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## Jean Monnet Working Paper Series



JMWP 17/13

Sergio Puig

Emergence & Dynamism  
in International Organizations:  
ICSID, Investor-State Arbitration  
& International Investment Law

Cover: *Upper East Side Family*, Diana Chelaru, USA



## THE JEAN MONNET PROGRAM

*J.H.H. Weiler, Director*

### **THE INAUGURAL ANNUAL JUNIOR FACULTY FORUM FOR INTERNATIONAL LAW**

Jean Monnet Working Paper 17/13

**Sergio Puig**

**Emergence & Dynamism in International Organizations:  
ICSID, Investor-State Arbitration & International Investment Law**

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**Presentations from the Inaugural Annual Junior  
Faculty Forum for International Law—New York City, May 2012**

*Dino Kritsiotis, Anne Orford and J.H.H. Weiler*

The papers that are presented here for the Jean Monnet Working Paper Series are the result of the inaugural Annual Junior Faculty Forum for International Law held at the New York University School of Law on May 29 and 30, 2012. The Forum is convened by the three of us, and will be held annually in the spring; it will rotate from one year to the next from each of our institutions: from New York, the Forum will head to Nottingham on May 29 and 30, 2013, and, in May 2014, we shall all converge on the University of Melbourne for the third Forum.

We believe that the Forum is an important addition to the international law calendar. It is designed to provide junior faculty from all over the world with a valuable opportunity to receive careful and rigorous feedback on their work in progress from eminent senior scholars in international law and related fields. Each junior faculty member is paired with a senior scholar, who leads a discussion of the work that the junior faculty member presents at the Forum.

The Forum was launched on our website—[www.annualjuniorfacultyforumIL.org](http://www.annualjuniorfacultyforumIL.org)—attracting a large number of impressive applications from young scholars across five continents. Nine of these applications were selected.

Our meeting in New York—held over two beautiful spring days in Washington Square—was a triumph of intellectual exchange and sustained engagement, and, without exception, the presentations seemed to us to be of such a high standard that they were deserving of a much broader audience. We therefore asked each of those who presented their work in New York—**Christopher Warren** (Carnegie Mellon University), **Michael Fakhri** (University of Oregon), **Sergio Puig** (Stanford University): **Martins Paparinskis** (University of Oxford), **Rose Sydney Parfitt** (American University of Cairo), **Umut Özsu** (University of Manitoba), **René Urueña** (Universidad de Los Andes), **Evan J. Criddle** (Syracuse University; now of William & Mary College of Law), **Alejandro Chehtman** (University Torcuato di Tella)—to consider submitting their presentations to the Jean Monnet Working Paper Series, and it is this impressive collection that you now have before you.

In introducing these presentations for the Jean Monnet Working Paper Series, we would also like to take the opportunity to extend our warmest appreciation to every one of these junior faculty for being part of this experiment—we could have hoped for no finer or more enthusiastic laureates than they to help inaugurate our first Forum. And their work—recorded here—will hopefully inspire other junior faculty to the same cause, and make the Forum a permanent a fixture of the international law calendar.

**EMERGENCE & DYNAMISM IN INTERNATIONAL ORGANIZATIONS:  
ICSID, INVESTOR-STATE ARBITRATION & INTERNATIONAL INVESTMENT LAW**

By Sergio Puig\*

**Abstract**

Near the fiftieth anniversary of ICSID, the international organization of the World Bank Group specialized in international investment dispute settlement, the organization has become nearly synonymous with the field of international investment law. But how and why this confluence developed is a gap in the rich literature on ICSID. In an attempt to breach this gap, this article traces ICSID's past and present, relying on a rich variety of sources with three broad objectives in mind: First, it offers a corrective to the prevailing view among international lawyers and legal scholars that ICSID is simply another arbitration facility and that its role in developing international investment law has been limited to enabling investor-State arbitration proceedings. Second, it provides evidence contradicting claims among practitioners and scholars that ICSID is experiencing an unprecedented crisis. Finally, it assesses the dynamics that have impacted ICSID's long-term development with the broader aim of contributing to the theoretical understanding of the evolution of international organizations. The article reveals ICSID's deep roots and far-reaching impact, and argues that while the challenges of the organization are serious and merit action, most are not unprecedented, and much can be learned from corrective measures taken in the past.

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## I. Introduction

Almost half-century after the advent of the International Centre for Settlement of Investment Disputes (“ICSID” or “Centre”), this institution of the World Bank (“WB”) is almost synonymous with the field of international investment law. Yet, how and why this confluence developed is a gap in the rich literature dealing with this remarkably influential international organization (“IO”).

This Article addresses this gap and opens the way for a major legal-historical synthesis: the telling of the recent legal histories of international investment law, investor-State arbitration and ICSID as a single interconnected story. In this sense, the Article trains new attention on a critical and under-scrutinized factor associated with the development of international investment law and investor-State arbitration practice: the legal, political, and bureaucratic dynamics that have shaped the main multilateral organization in this field. In particular the Article asks: (1) What has been the role of ICSID in the development of international investment law? (2) What types of dynamics have impacted ICSID’s long-term development? and (3) What do these answers reveal about how IOs implement legal mandates—whether to provide facilities for investment disputes, to fight money laundering, or to promote labor rights—in complicated political environments?

