to investor-state disputes and the varying degrees of confidentiality with which the forums cloak their operations."[378] Confidentiality and transparency in different arbitration forums or under different arbitration rules will be discussed further below.

1. Initiating Arbitration and Comparison of the Arbitral Tribunals

Initiating arbitration under the UNCITRAL Rules is easier because it does not require "an initial screening process," unlike ICSID which has jurisdictional requirements, including the requirement that the dispute be an "investment dispute," as defined by the Convention, and not manifestly outside of ICSID jurisdiction.[379]

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[373] DUGAN ET AL., *supra* note 54, at 82.
[374] *Id.*
[375] REED ET AL., *supra* note 230, at 13.
[376] VANDEVELDE, *supra* note 16, at 438. R
[377] *Id.*
[378] Salacuse, *The Emerging Global Regime for Investment*, *supra* note 3, at 447.
[379] DUGAN ET AL., *supra* note 54, at 82.

There are some disadvantages to investors under the UNCITRAL Rules. UNCITRAL has no supervisory body comparable to the ICSID secretariat.[380] The absence of a supervisory body "may allow recalcitrant parties (particularly sovereign parties) to delay the proceedings at various stages."[381] The UNCITRAL Rules provide some advantages to states. If the arbitration is conducted under UNCITRAL Rules, rather than under ICSID, the World Bank cannot use its influence to prevent a "recalcitrant" country from obstructing the arbitration process.[382]

There are slight differences between the appointment of the arbitral tribunal under ICSID and under UNCITRAL. Under the UNCITRAL Rules, each party appoints an arbitrator, and then the two arbitrators appoint a third arbitrator.[383] If the party-appointed arbitrators cannot agree, the Secretary-General of the Permanent Court of arbitration designates a third arbitrator.[384] In ICSID, the *parties* agree on the third arbitrator.[385] This gives the parties, which includes a state, more control over the composition of the tribunal than under UNCITRAL.[386] There are situations, however, where the parties cannot agree on a third arbitrator. When such a case arises, the president of the World Bank appoints an arbitrator.[387] Many developing countries dislike this system because the World Bank is viewed with skepticism in some regions.[388]

The allocation of costs and arbitrators' fees differs under ICSID and UNCITRAL Rules. In ICSID, the arbitrators decide the allocation of costs, while under UNCITRAL, the losing party normally pays administrative fees.[389] This difference may be inconsequential, however, as the allocation of fees does not clearly advantage one party over another.

2. The Situs of Arbitration and Lex Arbitri

The situs of the arbitration has very different consequences under ICSID and UNCITRAL. The situs of ICSID arbitration is of little significance, as long as the arbitration takes place in an ICSID Convention member state.[390] In ICSID arbitration, the domestic law of the arbitration situs has "no bearing whatsoever on the arbitration procedure," and is only of consequence for the purposes of seeking a stay of domestic court proceedings and enforcement of an award.[391] Under UNCITRAL, "the choice of the situs has significant legal conse-

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[380] *Id*. at 85.

[381] *Id*.

[382] *Id*. at 85-86("ICSID, a subdivision of the World Bank, may be able to use the World Bank's stature to prevent a recalcitrant country that has received substantial funds though the lending system of the Bank from obstructing the arbitration process.").

[383] United Nations Comm'n on Internat'l Trade Law Arbitration Rules, G.A. Res. 31/98, art 7, U.N. Doc. A/31/17 (Dec. 15, 1976) [hereinafter UNCITRAL Rules].

[384] VANDEVELDE, *supra* note 16, at 438. R

[385] *Id*.

[386] *Id*.

[387] *Id*.

[388] *Id*.

[389] DUGAN ET AL., *supra* note 54, at 86.

[390] *See* MCLACHLAN ET AL., *supra* note 166, at 55.

[391] *Id*.

quences."[392] The *lex arbitri* is normally the law of the place of arbitration, and the courts in that situs have "supervisory jurisdiction to provide interim relief."[393]

"An award must have a basis in a legal system of a sovereign state or in an international convention."[394] An arbitral award draws "validity from the law of the state in which it is made," or from the ICISD Convention if it is an ICSID award.[395] Ad hoc arbitration and arbitration under the ICSID Additional Facility use *lex arbitri* "selected by application of the methods used in commercial arbitration," which will be a "municipal system of law."[396]

Ad hoc arbitral awards are final in theory, but the court that has jurisdiction over the place where the tribunal sat may review the arbitral awards.[397] By contrast, ICSID awards "cannot be reviewed by national courts as the ICSID system is an autonomous system" that national courts do not have jurisdiction over.[398]

The most important difference between ICSID and UNCITRAL is the action that can be taken after the award is rendered. Challenging the award and enforcing the award are different under ICSID and under UNCITRAL.

3. Challenging Arbitral Awards

The annulment of an award and the enforcement of an award are interrelated to some extent. This section will discuss annulment, and the following section will focus on enforcement; both sections will discuss the subjects together when applicable.

The withdrawals of Bolivia, Ecuador, and Venezuela from ICSID indicate their collective belief that non-ICSID arbitration is advantageous, or at least less detrimental to them than ICSID arbitration. The methods for challenging awards differ among arbitration systems.