In this Article, I trace ICSID’s past and present relying on a rich variety of primary and secondary sources with three broad objectives in mind. *First*, I offer a corrective to the prevailing view among international lawyers and legal scholars that ICSID’s role is limited to enhancing different methods of international investment dispute settlement; that ICSID shall be evaluated as any other arbitral institution by metrics for operational efficiency and the number of registered cases; and that ICSID is separate from the rest of the WB and hence immune from the WB’s bureaucratic dynamics and legal discourse.<sup>1</sup>

*Second*, drawing on historical analysis, I show that contrary to the conventional wisdom among practitioners and scholars that ICSID is experiencing an exceptional crisis, most challenges to ICSID are not unprecedented, and learning the organizations

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<sup>1</sup> David D. Caron, *ICSID in the Twenty-First Century: An Interview with Meg Kinnear*, PROCEEDINGS, 105TH ANNUAL MEETING OF THE ASIL (2011): 413-434 [Hereinafter KINNEAR].



history suggests possible solutions. According to some commentators, the denunciation of the ICSID Convention by Venezuela, Bolivia and Ecuador shows problems of legitimacy; the lack of payment of all adverse arbitral awards against Argentina shows problems of efficacy; and the defense of alternatives to ICSID on the part of practicing lawyers shows problems of confidence.<sup>2</sup> During the mid-80's, ICSID faced similar tests, including distrust by Latin-American countries, competition for authority, and disparate standards applied by Annulment Committees in the review of arbitral awards. ICSID overcame these obstacles through a combination of effective leadership, issue framing, legal reforms, and doctrinal commentary. Looking forward, the Article proposes three concrete areas of action to address the most pressing matters faced by the organization: (1) improve the framework for addressing the ethical conduct of professionals involved in ICSID proceedings; (2) establish a transparent system for the appointment of Annulment Committees by requiring some continuity of committee membership; and (3) clarify the provisions in the ICSID Convention addressing the automatic enforcement of awards.

While a well-informed diagnosis of ICSID's current conditions and options is of obvious relevance for the present and future of international investment law, the examination also tells a larger story about the consequences of implementing legal mandates in complicated political environments. The case of ICSID's institutional development evidences how foundational ideas experience intense and cyclical periods of scripting, contestation, and reinterpretation as a result of changing political landscapes and the use of law-centered strategies on the part of actors in the fray. Such means are frequently employed during the deliberative processes of institutions of global governance, but often obscured by traditional doctrinal approaches to international law.

*Third*, a historical approach serves to assess dynamics that have impacted ICSID's long-term development with the broader aim of contributing to the theoretical understanding of the evolution of IOs.<sup>3</sup> ICSID's story is not only about institutional or

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<sup>2</sup> Michael Waibel & eds., *BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY*, Kluwer (2010).

<sup>3</sup> For an excellent literature review see, Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 VANDERBILT LAW REVIEW 649-726, 726 (2006)

legal redefinition. It is also one of attempts to formalize a heavily contested and politically-charged social order. The Article shows how two interwoven processes, pushing in different directions and creating different power-transferring dynamics, determined the long-term institutional change of ICSID: First, a trajectory of indirect, subtle, but top-down pressures aimed at structuring and stabilizing cooperation at the expense of domestic courts' legal and political autonomy. And second, cyclical bottom-up pressures applied by law-centered actors in exploring the spaces between legal interpretations, yielding a slow but constant move towards judicialization that has empowered actors such as international lawyers.

By evidencing these long-term processes and power-transferring dynamics, this Article attempts to engage with recent scholarship dissecting changes in the field of international investment law by reference to an underlying *clash of paradigms*; an evolutionary story based on intra-disciplinary competitions of actors relying on analogies from different fields, including public international law, international commercial arbitration, public law, trade law and human rights law.<sup>4</sup> This Article seeks to complement this account by showing a nuanced version of the evolution of global discourse around international investment law from the perspective of ICSID and the WB. It shows how the ideas accepted and promoted by the IO, the expert knowledge advanced and preferred by actors (and with that the values, biases, and interests), the format of interaction between principals and agents, and the institutional setting that enables legal spaces to introduce politics have distributive impacts. Therefore, the Article shows the broader context or *institutional ecology* in which the alleged clash of paradigms developed.

Before proceeding, a cautionary note is in order. This Article attempts to achieve a conversation across disciplines by combining the insights of historical institutionalism, socio-legal studies, and legal analysis, but does not seek to analyze every aspect of ICSID's remarkable history. Instead, the Article focuses on the Centre's evolving

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[Hereinafter CHANGE-IN-ILO]. For historical institutionalism see, Hall & Taylor, *Political Science and the Three Institutionalisms*, 44 POL. STUD. 936 (1996). Also, Pierson, POLITICS IN TIME: HISTORY, INSTITUTIONS AND SOCIAL ANALYSIS 108 (2004).

<sup>4</sup> Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L., 2013 available [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2033167](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2033167).

functions, leadership, challenges, and adaptation. The Article is structured as an analytic legal-historical narrative: following this introduction, I discuss the evolutionary process of ICSID in four stages. Then, the article concludes by reflecting on the points already outlined in this introduction. The story presented here harbors precious lessons for anyone who—like me—believes that IOs can always be improved to make the world a better place.

## **II. Evolution in Four Acts: Minimalism, Ambition, Idealism and Pragmatism**

After years of discussions among development agencies about practical innovations that could spur international development, in June 1962 a WB working group under the direction of the organization's General-Counsel and ICSID's first Secretary-General ("SG"), Aron Broches, completed the first draft of the ICSID Convention.<sup>5</sup> The final version of the Convention was promulgated for ratification in March 1965.<sup>6</sup> The Report of the Executive Directors that accompanied the treaty elaborated that the creation of an IO designed to facilitate the settlement of disputes between States and foreign investors was "a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it."<sup>7</sup> The Convention gave ICSID a simple organizational structure consisting of an Administrative Council and a Secretariat headed by the SG.<sup>8</sup> The Administrative Council, the Centre's governing body, is comprised of one representative of each

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<sup>5</sup> Memorandum of Meeting of Executive Directors on the Subject of "Settlement of Investment Disputes" (Mar. 13, 1962), in 2 HISTORY OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES 59 (1968) [hereinafter 2-HISTORY].

<sup>6</sup> Broches explained that the Convention "represented a compromise between various points of view" *Memorandum of the Meeting of the Committee of the Whole* (Feb. 16, 1965), in 2HISTORY, *supra* 5, at 972.

<sup>7</sup> Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, ¶ 9 [hereinafter REPORT EDS]

<sup>8</sup> *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Oct. 17, 1966, 575 U.N.T.S. 159 [hereinafter CONVENTION].

Contracting State.<sup>9</sup> The Secretariat, consisting of limited but growing number of staff members is responsible for ICSID's day-to-day operations.

After the required membership conditions were met (the deposit of twenty instruments of ratification), the Convention entered into force in the fall of 1966. The Centre was established in 1967, a year before George D. Woods retired as the 4<sup>th</sup>-President of the WB.<sup>10</sup> What happened after ICSID was established? What follows is a narrative divided in four stages: Minimalism, Ambition, Idealism and Pragmatism.

### **A. Minimalism: ICSID as “*Lex Fori*”**

Every story of ICSID's transformation starts with Broches, who led ICSID from its conception until 1980.<sup>11</sup> During this time Robert McNamara, a former U.S. Secretary of Defense, lead the WB and focused on providing access to the “basic needs [for] fundamental human dignity” in developing countries.<sup>12</sup>

Conscientious of the delicate status of the IO, Broches and his successor Heribert Golsong promoted ICSID simply as an “arbitration and conciliation Convention.”<sup>13</sup> The first two SGs emphasized the consensual nature of conciliation and arbitration as techniques of international dispute settlement and the importance of neutrally-administrated proceedings “in furthering the availability of private international investment for economic development.”<sup>14</sup>

#### **1. Expanding Membership: UNCTAD Recommends “Adherence to and Use of the Convention”**

During its first year of operation, ICSID adopted the first definitive Rules and Regulations, which entered into force in 1968.<sup>15</sup> The following years were devoted to

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<sup>9</sup> Shihata, *THE WORLD BANK IN A CHANGING WORLD: SELECTED ESSAYS AND LECTURES*, Martinus Nijhoff, 1995.

<sup>10</sup> ICSID, *ANNUAL REPORT* (1967) [hereinafter AR/YEAR(S)]. See also, Szasz, *A Practical Guide to the Convention on the Settlement of Investment Disputes*, 1 CORNELL INT'L.L.J. 1, 15 (1968)

<sup>11</sup> ICSID, *Aron Broches 1914-1997*, NEWS FROM ICSID (Summer 1997) [hereinafter NEWS].

<sup>12</sup> World Bank, *Robert S. McNamara at the World Bank Group: A Chronology of Significant Events* at [www.worldbank.org](http://www.worldbank.org).

<sup>13</sup> Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 RECUEIL DES COURS 331, 346–47 (1972). See also 2HISTORY, *supra* 5, at 74.

<sup>14</sup> ICSID, AR/67.

<sup>15</sup> Parra, *The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes*, 41 INT'L LAW. 47, 52 (2007) [Hereinafter RULES DEVELOPMENT].

distributing information to acquaint potential parties to the Convention and promoting the inclusion of arbitration or conciliation clauses in international investment contracts (“IICs”).<sup>16</sup> A quantitative assessment of ICSID in 1969 indicated that only 15 contracting States had entered into one or more IICs providing for the submission of disputes to the Centre.<sup>17</sup> In clear contrast, by the end of Broches’ tenure the Centre estimated that ICSID clauses could be counted in the thousands.<sup>18</sup>

Uncertain of the final outcome of the Convention, the directors and staff involved in its drafting generally agreed that the proposed facility should be limited to disagreements concerning legal rights, contractual rights or property rights, rather than any political or commercial disputes.<sup>19</sup> Thus, in promoting ICSID, Broches placed emphasis on including clauses in relationship-specific agreements to “promote massive investment by foreign interests”, and only made minor reference to the more complex ideas surrounding international investment disputes.<sup>20</sup> The Convention, in other words, was framed during this stage as an opt-in system of foreign investment protection; a strategic consideration to avoid discussing how the Convention also enabled “open-ended” or “blank” consent given by host States via international investment treaties (“IITs”) or broader investment promotion legislation.<sup>21</sup> As explained by Professor Lowenfeld, stressing the possibility of open-ended consent by host States only would have contributed to the existing uneasiness of developing countries at a time when ICSID was still fragile.<sup>22</sup>

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<sup>16</sup> ICSID, AR/68/69/70/71.

<sup>17</sup> ICSID, AR/69.

<sup>18</sup> ICSID, AR/80.

<sup>19</sup> Mortenson, *The Meaning of “Investment”: ICSID’s Travaux and the Domain of International Investment Law*, 51 HARV. INT’L L.J. 257 (2010).

<sup>20</sup> ICSID, AR/71.

<sup>21</sup> Memorandum of the Meeting of the Committee of the Whole (Dec. 18, 1962), in 2HISTORY (During the drafting Broches the “situation in which a government . . . made a general statement that it would submit to arbitration a defined class of disputes with all comers” was “hardly ever likely to obtain”).

<sup>22</sup> Lowenfeld, *ICSID Convention: Origins and Transformation*, 38 GA. J. INT’L & COMP. L. 47, 51–52 (2009). See also, Consultative Meeting of Legal Experts, Addis Ababa (Dec. 16–20, 1963), in 2HISTORY, *supra* 5, at 273–75 (“bilateral [investment] agreements” that “provide for appeals for arbitration by a national of one State in relation to the other State”).

In spite of an important victory in 1968, when UNCTAD “recommended both adherence to and use of the Convention,”<sup>23</sup> Latin-American countries were generally reluctant to join ICSID during the 1970s. Paraguay, the first country of the region to do so, joined in 1983 in the midst of the Latin-American debt crisis of the 1980s.<sup>24</sup> Most Eastern European countries joined only after the collapse of the Soviet-Union in the 1990s.<sup>25</sup> In fact, this first stage of ICSID coincided with efforts by developing countries to pioneer a New International Economic Order in different IOs.<sup>26</sup> The UN became a site of trenchant clashes between the developed “North” and developing “South” arguing over, among other issues, the limits of international law as a framework to decide conflicts involving foreign investors.<sup>27</sup>

Indeed, one of the reasons ICSID was established under the auspices of the WB was to insulate this discussion from the UN’s General-Assembly.<sup>28</sup> At the WB, where the industrial States had greater voice and vote, a bargain to authorize foreign investors to submit particular controversies to international dispute settlement was achieved by carefully omitting any explicit provision going to the substance of the obligations running between host States and foreign investors.<sup>29</sup> The Convention, in other words, was the result of insulation from some of the emancipatory rhetoric of post-colonial times, followed by its drafting and later advancement as an arbitration (and conciliation) Convention. Hence, in promoting ICSID, Broches always distinguished between procedural and substantive law, and emphasized the Convention’s role as *lex*

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<sup>23</sup> UN Doc. TD/35/Supp.1, Chapter II, paras. 130-145 and Chapter X, Part II, paras. E. 2-3. *See also UN Document E/4446*, p. 4 and paras. 121-137 (including recommendations and countering objections that have delayed action by certain countries.)