The methods through which arbitral awards may be challenged is an important difference between ICSID arbitration and non-ICSID arbitration. Annulment of an award is available in ICSID, and setting aside an award through judicial review is available for most other types of non-ICSID arbitration.[399]

a. Annulling and Setting Aside Awards

Arbitral awards rendered under the UNCITRAL Rules, the ICSID Additional Facility, or institutions with comparable rules are "vulnerable to judicial review" in the seat of arbitration and in the place where enforcement is sought.[400] Non-ICSID arbitral awards may be set aside by a judge in the domestic judicial system of the state where the arbitration took place.[401] In non-ICSID arbitration, "the choice of the location of the arbitration is important

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392 DUGAN ET AL., *supra* note 54, at 83.
393 *Id*.
394 SORNARAJAH, *supra* note 136, at 279 n.3.
395 *Id*. at 279.
396 MCLACHLAN ET AL., *supra* note 166, at 55.
397 SORNARAJAH, *supra* note 136, at 287.
398 *Id*. at 288.
399 VANDEVELDE, *supra* note 16, at 446. R
400 *See* Paul Michael Blyschak, *State Consent, Investor Interests and the Future of Investment Arbitration: Reanalyzing the Jurisdiction of Investor-State Tribunals in Hard Cases*, 9 ASPER REV. INT'L BUS. & TRADE L. 99, 152 (2009).
401 VANDEVELDE, *supra* note 16, at 446. R

because that choice determines which courts will conduct any set-aside proceedings and the grounds upon which an award may be set aside."[402] Domestic laws usually provide for "a minimum standard of review of arbitral awards in setting-aside proceedings, and provide limited grounds for refusal to recognize and enforce arbitral awards, including uncertain public policy grounds."[403]

Jurisdictions that are "typically chosen" as the seat of arbitration have national arbitration laws that are very similar to the New York Convention or the UNCITRAL Model Law.[404] Such laws "serve the same purpose" as ICSID's annulment mechanism, and although the application of such laws "may vary significantly" from the ICSID Convention, it is "not always in ways that favor the respondent state."[405]

Annulment of an ICSID award is addressed in Article 52 of the Convention.[406] In ICSID, annulment proceedings are performed by a tribunal that is similar to the original arbitral tribunal which rendered the award.[407] If a party requests annulment of an award, the Chairman of the Administrative Council, who is the President of the World Bank, will appoint three arbitrators to an ad hoc committee.[408] The narrow grounds for annulment include cases in which a tribunal "manifestly exceeded its powers."[409]

b. The Lack of an Appeal Mechanism

ICSID has been criticized by some for its lack of an appeal mechanism, as discussed in Part V. However, alternative types of investor-state arbitration are similar because the closest mechanism to an appeal is having the award set aside. In terms of a review mechanism, ICSID annulment is considered "preferable to the alternatives," even though it still does not amount to a "genuinely effective" review mechanism.[410] Therefore, in regard to appeal mechanisms, ICSID is no more detrimental to respondent states than other types of investor-state arbitration forums.

c. Is It Easier for States to Challenge non-ICSID Awards?

The withdrawal of Bolivia, Ecuador, and Venezuela from ICSID might be explained by the option to challenge and resist enforcement of non-ICSID arbitral awards. This tactic, however, may not prove useful to them.

The grounds for annulling an ICSID award "offer more hope for counsel seeking review than those provided by either the UNCITRAL Model Law or the New York Convention."[411] Gaetan Verhoosel looks at whether non-ICSID awards are "more vulnerable" than

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[402] *Id*.
[403] REED ET AL., *supra* note 230, at 14.
[404] *See* Blyschak, *supra* note 400, at 152-153.
[405] *Id*. at 99.
[406] *See* ICSID Convention, *supra* note 11, at art. 52. R
[407] *See* VANDEVELDE, *supra* note 16, at 446. R
[408] ICSID Convention, *supra* note 11, at art. 52(3). R
[409] ICSID Convention, *supra* note 11, at art. 52(1)(b); *see* Blyschak, *supra* note 400, at 150.
[410] Garcia, *supra* note 133, at 344.
[411] *Id*.

ICSID awards.[412] Public policy is a ground for annulment or setting aside an award under most arbitration laws, but not under ICSID.[413] However, public policy as grounds for setting aside awards has *not* increased the vulnerability of non-ICSID awards, according to Verhoosel.[414] In the jurisdictions that have been studied, courts have "invariably set the public policy bar very high."[415]

Regarding the enforcement of arbitral awards, Verhoosel examines the extent to which the ICSID regime is automatic in enforcing awards, and the extent to which the New York Convention regime is disadvantageous in enforcing awards.[416] Verhoosel looks at whether there are "distinct enforcement advantages" for states in "opting out of the ICSID regime."[417]

Under the New York Convention regime, there were "no reported decisions refusing recognition or enforcement of non-ICSID treaty awards."[418] The lack of a review mechanism affects the enforcement of an award, since an award could not be enforced if it was being reviewed. Awards rendered under the Additional Facility or the UNCITRAL rules "may require judicial enforcement . . . under national legal systems, and . . . may be subject to scrutiny by the jurisdiction designated as the place of arbitration, at which point the losing side . . . will have some opportunity for judicial review."[419] As discussed, ICSID has its own internal review mechanism in the form of annulment.[420]

Non-ICSID arbitral awards are subject to review in the national courts of the place of arbitration or of the state in which the investor seeks to enforce an award.[421] However, "as a practical matter," those means of "redress against an award are dead-ends," since states have committed to not interfere with international arbitral awards.[422] Setting aside awards is limited to "the very rare instances of gross transgressions, such as lack of notice, excess of jurisdiction, unarbitrability, or an award in conflict with public policy."[423] The grounds for refusing recognition and enforcement under the New York Convention are similar.[424] The grounds for challenging arbitral awards have been called "prohibitive," and "make the process largely worthless."[425]

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412 Gaetan Verhoosel, *Annulment and Enforcement Review of Treaty Awards: to ICSID or Not to ICSID?*, 23 ICSID REV. 119, 140 (2009).
413 *See id.*
414 *See id.* at 141.
415 *Id.*
416 *Id.* at 146.
417 *Id.*
418 *Id.* at 149.
419 Garcia, *supra* note 133, at 341.
420 *See id.*
421 *See id.*
422 *See id.*
423 *Id.*
424 *See id.* at 342.
425 *See id.*

d. Setting Aside a non-ICSID Arbitral Award Does Not Necessarily Mean the Award Cannot Be Enforced.