<sup>24</sup> ICSID, AR/83.

<sup>25</sup> ICSID, AR/92.

<sup>26</sup> *Declaration on the Establishment of a New International Economic Order*, May 1, 1974, G.A. Res. 3201, 29 U.N. GAOR Supp. (No.1), in 13 I.L.M. 715, 716, 718 (1974). Also, Weston, *The Charter Of Economic Rights And Duties Of States And The Deprivation Of Foreign-Owned Wealth*, 75 AM. J. INT’L L. 439 (1981).

<sup>27</sup> Rozental, *The Charter of Economic Rights and Duties of States and the NIEO*, 16 VA. J. INT’L L. 309 (1976).

<sup>28</sup> Schwebel, *The Story of the UN’s Declaration on Permanent Sovereignty over Natural Resources*, 49 A.B.A. J. 463 (1963).

<sup>29</sup> Lowenfeld, *supra* 22 at 48.

*fori*, avoiding any reference to ICSID as part of the framework forming the substance of international investment law.<sup>30</sup>

ICSID's emphasis on expanding its membership during this stage served to cement the bargain reached at the WB and outperform similar endeavors such as the 1974 Convention of the Settlement of Investment Disputes between Host States of Arab Investments and Nationals of other Arab States.<sup>31</sup> The latter, an Arab multilateral treaty (superseded by the Unified Agreement) was closely modeled on the Convention and called for the creation of an IO that, in many respects, would resemble ICSID.<sup>32</sup> In 1977, Broches—choosing his words carefully—argued that the Centre was the “only institution dealing exclusively” with proceedings between foreign investors and host States.<sup>33</sup> Trying to ascertain ICSID as the true multilateral effort with universal aspirations, Broches argued that the creation of the Centre under the auspices of the WB gave this institution “both moral authority and a clear mandate of strict impartiality” for enabling dispute settlement, perhaps implying that these qualities were lacking in other similar endeavors.<sup>34</sup>

By the end of its first stage ICSID membership reached almost 90 signatories, evidencing general support from developed nations but also many developing Arab, African and South-East Asian states.<sup>35</sup>

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<sup>30</sup> BROCHES, *SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW*, (Martinus Nijhoff 1995) [hereinafter BROCHES ESSAYS]. at 224. Broches referred to the relevant sections of the Convention that spell out this as *loi de l'arbitrage*. Articles 37 to 40, on the composition of the arbitral tribunal; Articles 56 to 58, on the replacement and disqualification or arbitrators; Article 45, on failure of a party to appear; Article 43, on production of evidence, and; Article 44, on the right of the tribunal to decide on questions of procedure not covered by the Convention.

<sup>31</sup> *The Convention of the Settlement of Investment Disputes between Host States for Arab Investment and Nationals of Other Arab States*, 1974.

<sup>32</sup> Ziade, *Selective Bibliography on Arbitration and Arab Countries*, 3 ICSID REVIEW 423 (1988). Also, Nassib G., Ziade, *ICSID and Arab Countries*, 5 NEWS (Summer 1988) p 7.

<sup>33</sup> ICSID, AR/77.

<sup>34</sup> *Id.*

<sup>35</sup> ICSID, AR/84.

[Insert figure 1 here]

Figure 1: ICSID Membership (1967-2011)

## **2. A Slow Start: Success “Should Not be Measured by the Number of Disputes Submitted”**

During the first stage, the Centre relied on the staff of the WB to promote its first programmatic agenda. A few, well-regarded lawyers such as Paul Szasz, worked as Legal Advisers, sharing their workload with the Legal Department of the WB.<sup>36</sup> Their tasks included, in addition to accelerating the expansion of the membership, an editorial project aimed at the publication of the Legal History of the Convention completed in 1971, the development of model consent clauses that defined the work of the Centre until the 90s and the Centre’s investment legislation project, a country-by-country survey of laws and agreements affecting foreign investment.<sup>37</sup>

ICSID had a “slow start” as a dispute settlement facility.<sup>38</sup> *Holiday Inns/Occidental Petroleum*, the first dispute submitted to ICSID was registered in 1972, more than five years after the Convention entered into force.<sup>39</sup> With only five cases in its historical docket, all of them relying on IICs,<sup>40</sup> in 1976 the SG expressed some caution about trying to link the success of ICSID with the number of disputes in the docket.<sup>41</sup> Golsong, who lead ICSID for three years immediately after Broches’ retirement in 1980, also stressed the role of ICSID as an IO promoting amicable settlements, cautioning against measuring “effectiveness and the efficiency ... by the number of cases registered or decided upon”.<sup>42</sup> The success of ICSID, it was argued during this stage, should be associated to the positive incentives for “negotiation and amicable agreement”<sup>43</sup> created

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<sup>36</sup> ICSID, AR/71. Also, Barcelo & Whipman, *A Tribute to Paul Szasz*, 35 CORNELL INT’L L.J. 457 (2002).

<sup>37</sup> ICSID, AR/70/76.

<sup>38</sup> Schreuer, *The Dynamic Evolution of the ICSID System*, p. 19 available [http://www.univie.ac.at/intlaw/wordpress/pdf/85\\_cspubl\\_86.pdf](http://www.univie.ac.at/intlaw/wordpress/pdf/85_cspubl_86.pdf)

<sup>39</sup> Pierre Lalive, *The First World Bank Arbitration (Holiday Inns v. Morocco)—Some Legal Problems*, 51 BRIT. Y.B. INT’L L. 123, 127–28 (1980) (discussing *Holiday Inns v. Morocco*, ICSID Case No. ARB/72/1); Also, ICSID, AR/72.

<sup>40</sup> *Adriano Gardella S.p.A. v. Côte d’Ivoire* (ICSID Case No. ARB/74/1), Award, 29 August 1977 in 1 ICSID REPORTS. 283 (1993); *Alcoa Minerals of Jam., Inc. v. Jamaica*, ICSID Case No. ARB/74/2 (July 26, 1975), excerpted in 4 YEARBOOK COMM. ARB. 206, 206–08 (1979); *Kaiser Bauxite Co. v. Jamaica*, ICSID Case No. 74/3, Decision on Jurisdiction of 6 July 1975, 1 ICSID REPTS. 296, 303 (1999); *Reynolds Jamaica Mines and Reynolds Metals Company v. Jamaica*, Cases ARB/74/2, 3 and 4.

<sup>41</sup> ICSID, AR/76.

<sup>42</sup> ICSID, AR/83.

<sup>43</sup> ICSID, AR/73.



by the “dispute settlement clauses or the mere filing of requests [to arbitration or conciliation]”.<sup>44</sup>

To some degree, the first two SGs had a similar view of the IO. Both stressed the importance of ICSID as an agreed upon forum to enable, facilitate and administer dispute settlement in a neutral way. While recognizing that the ultimate end of ICSID is “furthering the availability of private international investment for economic development”, Broches (and Golsong) insisted that:

[T]he success of the Centre should not be measured by the number of disputes submitted to it, but rather by the degree of willingness of governments and investors to accept conciliation and arbitration under the auspices of the Centre.<sup>45</sup>

In spite of the attempt to divorce the number of disputes from the idea of success of ICSID, the shy number of cases left a mark, perhaps indicative of the internal pressures within the WB to enable an organization more functionally related to the intermediate goal of a dispute settlement facility.<sup>46</sup> This mark took shape in the form of layering by the creation of the Additional-Facility system in 1978 to increase the potential cases administrated by ICSID.<sup>47</sup> These rules expanded the number of possible ICSID-based disputes mainly by creating a mechanism to secure recourse to ICSID for those cases where only one of the States involved in the dispute is a party to the Convention.<sup>48</sup> Although the Additional-Facility arbitrations would not result in awards that benefit from the self-contained and delocalized enforcement scheme that shelters ICSID awards from the scrutiny of national courts, the cases could nevertheless benefit from nearly identical Arbitration Rules and the administrative support and processes offered by ICSID.<sup>49</sup>

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<sup>44</sup> ICSID, AR/83.

<sup>45</sup> ICSID, AR/76. For Golsong’s position, see, ICSID, AR/83.

<sup>46</sup> *Id.*

<sup>47</sup> ICSID, *ICSID Additional Facility Rules*, ICSID Doc. ICSID/11 (Apr. 2006) [hereinafter AF-RULES]; Broches, *The Additional Facility of ICSID*, 4 YEARBOOK COMM. ARB. 373 (1979).

<sup>48</sup> Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards*, 51:4 VA. J. INT’L L. (2011)

<sup>49</sup> Convention Art. 53

[Insert figure 2 here]

Figure 2: ICSID Convention and ICSID (AF) Cases (1967-2011)

### **B. Ambition: ICSID as “Instrument of International Public Policy”**

In October of 1983, Ibrahim Shihata was appointed WB’s General-Counsel as well as SG of ICSID. During his 17-year tenure as SG, Shihata led a critical transformation of the Centre.<sup>50</sup> His impressive tenure can be divided into two periods, the first covering from his appointment until the Soviet collapse in 1991, and the second spanning from 1992 to his retirement in 2000.

An expert in international law with a doctoral degree (*SJD*) from Harvard Law School and diplomat with high-level experience at a number of IOs, Shihata was well-regarded and trusted within the WB and development circles more generally.<sup>51</sup> The Egyptian “Masterful Missionary” used his first year to lay out an ambitious programmatic agenda.<sup>52</sup> In his first annual report Shihata defined ICSID as an “effective instrument of international public policy,”<sup>53</sup> making it clear he would expand the role of the organization beyond simply promoting itself as an arbitration and conciliation machinery.<sup>54</sup> Rather, Shihata saw ICSID as an institution that could forge ties of confidence between investors and States as well as between States due to the Centre’s ability to *depoliticize* investment disputes<sup>55</sup> and effectively enhance FDI to developing countries.<sup>56</sup> This particular framing gave rise to three lines of action anchored in the malleable text and background of the Convention that would in turn frame the organization’s goals throughout his tenure: specialization of international dispute settlement, de-politicization of inter-State conflicts, and economic policy stabilization.

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<sup>50</sup> ICSID, *Ibrahim F. I. Shihata (1937-2001)*, NEWS (Spring 2001) p. 3.

<sup>51</sup> *Id.* Interview with WBG officer, Friday, March 29, 2012, Washington D.C. explaining that Shihata as a “visionary and a technician that did his homework” and “could see things in many different ways”.

<sup>52</sup> Brower, *Ibrahim Shihata and the Resolution of International Investment Disputes: The Masterful Missionary*, 15 ICSID REVIEW 2, (2000), 288-300 [Hereinafter MASTERFUL-MISSIONARY].