When an arbitral award is set aside in one state, another jurisdiction may still choose to enforce the award. Article V(1) of the New York Convention provides that a court may refuse to recognize and enforce an award if a party shows that, under subsection V(1)(e), the award "has been set aside or suspended by a competent authority of the country which, or under the law of which, that award was made."[426] Since the famous case of *Pabalk Ticaret Ltd. Sirketi v. Norsolor S.A.* ("Norsolor"), the French Supreme Court has held that annulled awards may be enforceable.[427]

In another case, *Chromalloy v. Egypt*, a contract dispute was submitted to arbitration and the tribunal issued an award in favor of Chromalloy.[428] Despite an Egyptian court's annulment of the award, a U.S. court used the New York Convention and the Federal Arbitration Act to enforce the award against Egypt.[429] The court "held that Article V(1)(e) was discretionary, not mandatory, relying on the 'may' language in the official English translation."[430] "In other words, the court might, but was not obligated to, refuse enforcing an award that had been annulled in the country of origin."[431] Although there has not been an outright rejection of the U.S. court's reasoning that a court has discretionary power under Article V of the New York Convention to enforce awards, subsequent decisions by U.S. courts have refused to enforce awards that were set aside at the seat of arbitration.[432]

Therefore, states trying to escape liability from non-ICSID arbitral awards have the possibility of having the award set aside. Investors seeking to enforce that award, however, also have a chance, albeit slim, to have the award enforced under the New York Convention regardless of whether it has been set aside by another jurisdiction.

4. Enforcement of the Award

This section will examine the differences in enforcement between ICSID and other types of investor-state arbitration, namely arbitration under the Additional Facility and the UNCITRAL Rules. In light of the actions that Venezuela, Ecuador, and Bolivia have taken against foreign investment, discussed above in Part V, these states may have aimed to avoid the enforcement of arbitral awards under the ICSID Convention.

In terms of enforcing an award, ICSID arbitration is probably preferable for investors.[433] ICSID awards must be recognized and enforced "in all Contracting States as if they were final judgments of the local courts."[434] This recognition and enforcement is "a distinc-

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[426] New York Convention, *supra* note 144, art. V(1)(e).
[427] *See* Kenneth R. Davis, *Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 37 TEX. INT'L L.J. 43, 63 (2002).
[428] *See* Ray Y. Chan, *The Enforceability of Annulled Foreign Arbitral Awards in the United States: A Critique of Chromalloy*, 17 B.U. INT'L L.J. 141, 142-43 (1999).
[429] *See id.* at 154.
[430] *Id.*
[431] *Id.*
[432] *See* Vesna Lazic, *Enforcement of an Arbitral Award Annulled in the Country of Origin*, 13 CROAT. ARBIT. YEARB. 179, 187 (2006).
[433] *See* REED ET AL., *supra* note 230, at 14.
[434] *Id.*

tive feature of ICSID arbitration, as other international arbitration regimes leave enforcement to domestic laws" or treaties such as the New York Convention.[435]

A key distinction between ICSID and the Additional Facility is that "Additional Facility awards are not enforceable under the Convention, but require an independent basis for enforcement."[436] "For this reason, Additional Facility Rules require that arbitral proceedings be held in a state that is a party to the New York Convention."[437] The ICSID Additional Facility Rules require arbitration to take place in a New York Convention state party because the New York Convention is relied on to enforce the award, as opposed to the ICSID Convention.[438]

Problems exist in the enforcement of all types of awards against states, including ICSID awards.[439] "The existence of an award itself creates a moral pressure on the part of the state party to conform to the award."[440] States compete to attract foreign investment, and a state will not be attractive to foreign investors if it does not abide by an arbitral award.[441] The state may not care to comply with awards, however, if it has already taken action hostile to foreign investors, as Bolivia, Ecuador, and Venezuela have done.

ICSID "seemingly creates a mandatory duty to recognize the awards of ICSID tribunals,"[442] but ICSID awards face some of the same impediments to enforcement as other foreign investment arbitral awards, such as sovereign immunity.[443] Sornarajah's discussion of the difficulties faced in enforcing all types of awards against states demonstrates that ICSID awards may not really be easier to enforce than other types of arbitral awards.[444] This indicates that resorting to non-ICSID arbitration is neither more detrimental to an investor nor more advantageous to a state.

5. Confidentiality/Secrecy versus Transparency

The conflict between confidentiality and transparency is another contentious aspect of investor-state arbitration. The alternative forums for investor-state arbitration are all less transparent than ICSID. If transparency is desirable, then denunciation of ICSID is counterproductive.

Arbitration is generally known for secrecy, and investor-state arbitration is no exception. It has been reported that the Centre "works with a modicum of transparency. But other dispute-settling bodies, even in countries known for open governance, are more guarded . . ."[445]

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[435] *Id.*
[436] NORMAN S. KINSELLA & PAUL E. COMEAUX, PROTECTING FOREIGN INVESTMENT UNDER INTERNATIONAL LAW: LEGAL ASPECTS OF POLITICAL RISK 212 (1997).
[437] *Id.*
[438] *See* VANDEVELDE, *supra* note 16, at 447. R
[439] *See* SORNARAJAH, *supra* note 136, at 289, 304.
[440] *Id.* at 289.
[441] *See id.* at 290.
[442] *Id.* at 304.
[443] *Id.* at 305.
[444] *See id.* at 304-305.
[445] *Investment, Arbitration & Secrecy: Behind Closed Doors*, *supra* note 86.

a. Is Transparency in Investor-State Arbitration Desirable?

Confidentiality is a component of arbitration derived from commercial arbitration practice, which shaped investor-state arbitration.[446] One view is that confidentiality is often beneficial to investor-state arbitration.[447] In addition to being beneficial to the investors' interests, confidentiality may also be in the states' best interests, because of their "fear that potentially embarrassing conduct by some officials will be made public in a way that undermines the BIT's purpose" in attracting investment.[448] Governments may want to maintain confidentiality because they may be "reluctant to expose to public view the extent to which narrow interest groups have captured administrative and regulatory structures, fearful of gaining an exaggerated reputation as a poor host for foreign investment."[449] Political figures may sometimes want confidentiality in investor-state arbitration, but this is not in the public's interest. A state's representatives may publicly advocate transparency while secretly wishing for confidentiality.