<sup>53</sup> ICSID, AR/84.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

### **1. Specialization: “Very Different Disputes”**

Under Shihata’s leadership ICSID was promoted as an IO specializing in “very different disputes” than other commercial or international dispute resolution facilities.<sup>57</sup> In promoting ICSID’s expertise Shihata emphasized that the specific disputes in which ICSID specialized related to *investment*. In contrast to Broches, Shihata did not stress consent as the most important element of jurisdiction. Instead, he praised the flexibility reflected in the absence of a clear definition of the notion of investment in the ICSID Convention as “a wise precaution”<sup>58</sup> because it both permitted the Centre to respond to the pragmatic needs of ICSID users and parties to adapt to changes in the form of cooperation between investors and host States.<sup>59</sup> This, he argued, contributed to the effectiveness and flexibility of the system of FDI protection established by ICSID.<sup>60</sup>

Shihata adopted a similar measure for ICSID’s effectiveness as his immediate predecessors, but with the following considerations. First, conflict prevention and incentivizing the settlement of conflicts was important, but only one of three functional goals of ICSID.<sup>61</sup> For Shihata, the fact that during the first years of ICSID’s existence more than half of the proceedings had resulted in amicable settlement was clear evidence that ICSID was a successful endeavor.<sup>62</sup>

Second, affirming ICSID’s expertise claim, Shihata rejected using “statistics regarding the average duration of proceedings” or any financial consideration for assessing ICSID because the organization’s role, in his view, was not limited to dispute resolution.<sup>63</sup> Instead, he considered data on the duration of proceedings to be of little or no value because of the many factors that distinguish ICSID proceedings from one another as

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<sup>57</sup> Shihata, *Remarks on the Obstacles Facing ICSID’s Proceedings and International Arbitration in General*, NEWS (Winter 1986) [hereinafter REMARKS]

<sup>58</sup> ICSID, AR/84.

<sup>59</sup> *Id.* See Mortenson, *supra* 19 at 288. (According to him the domain places the primary control over the meaning of property relationships covered by the process back in the hands of the State parties to the Convention.)

<sup>60</sup> Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA*, 1 ICSID REVIEW (1986) [Hereinafter DEPOLITICIZATION].

<sup>61</sup> ICSID, AR/84 p. 9. (Shihata argues that ICSID should not be assessed only on the basis of the number of disputes that have been submitted to or settled by ICSID, but rather by its ability to foster conflict avoidance.)

<sup>62</sup> Shihata, REMARKS at p. 10.

<sup>63</sup> *Id.*

well as from those of other institutions.<sup>64</sup> On the cost of cases brought to ICSID, he asserted the non-for-profit character of the organization and pledged not to treat ICSID as a business by keeping the cost of disputes “to a minimum”.<sup>65</sup> By doing so, he recognized that ICSID received (and still receives) financial support from the WB and benefits from the use of its facilities, distancing it from profit-oriented facilities that do not enjoy subsidization. Both considerations limited perverse institutional incentives such as registering unmeritorious cases, prolonging disputes for institutional gains or using fees for rushing parties into settlements.

Shihata shepherded ICSID’s progress beyond the stage of infancy, entering the Centre into agreements with facilities for commercial arbitration and sponsoring conferences<sup>66</sup> and educational programs with development specialists on international investment and arbitration.<sup>67</sup> This helped ICSID build a community of practitioners, promote the arbitration process and maintain an active cooperation with development specialist networks. It also generated the interest of international law practitioners arguing before the International Court of Justice and, at the time, the newly implemented Iran-U.S. Claims Tribunals,<sup>68</sup> as well as experts in international business disputes, such as commercial arbitration.

[Insert figure 3 here]

Figure 3: Cost and Subsidization (1967-2011)

## **2. De-politicization: “A Superior Solution to the Calvo Doctrine”**

For Shihata, ICSID was “not merely a dispute settlement mechanism,”<sup>69</sup> but an institution whose role included “de-politicization” of investment disputes. As advocated by Shihata, the formalization and compartmentalization of disputes worked in opposition to power politics and helps to provide stability.<sup>70</sup> In Shihata’s eyes, the purpose of ICSID included acting as a tool for balancing power between asymmetrical

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *E.g.*, Annual Colloquium organized by ICSID, AAA and ICC available <http://icsid.worldbank.org>.

<sup>67</sup> ICSID, *ICSID Assists IDLI in Organizing an Arbitration Course*, NEWS (Summer 1985) p 13.

<sup>68</sup> Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT’L L. 104 (1990).

<sup>69</sup> ICSID, AR/84.

<sup>70</sup> DEPOLITICIZATION *supra* 62 at 19.

States that served to limit abuses traditionally observed with the practice of diplomatic protection.<sup>71</sup>

This specific idea of de-politicization resonated among Latin-American countries previously indifferent or opposed to ICSID, and in many cases may even have prompted them to join the Convention.<sup>72</sup> Shihata stressed this function at a time when the volume of FDI in developing countries and the Latin-American region was declining as a consequence of the debt crisis of that time.<sup>73</sup> According to Shihata, ICSID was “a superior solution to the Calvo doctrine” (maintaining that States owed aliens no duties beyond national treatment) stressed by Latin-American countries because it was effective in the encouragement of FDI “without inviting the abuses of diplomatic protection”.<sup>74</sup> Thus, Latin-American countries should not necessarily view ICSID in opposition to the core of such doctrine because, as argued by Shihata, the Convention: (1) prohibited a contracting party giving diplomatic protection to nationals (Art.26); (2) allowed States to require exhaustion of local remedies (Art.27); and, (3) permitted countries to stipulate that their relationship with foreign investors was governed by domestic law (Art.42).<sup>75</sup> By 1991, the end of Shihata’s first stage, at least 10 countries of that region had signed the Convention.<sup>76</sup> This contrasted to the infamous “*No de Tokio*” of 1964, a concerted effort of the Latin-American countries to defeat the Convention during a Meeting of Legal Experts in charge of drafting the treaty.<sup>77</sup>

The notion of ICSID as a legalized framework to limit power enabled by a nominally neutral IO meant linking the success of ICSID to the high proportion of settlements and the active participation of developing States in the proceedings. In this sense, ICSID

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<sup>71</sup> ICSID, AR/85.