In contrast to the complete confidentiality of international commercial arbitration, for which the UNCITRAL Rules were designed, investor-state arbitration necessarily requires some transparency.[450] A state's participation in an arbitration that involves issues of interest to the public means "that transparency and accountability are beginning to outweigh privacy and confidentiality in importance."[451] A criticism of investor-state arbitration is that "decisions with important public policy implications were made in complete secrecy, a problem aggravated by the lack of accountability," in that arbitrators are not accountable to anyone.[452] Therefore, transparency is desirable.

b. Non-ICSID Arbitration Lacks Transparency.

In contrast to ICSID, arbitral awards rendered under the UNCITRAL Rules are confidential and lack the transparency of ICSID awards. Vandevelde says that some investor-state arbitrations "remain shrouded in secrecy."[453] UNCITRAL Article 32(5) states that an "award may be made public only with the consent of both parties." It is "difficult to determine the exact distribution of investment arbitration cases" outside of ICSID due to confidentiality.[454] Unlike ICSID, which lists all cases on its website, there is no registry of the cases filed under UNCITRAL.[455] As a result, neither the number of investor-state arbitrations that have been conducted under UNCITRAL nor the content of the arbitral proceedings or awards can be ascertained. Although Vandevelde cites some figures for investor-state arbitrations,[456]

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[446] *See* Salacuse, *The Emerging Global Regime for Investment*, *supra* note 3, at 462.
[447] *See* VANDEVELDE, *supra* note 16, at 449. R
[448] *Id.*
[449] *See* DUGAN ET AL., *supra* note 54, at 707.
[450] *See* Salacuse, *supra* note 3, at 462.
[451] MCLACHLAN ET AL., *supra* note 166, at 57.
[452] VANDEVELDE, *supra* note 16, at 449. R
[453] *Id.* at 452.
[454] DUGAN ET AL., *supra* note 54, at 77.
[455] *See generally*, http://www.icsid.worldbank.org (Apr. 20, 2012).
[456] *See* VANDEVELDE, *supra* note 16, at 435. R

he also states that "no one knows precisely how many investor-state arbitrations have been conducted."[457]

When investor-state arbitration is conducted under rules that provide for total confidentiality, such as ad hoc arbitration under the UNCITRAL Rules, the existence of the arbitration itself may not be known. The fact that "nobody is sure how many investment arbitration cases are being considered" is a testament to the high levels of confidentiality in non-ICSID arbitrations.[458]

UNCTAD data on investor-state dispute resolution provide examples of secrecy in non-ICSID arbitration. As of 2010, eighteen of the twenty-five known "new" *treaty-based* cases were filed with ICSID or the ICSID Additional Facility.[459] *At least* four were filed under the UNCITRAL Rules, and at least one was filed with the Stockholm Chamber of Commerce.[460] Since there is no registry of arbitrations under UNCITRAL, there could be more ongoing investor-state arbitrations conducted under the UNCITRAL Rules. The fact that the number of investor-state arbitrations under the UNCITRAL Rules is unknown evidences the lack of transparency in non-ICSID cases. The applicable arbitration rules are *unknown* in two new cases,[461] thus further evidencing the secrecy that shrouds non-ICSID investor-state arbitration.

c. ICSID Arbitration is More Transparent than non-ICSID Investor-State Arbitration.

ICSID has been criticized as "secretive."[462] There appears to be a popular belief that ICSID decisions are "kept secret except when the parties agree to make them public;"[463] however, this is not true.

The ICSID secretariat maintains public records of the current status and ultimate disposition of all ICSID arbitrations.[464] The basic details of ICSID arbitration, including the parties, the composition of the tribunal, and "the nature of the dispute," are available to the public from the beginning of the arbitration.[465]

Article 48(5) of the Convention allows ICSID to "publish the full text of an award only with the consent of both parties, although the ICSID arbitration rules permit ICSID to publish excerpts from the award without consent."[466] Consent by the parties is "encouraged,"[467] and "is obtained about half the time."[468] Under the ICSID arbitration rules,

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[457] *Id*. at 452.

[458] *Investment, Arbitration & Secrecy: Behind Closed Doors*, *supra* note 86.

[459] *See* UNCTAD, *Latest Developments in Investor-State Dispute Settlement*, *supra* note 34, at 1.

[460] *See id*.

[461] *See id*. at 1-2.

[462] Bretton Woods Project, *Secretive World Bank tribunal confronts calls to open up* (June 13, 2005, last edited May 27, 2010), http://www.brettonwoodsproject.org/art-236015.

[463] *Id*.

[464] *See* REED ET AL., *supra* note 230, at 15.

[465] MCLACHLAN ET AL., *supra* note 166, at 57.

[466] VANDEVELDE, *supra* note 16, at 451. R

[467] MCLACHLAN ET AL., *supra* note 166, at 57.

[468] VANDEVELDE, *supra* note 16, at 451. R

"ICSID is obliged to publish excerpts of the legal reasoning of the tribunal even if the parties do not consent to publication."[469]

A party to an ICSID dispute may voluntarily publish the contents of an award.[470] ICSID does not impose any restriction on the publication of awards *by* parties.[471] Parties to ICSID arbitration "frequently publish unilaterally . . . and in practice, most ICSID awards are published and readily available."[472]

d. If transparency is desirable, then non-ICSID arbitration is undesirable because it is less transparent.