<sup>72</sup> In response to what was perceived as abusive interferences by foreign powers, Latin American countries developed the Drago Doctrine (prohibiting the use of force to recover debts) and the Calvo Doctrine (maintaining that States owed aliens no duties beyond national treatment). See, DONALD SHEA, *THE CALVO CLAUSE* (1955).

<sup>73</sup> ICSID, AR/84. Also, Lee C. Buchheit & Ralph Reisner, *The Effect of the Sovereign Debt Restructuring Process on Inter-Creditor Relationships*, U. ILL L. REV. 493,494 (1988). Also, R. Pastor, *The Debt Crisis: A Financial or a Development Problem?*, in DEBT CRISIS: ADJUSTING TO THE PAST OR PLANNING FOR THE FUTURE? 5, (R. Pastor ed., 1987).

<sup>74</sup> ICSID, AR/85. Also, DEPOLITICIZATION *supra* 62.

<sup>75</sup> Shihata, *ICSID and Latin America*, NEWS (Summer 1984) [Hereinafter ICSID & LATIN-AMERICA].

<sup>76</sup> E.g., ICSID, *Costa Rica and Peru Joined ICSID*, NEWS (Summer 1993).

<sup>77</sup> For a detailed discussion of the reasons for the negative attitude toward the Convention in Latin-America, see Paul C. Szasz, *The Investment Disputes Convention and Latin America*, 11 VA. J. INT’L L. 256(1971).

was also promoted as a truly independent, autonomous and delocalized system that could be more reassuring, from the viewpoint of capital-importing States, than diplomacy or the acceptance of clauses providing for jurisdiction of courts of the lending source.

The emphasis of ICSID as a legalized solution for investment dispute settlement and to deal with power imbalances triggered the three following reactions: (a) a discussion on expertise and diversity of arbitrators; (b) an efforts to cement the insulation of proceedings from the scrutiny of national courts; and (c) an attempt to calibrate ICSID as a dispute settlement process with a high degree of finality.

#### **a. We Need to “Diversify Representation of Nationalities of ICSID Tribunals”**

Shihata believed that to enhance a trusted and global system there was a need for a “divers[e] representation of nationalities in ICSID tribunals.”<sup>78</sup> At the same time, a secure and specialized system could not be built without the expertise of professional arbitrators. In promoting these two ideas, Shihata stressed to the member States the need to submit names of experts to the roster of arbitrators “having the qualifications suited to serve ... on ICSID tribunals.”<sup>79</sup>

ICSID provisions demand that arbitrators be independent from the parties in the dispute, and emphasize competence in the fields of law, commerce, industry or finance.<sup>80</sup> By 1987 a total of 19 arbitral tribunals and 2 *ad hoc* Committees had been constituted; 63 arbitrators, mostly lawyers, representing 14 countries had been appointed, including 2 architects and 2 maritime dispute experts.<sup>81</sup>

#### **b. The Abstention of Courts is “Essential to the Proper Implementation of the Convention.”**

In 1984 Shihata ordered the first extensive revision of the ICSID rules and regulation to inject “into them a greater degree of flexibility” as well as to reflect the lessons learned

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<sup>78</sup> Shihata, *Obstacles Facing ICSID's Proceedings and International Arbitration in General*, Speech delivered in October 1985 at ICC symposium in NEWS (Winter 1986).

<sup>79</sup> ICSID, *Composition of ICSID Tribunals*, NEWS (summer 1987)

<sup>80</sup> Convention Arts. 14.

<sup>81</sup> ICSID, *Composition of ICSID Tribunals*, NEWS (summer 1987) p. 6.

from the Centre's early experience.<sup>82</sup> Advance payments to cover expenses of the proceedings, pre-hearing conferences, record keeping, and the dispensation of the SG's attendance to hearings, all features common to ICSID procedural practice today, were practical innovations that resulted from this review.<sup>83</sup>

Insulating ICSID arbitrations more fully from any pre-award resort to municipal courts was the most dramatic modification connected to this review.<sup>84</sup> In hindsight, this was a strategic effort to cement ICSID's self-contained system and disassociate its proceedings from the scrutiny of national courts. It was the result of a meticulous twofold strategy. First, the revision of the arbitration rules a new paragraph was introduced to then Arbitration Rule 37 (currently Rule 39(5)) to provide explicitly that parties could request provisional measures before domestic or other courts, "provided that they have so stipulated in the agreement recording their consent."<sup>85</sup> This was an effort to promote judicial abstention as a result of two cases, *Atlantic Triton Company Limited* and *MINE*, in which the investors sought the assistance of domestic courts in attaching property relating to the same respondent (Republic of Guinea) and requested the courts to order provisional measures aimed at guaranteeing the execution of future awards.<sup>86</sup>

Second, extensive doctrinal commentary on the role of ICSID as a self-contained dispute settlement system complemented the revision of the rules. As evidenced by the contemporaneous writings of Delaume, Marchais and Parra, then Legal Advisers to ICSID, the Centre engaged in a campaign to highlight the importance of the rules of abstention of Courts as "essential to the proper implementation of the Convention."<sup>87</sup> This view implied the exclusive character of ICSID: by agreeing to arbitration, parties waived their right to institute proceedings in any forum other than ICSID. Therefore,

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<sup>82</sup> ICSID, *ICSID Regulations and Rules*, NEWS (summer 1984) p 13. See also Parra, RULES DEVELOPMENT *supra* 15.

<sup>83</sup> Parra, *Revised Regulations and Rules*, NEWS (Winter 1985).

<sup>84</sup> *Id.*

<sup>85</sup> Convention Art. 47, and Rule 39 Rules of Procedure for Arbitration Proceedings.

<sup>86</sup> *Maritime International Nominees Establishment v. the Republic of Guinea* (693 F. 2d 1094 (D.C. Cir. 1982), reprinted in I.L.M. 1335 (1982). *Atlantic Triton Co. v. People's Revolutionary Republic of Guinea*, ICSID Case No. ARB/84/1, Award, ¶ 118 (Apr. 21, 1986), reprinted in 3 ICSID REP. 13 (1995).