ICSID's "comparative transparency" has a "strategically important side effect."[473] "Because many States want to be considered investment-friendly, the prospect of a host State being named—publicly—in an ICSID arbitration may provide investors with more leverage in early negotiations with the host State than the threat of international arbitral proceedings conducted under other rules."[474] If political figures actually desire confidentiality, contrary to their public stance, then non-ICSID arbitration is preferable. This does not change the fact that transparency in investor-state arbitration is in society's interest.[475] Advocating confidentiality in investor-state arbitration may be a "device," among others, to "keep the public ignorant of the state's actions in the cases where a state or state entity is involved."[476]

Greater transparency, rather than confidentiality, is in the interest of the public.[477] "The justification for privacy in arbitration proceedings has never been clearly understood and it may be suggested that a demand for privacy in international transactions merely helps to cloak shady deals, sharp practices, and adventures."[478] In the interest of public policy, "there should be a maximum transparency particularly in international arbitration proceedings involving a state or state entity and a foreign legal or natural person."[479] There is "no real defensible argument" to keep investor-state cases "in the dark" because they "often have serious public policy implications."[480]

Overall, transparency is desirable. ICSID arbitration is much more transparent than non-ICSID arbitration, the existence of which may not even be known by the public. Therefore, ICSID is preferable to non-ICSID investor-state arbitration.

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469 MCLACHLAN ET AL., *supra* note 166, at 57 (citing ICSID, *Rules of Procedure*, Rule 48(4)); *see also* REED ET AL., *supra* note 133, at 15 (according to changes made to the arbitration rules in 2006, "ICSID must include excerpts of the legal reasoning of ICSID tribunals in its publications.").

470 VANDEVELDE, *supra* note 16, at 452. **R**

471 *See* BROCHES, *supra* note 24, at 14.

472 REED ET AL., *supra* note 230, at 15.

473 *Id.*

474 *Id.*

475 *See* NATHAN, *supra* note 4, at 2. **R**

476 *Id.*

477 *See id.*

478 *Id.*

479 *Id.*

480 Garcia, *supra* note 133, at 354.

6. The Cost of Investor-State Arbitration: ICSID Arbitration is Less Expensive

The high cost of investor-state arbitration is one criticism that has been aimed at ICSID.[481] "Investment claims are notoriously drawn out and expensive,"[482] and investor-state arbitration is criticized as "neither speedy nor cost effective."[483]

In addition to the cost of legal counsel, the cost of arbitration includes arbitrators' fees and administrative expenses. The administrative costs of ICSID arbitration are actually lower than the charges of other arbitral institutions because the "administration expenditures are covered almost entirely by the World Bank."[484] ICSID offices are located in the World Bank headquarters in Washington, D.C., ICSID staff are employed by the World Bank, and "ICSID shares all the common services provided by the World Bank."[485] Therefore, parties to an ICSID arbitration "do not pay for the upkeep of ICSID, whose charges for administration of an arbitration are limited to the reimbursement of out-of-pocket expenses, except when the actual proceedings are held outside the World Bank buildings."[486] ICSID's "fees and charges are considerably less than those levied by European arbitral institutions."[487] As of 2011, a party requesting ICSID arbitration has to pay a non-refundable fee of $25,000.[488]

It is very difficult to compare costs of arbitration because the cost of ad hoc arbitration is unpredictable and confidential. The International Chamber of Commerce ("ICC") provides an "arbitration cost calculator" that can be used as a point of reference.[489] The ICC, which calculates arbitration costs based on the amount in dispute, estimates that arbitration with ten million dollars ($10,000,000) in dispute would cost $397,367.[490] The arbitrators' fees for a three-person tribunal amount to $339,852 and the administrative expenses are $57,515.[491]

In general, arbitrator fees and expenses typically amounted to $1 million per case in 2004.[492] In 2004, ICSID's arbitrators' fees of $2,400 per day were considered "low-floor" compared with fees paid to arbitrators in other systems.[493] As of 2011, the fee per arbitrator per day in ICSID is $3,000.[494] This fee is prorated accordingly if an arbitrator works less than eight hours in a day.[495] This may seem high, but it is less than the amount charged by most arbitrators in *ad hoc* investor-state arbitrations.

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[481] *See* Vincentelli, *supra* note 12, at 423. *See also* Gillman, *supra* note 9, at 273. R
[482] Garcia, *supra* note 133, at 355.
[483] *Id*. at 356.
[484] NATHAN, *supra* note 4, at 53. R
[485] *Id*.
[486] *Id*.
[487] NATHAN, *supra* note 4, at 53. R
[488] *See* ICSID, *Schedule of Fees* (Jan. 1, 2008), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&ScheduledFees=True&language=English.
[489] *See* International Court of Arbitration, Dispute Resolution Services, *Arbitration Cost Calculator – 2010 rates* (May 1, 2010), http://www.iccwbo.org/court/arbitration/id4097/index.html.
[490] *Id*.
[491] *Id*.
[492] *See* Garcia, *supra* note 133, at 355.
[493] *See id*. at 352.
[494] ICSID, *Schedule of Fees*, *supra* note 488.
[495] *See* ICSID, *Memorandum on the Fees and Expenses of ICSID Arbitrators* (July 6, 2005), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=Memorandum.

In UNCITRAL arbitration, fees are not prescribed, and as of 2004, non-ICSID arbitrator fees could be at least as high as $600 per hour.[496] The confidentiality of non-ICSID arbitration makes it difficult to know exactly how much arbitrators are paid. If an arbitrator's fee is $600 per hour, the charge for an eight-hour work day amounts to $4,800, which is more than the fee of $3,000 per day charged by ICSID arbitrators. Arbitrators' fees in ad hoc UNCTIRAL arbitration are "rather difficult to predict" because the fees must be negotiated between the parties and the arbitral tribunal, and the parties have "relatively little bargaining leverage, or incentive to use it."[497]

Investment dispute arbitration is expensive, but this should not be a reason to denounce the ICSID Convention because ICSID arbitration is more cost-effective than non-ICSID arbitration. Financial strain makes it difficult for Latin American states to "compete" with some claimant investors, such as large transnational corporations.[498] The denunciation of ICSID has probably made arbitration with Bolivia, Ecuador, and now Venezuela more expensive both for investors and for states.

C. Moving From *Un*productive to *Counter*productive

When BITs are still in force that provide for investor-state arbitration, denouncing ICSID is unproductive because other arbitration mechanisms are available to investors. But it is not merely *unproductive* to denounce ICSID. It is *counterproductive* because states will find that some aspects of non-ICSID arbitration are more detrimental to them than ICSID arbitration.

Bolivia and Ecuador probably hoped to be able to challenge non-ICSID awards more easily than ICSID awards, but overall, it does not seem any more likely that they will succeed in challenging non-ICSID awards. Even before Ecuador denounced ICSID, in 2007, the case of *Occidental v. Ecuador* was brought under the U.S.-Ecuador BIT through arbitration in London using the UNCITRAL Rules.[499] Ecuador remains subject to other arbitration forums for violations of investment treaties even after its denunciation of ICSID.[500]

Bolivia and Ecuador may have thought that denouncing ICSID would render meaningless dispute settlement provisions that only provided for ICSID, such as the France-Ecuador BIT. Investment arbitration forum shopping may have defeated any benefit that Bolivia and Ecuador could have derived from that. Claims are sometimes now structured in a way that gains "access to arbitral jurisdiction under international investment treaties."[501] "Treaty shopping" and "corporate engineering" refer to structuring a transaction so that the investor

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[496] Garcia, *supra* note 133, at 352.

[497] RUBINS & KINSELLA, *supra* note 143, at 312 (citing ALAN REDFERN ET AL., THE LAW & PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 230 (4th ed., 2004)); *see also id*. at 312 n.14 ("The problem is that each party is reluctant to upset the arbitrators by appearing to criticize their fees, because each party has it well in mind that, at the end of the day, the arbitrators will be sitting in judgment on their case. It may seem foolish to bargain over a few hundred dollars per day if, by doing so, a claim worth thousands or even millions of dollars may be put in jeopardy.").

[498] *See* Garcia, *supra* note 133, at 365.

[499] *See* MCLACHLAN ET AL., *supra* note 166, at 54.

[500] Yalkin, *supra* note 17.

[501] Katia Fach Gomez, *Latin America and ICSID: David versus Goliath?*, 17 LAW & BUS. REV. AM. 195, 216-17 (2011).

has a corporate form in a country that has a strong BIT with the host country.[502] Companies may structure investments through countries that have favorable BITs with the host state,[503] which, in turn, enables investors to circumvent the BITs that only provide for ICSID arbitration in states that have denounced ICSID.

Bolivia and Ecuador claimed that the lack of transparency was a reason they denounced ICSID, but non-ICSID arbitration is certainly less transparent than ICSID arbitration. Less transparency exacerbates the perceived problems in the international investment regime. The lack of transparency was a reason that Bolivian officials gave for denouncing ICSID,[504] but the effect of denouncing ICSID has had the opposite effect on the purported goal.

ICSID has also been criticized for being expensive, but non-ICSID arbitration costs even more. In denouncing ICSID, Bolivia and Ecuador have harmed themselves by making investment dispute arbitration less cost effective and more expensive.

Denunciation of ICSID is counterproductive. The question remains what states should do if they wish to change the current investor-state arbitration system.

VII. PROPOSED SOLUTIONS FOR CHANGE

A. Other States Should Not Denounce ICSID in an Attempt to Withdraw from the Current International Investment Regime

This Article recommends that other states *not* denounce the ICSID Convention. States see possible benefits in withdrawing from ICSID, such as the ability to frustrate the proceedings and challenge the awards. These possible advantages are uncertain because non-ICSID investor-state arbitration is also efficacious. The disadvantages to non-ICSID arbitration, such as the lack of transparency and the unpredictably high costs, outweigh the tenuous advantages.

ICSID as an arbitration forum should not be blamed for the perceived problems in the investment regime that are rooted in BITs. Instead, the protections that BITs give investors and the lack of protection for states' interests should be examined for deficiencies. Denouncing the ICSID Convention does not ultimately give states an advantage in prevailing in investment disputes, as discussed above. Also, due to the efficacy of the New York Convention, denouncing the ICSID Convention probably does not help states challenge the enforcement of awards. An argument for denouncing ICSID is that Bolivia, Ecuador, and Venezuela have achieved some goals because non-ICSID arbitral awards can be set aside. However, there is no clear evidence that states prevail more in having awards set aside than they would in the ICSID annulment procedure.

Bolivia and Ecuador should accede again to the Convention but cannot due to restrictions in their Constitutions, so the most they can do is try to renegotiate their BITs. Other countries should see this as a lesson that they should not be hasty in denouncing ICSID because the consequences might place them in worse positions.

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[502] Vincentelli, *supra* note 12, at 413-14. **R**
[503] *See* Gomez, *supra* note 501, 216-17.
[504] *See* Fernando Cabrera Diaz, *Bolivia expounds on reasons for withdrawing from ICSID arbitration system*, INVESTMENT TREATY NEWS (May 27, 2007), at 14, *available at* http://www.iisd.org/itn/wp-content/uploads/2010/10/itn_may27_2007.pdf.

B. Amending ICSID or Other Relevant Arbitration Rules

1. Should ICSID be Changed by Amending the Convention?

Amending the ICSID Convention has been suggested as a means of addressing problems and deficiencies in the system. One author suggests that ICSID needs to take Third World countries' interests more into account.[505] Ibironke Odumosu's article has the laudable aim of advancing international public interests such as human rights and the environment.[506] The ways in which ICSID can provide "mutual confidence" are considered so that ICSID can remain "relevant" to developing states.[507] Some believe that ICSID has a "legitimacy crisis."[508] Odumosu's article questions "ICSID's ability to respond to the inevitable multiplicity of interests that arise in investment dispute settlement, especially in relation to Third World states and foreign investors."[509]

ICSID "is situated at the intersection of law . . . politics . . . and economics . . ."[510] It has been suggested that ICSID favors the interests of foreign investors and that ICSID tribunals need to consider "multiple and diverse interests."[511] The lack of references in ICSID jurisprudence to economic development and to the interests of developing states has been cited as evidence that ICSID tribunals focus on protecting investors.[512]

Some suggest that the ICSID Convention should be amended to address developing countries' interests.[513] It should be amended to "reflect evolving norms," which would have the effect of recognizing "the consideration of environmental, public health, and labor standards could reasonably be accepted by all contracting states."[514]

This Article argues that if ICSID has a problem responding to these issues, then every other investment dispute arbitration mechanism, such as *ad hoc* arbitration under the UNCITRAL Rules or International Chamber of Commerce arbitration, also has this problem. The root of the problem is not in the dispute resolution mechanism but in the BITs and other investment treaties.

2. ICSID Cannot Realistically Be Changed Because Amending the Convention Requires Consensus and Arbitrators Cannot Create Laws.

The ICSID Convention requires consensus for amendment, which is unlikely to the point of impossibility. Amending the Convention is "no easy feat" since all member states

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[505] *See* Ibironke T. Odumosu, *The Antinomies of the (Continued) Relevance of ICSID to the Third World*, 8 SAN DIEGO INT'L L.J. 345, 348-50 (2007).
[506] *Id*. at 378-79.
[507] *Id*. at 362.
[508] *Id*. at 373.
[509] *Id*. at 347.
[510] *Id*. at 350.
[511] *Id*.
[512] *See id*.
[513] *See* Kate M. Supnik, *Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law*, 59 DUKE L.J. 343, 366-67 (2009).
[514] *Id*. at 367-68.

must unanimously agree.[515] There is a general belief that amending the Convention is virtually impossible.[516]

ICSID is an arbitration forum that has rules for arbitration procedure, but it does not create laws on which tribunals may base decisions. Arbitrators cannot create rules that are not contained in ICSID or the BITs because they would be acting beyond the scope of the powers conferred on them. Again, BITs are the source of law, which arbitrators apply. Arbitrators cannot invent new rules or law.

Even if ICSID could be amended to accommodate the views that arbitral tribunals should take developing countries' interests more into account, this would not change the current system of investor-state arbitration. The view of this Article again is that ICSID tribunals are interpreting BITs and do not have the latitude to take into account interests that are not included in the investment treaty. If ICSID tribunals did favor states' interests more than is provided for in the agreement being interpreted, then investors may initiate more *ad hoc* arbitration, which would circumvent any proposed reforms to ICSID. The purported problems lie in the investment protections contained in BITs.

C. Denouncing or Amending BITs

1. Whether Developing States Should Denounce BITs: It Would Not Achieve the Desired Results.

It has been said that the "next logical step" for Latin American states that have denounced ICSID "would be to denounce existing BITs that call for arbitration under the auspices of ICSID."[517] A "striking mechanism for reducing ICSID's power" is the denunciation of existing BITs.[518]

Some criticism against the current system of international investment law and arbitration is that BITs and investor-state arbitration "institutionalize a pro-investor bias that casts the legitimacy" of the system into doubt.[519] As discussed above, many perceived problems with investor-state arbitration and ICSID are rooted in BITs. Thus, it is not unreasonable for developing states to consider denouncing BITs if they are the source of the problems.

However, due to the survival clauses discussed above in Parts III.B and IV.B, denouncing a BIT does not end a BIT's protection. States should not denounce BITs because the survival clauses in BITs would give investors many years to withdraw their investments, during which time they could initiate arbitration against states for BIT violations.[520]

A possible problem with the preceding argument is the example of Brazil. Brazil has not ratified any BITs and is not a party to ICSID.[521] Brazil still attracts the most foreign

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[515] *Id.*at 367.

[516] *Id.*

[517] Mourre, *supra* note 61, at 608.

[518] Gomez, *supra* note 501, at 216.

[519] Charles N. Brower & Stephan W. Schill, *International Judges: Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471, 474-75 (2009).

[520] *See* SALACUSE, *supra* note 3, at 129 (discussing the duration of survival clauses in BITs, usually at least ten to fifteen years). R

[521] *See 2010 Investment Climate Statement – Brazil*, U.S. DEP'T OF STATE (March 2010), *at* http://www.state.gov/e/eeb/rls/othr/ics/2010/138040.htm. The few BITs that Brazil has signed have not been ratified. *Id.*

investment in Latin America.[522] This could be evidence that states do not need to enter into BITs. On the other hand, perhaps Brazil's economy, the largest in Latin American, is performing relatively well *despite* not entering into BITs for the same reason that the U.S. and European states do not enter into BITs with each other: they can attract foreign investment without BITs. One issue that should be examined, but is beyond the scope of this Article, is whether Brazil attracts foreign investment because it offers more protection to foreign investors, or if it attracts foreign investment because of the size of its economy, regardless of whether it offers foreign investment protections. Signing BITs and then denouncing them probably sends worse signals to investors than having never entered into any BITs from the onset.

2. Whether States Should Amend BITs: Developed Countries Should Consider Limited Modifications to BITs for Political Reasons if Developing Countries Wish.

As discussed, the ICSID Convention cannot be amended, and arbitral tribunals cannot invent law to take developing states' interests more into account. Since investment protections applied in investor-state arbitration are usually contained in BITs, amending BITs may be the only way to change the system. Existing BITs "are here to stay, with little likelihood of amendment or abrogation."[523] Although amending BITs would be very difficult, it should at least be considered.

A treaty can be denounced in whole, but a state cannot unilaterally denounce portions of a treaty. According to the Vienna Convention on the Law of Treaties, "[a] right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty *may be exercised only with respect to the whole treaty* unless the treaty otherwise provides or the parties otherwise agree".[524] Thus, states have to agree to the modification of investment treaties, rather than act unilaterally.

Examining various states' BITs and other international agreements can provide guidance on how to improve the BITs. The 2004 U.S. model BIT provides less protection to investors than the previous 1994 model BIT.[525] Some claim that "capital-exporting countries should follow the examples" of the newer model BITs used in the United States and Norway, "and refrain from pressing BIT protection beyond a reasonable level for protection of investments."[526] "Otherwise . . . they run the long-term risk of weakening investment protection in general."[527] The language in the Canada-Ecuador BIT might also be less objectionable to developing countries. Canada's BIT is a good example of an investment treaty that underlines states' regulatory power by providing for "protection of human and animal life."[528]

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[522] *Id*. (Brazil encourages foreign investment and receives the largest amount of foreign investment in Latin America even though Brazil does not have any BITs in force and is not an ICSID signatory.).
[523] Garcia, *supra* note 133, at 365.
[524] Vienna Convention, *supra* note 259, art. 44 (emphasis added). R
[525] *See* Stephen M. Schwebel, *The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law*, TRANSNAT'L DISP. MGMT., Apr. 2006, *available at* http://transnational-dispute-management.com/article.asp?key=780.
[526] SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION 161 (2009).
[527] *Id*.
[528] Canada-Ecuador BIT, *supra* note 305.

Bolivia proposed guidelines for a new investment treaty with the U.S. in 2006.[529] This shows a desire to renegotiate BITs and other investment treaties. Why should capital exporting states which already have strong BITs in place participate in renegotiating certain provisions of BITs? One possible reason is to maintain the international investment regime. The international investment regime faces challenges, and it cannot be assumed that the regime will endure.[530] To save the international investment regime, BITs may have to be altered. "If the backlash against BITs continues to burgeon unchecked, international investment law will eventually divide into a complex set of sub-systems—if not dissolve altogether."[531]

Bolivian President Morales' rejection of "legal, media and diplomatic pressure of some multinationals that . . . resist the sovereign rulings of countries, making threats and initiating suits in international arbitration" seems to be an ideological rejection of ICSID.[532] If the genuine reasons for denouncing ICSID are ideological, as discussed in Part II.B, it would be in both developed and developing countries' interests to amend BITs. Political leaders such as Presidents Chavez, Correa, and Morales could point to BIT modification as an accomplishment in altering the foreign investment regime. This would also allow capital-exporting countries to maintain the current international investment regime because it may eventually unravel if other states follow Bolivia, Ecuador, and Venezuela.

Amending BITs would not solve the problem of conflicting interests between states and investors. It would merely change the substance of the parties' arguments. The challenge of arbitrators interpreting modified BITs would be just as difficult as it is at present. The benefit to amending BITs may be a brief appeasement of ideological concerns in developing countries. Such appeasement might only last until an investor from a capital exporting country initiated arbitration against a developing state under a modified treaty, at which time the developed and developing countries would disagree over the correct interpretation of the treaty. BIT amendment would only be a temporary solution, but perhaps a temporary solution is better than no solution.

VIII. CONCLUSION

Critics of investor-state arbitration often object to ICSID when the criticism should instead be aimed at investment protections in BITs. ICSID has become a symbol of investor-state arbitration that some countries have opposed for political reasons. ICSID itself is not detrimental to developing countries, but it is often used to symbolize despised investor-state arbitration. The arbitration clauses in BITs, not ICSID, are the root of the perceived problems.

Since the BIT regime is still mostly intact, investors can use non-ICSID arbitration to settle investment disputes, which can be just as effective as ICSID. Foreign investors in Bolivia, Ecuador, and Venezuela will now use the UNCITRAL Rules or the ICSID Additional Facility to initiate arbitration against those states.

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529 Gomez, *supra* note 501, at 219.
530 Salacuse, *supra* note 3, at 468.
531 Blyschak, supra note 400, at 103.
532 Morales is quoted as saying, "[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." *Latin Leftists Mull Quitting World Bank Arbitrator*, REUTERS (Apr. 29, 2007), http://www.reuters.com/article/2007/04/29/bolivia-venezuela-nationalizations-idUSN2936448520070429.

THE COUNTER-PRODUCTIVITY OF ICSID DENUNCIATION

Bolivia, Ecuador, and Venezuela denounced the ICSID Convention because investors had initiated arbitration against those states in ICSID. These states did not benefit themselves by denouncing ICSID. Overall, non-ICSID arbitration is no more advantageous to states than ICSID arbitration. The states probably hoped that investors would have more trouble enforcing arbitral awards outside of ICSID. The possibility of having non-ICSID arbitral awards set aside does not benefit respondent states any more than the possibility of having ICSID awards annulled. The disadvantages of non-ICSID arbitration affect both investors and states. Bolivia, Ecuador, and Venezuela will suffer from the disadvantages of decreased transparency and increased costs in non-ICSID arbitration. Therefore, the denunciation of ICSID is counterproductive when BITs containing non-ICSID alternatives are still in force.

Despite Bolivia's, Ecuador's, and Venezuela's denunciations of ICSID, the current international investment regime is not in immediate danger of collapse. The withdrawal from ICSID by three states is not enough to cause the system to unravel. However, it is a sign that the current international investment regime may eventually deteriorate if changes are not made. Withdrawing from the system is not a good solution, and other states should not denounce the ICSID Convention. Amending the ICSID Convention to require greater consideration of developing countries' interests is completely unrealistic. The only way to change the current international investment regime may be to amend investment treaties, particularly BITs. This would unfortunately be a temporary solution that would create new challenges in investment treaty interpretation, but it is the best solution to the problem. When there are clashing interests, treaties cannot be interpreted in a manner that is satisfactory to everyone. Denouncing the ICSID Convention cannot prevent this reality.