<sup>87</sup> Delaume, *ICSID Arbitration and the Courts*, 77 AM. J. INT'L L. 784 (1983). See also, B. P. Marchais, *ICSID and the Courts*, NEWS (Summer 1986) p 4. Also, Delaume, *Sovereign Immunity and Transnational Arbitration*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 313, 313 (Julian Lew ed., 1986).

ICSID users should expect that the sole role assigned to domestic courts under the Convention is “one of support for, not interference with, the self-contained machinery provided for in the Convention.”<sup>88</sup> The move reduced the role of domestic courts to expediting the recognition and enforcement of ICSID arbitral awards, in accordance with the “simple and effective procedure set forth in Article 54 of the Convention.”<sup>89</sup> Indeed, when a New York District Court granted recognition to and enforcement of the ICSID award on the merits in *LETCO* in 1987, ICSID promptly publicized this decision as authoritative.<sup>90</sup>

### c. “A Viable and Useful Dispute Resolving Instrument is in Peril”

The disassociation of ICSID from domestic law was much less controversial than establishing the limits of ICSID’s control mechanism or annulment procedure. In fact, the finality of ICSID awards soared to the level of controversy as a consequence of the decisions in *Klockner I* and *Amco I* annulling the awards for reasons seen by many experts as second-guessing the reasoning of the tribunal that decided the cases.<sup>91</sup> The academic debate that arose from those proceedings was whether the conceptual holdings of the Annulment Committees (“Committees”) had respected the restrictions of the ICSID system that provides for limited grounds and a high bar to annul an arbitral award. Alarmed by the potential effects of the decisions, Professor Reisman observed that “a viable and useful dispute resolving instrument [was] in peril because its control system has spun out of control”.<sup>92</sup>

ICSID acted swiftly when ICSID users and commentators expressed worry over the success of the first proceedings and the standard applied in that second case. In response to these decisions and the critical commentary they spurred, Broches, by then

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<sup>88</sup> Delaume, *ICSID Arbitration in Practice*, 2 INT’L TAX & BUS. LAW. 58, 68 (1984).

<sup>89</sup> Marchais, *ICSID and the Courts*, NEWS (SUMMER 1986)

<sup>90</sup> United States District Court, D.C., 16 April 1987, 2 ICSID REP. 390. For the decision of the U.S. Court of Appeals (2d Circuit) on 19 May 1987 see Joyce, A., Note, 29 HARVARD INT’L.L.J. 135 (1988). *ICSID and the Courts*, NEWS (Summer 1987).

<sup>91</sup> *Kloeckner v. Cameroon: Decision of the Ad Hoc Committee*, 1 ICSID REVIEW. 89 (1986) [hereinafter KLOECKNER]. *Amco Asia Corp. v. Indonesia*, ARB/81/I (citing to Koeckner Decision) reprinted in 24 I.L.M. 1022 (1985) [Hereinafter AMCO].

<sup>92</sup> Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739, 787 (1989). Redfern, *ICSID-Losing Its Appeal*, 3 ARB. INT’L 98 (1987); Thompson, *The Kloeckner v. Cameroon Appeal-A Note on Jurisdiction*, 3 J.INT’L ARB. 93 (1986); Feldman, *The Annulment Proceedings and the Finality of ICSID Arbitral Awards*, 2 ICSID REVIEW 85 (1987).



a private practitioner in the field of international law, observed that both decisions “rejected the clear conception of the drafters of the Convention of annulment as an exceptional remedy ... moving to the prohibited role of appellate tribunal.”<sup>93</sup> Against this background, Shihata did not hesitate to intervene, forcefully arguing that ICSID awards were open to attack only in limited circumstances, and quickly affirming that the Convention provided only *exceptional* special remedies.<sup>94</sup> Implying that the Committees in *Klockner I* and *Amco I* exceeded their mandates, he alerted in the 1988 annual report that the ICSID system would suffer:

if a trend emerges in future of unjustifiable recourse to the annulment procedure in the ICSID arbitral process. Should this become the case, the Administrative Council may, as I have suggested to it on an earlier occasion, wish to consider ways in which to clarify the exceptional nature of the annulment procedure through appropriate amendments...<sup>95</sup>

ICSID also took action in less structured ways. To ensure a ‘correct’ and uniform case law in this area, Shihata saw to it that the Chairman of the Administrative Council judiciously exercised his authority to appoint the members of later *ad hoc* Committees that rule on annulment applications so as to appoint at least one member (if not two members) who already had sat on a previous Committee.<sup>96</sup> With the overwhelming criticism of the first two annulment decisions and the Centre’s ensuing actions, subsequent Committees were much more cautious and deferential to tribunals.<sup>97</sup> This practice in favor of finality, aided by the critical commentary on this issue as well as the actions of the Centre’s leadership cemented ICSID as a specialized system not only insulated from domestic courts but with a carefully calibrated degree of formalism that fostered finality over doctrinal correctness.

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<sup>93</sup> BROCHES ESSAYS 79, 80-4.

<sup>94</sup> ICSID, AR/87. The Convention allows remedies for annulment, interpretation and revision of awards.

<sup>95</sup> ICSID, AR/88.

<sup>96</sup> MASTERFUL-MISSIONARY *supra* 54.

<sup>97</sup> For example, in *MINE*, the following case reaching such procedural stage, the *ad hoc* Committee held that “[t]he adequacy of the reasoning is not an appropriate standard of review [and is] in disregard of the exclusion of the remedy of appeal by Article 53 of the Convention.” *MINE v. Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment of January 6, 1988, para. 4.06.

According to Judge Brower, as a result of Shihata's actions there was an increase of confidence in ICSID among users.<sup>98</sup> However, the uncertainties created by the first two annulment decisions did leave a mark. At around this time, the first IITs providing for settlement of investment disputes by arbitration under the Rules of either the International or the Stockholm Chamber of Commerce ("ICC" or "SCC") appeared. According to Parra "it is nonetheless likely that this development in IIT practices also owed something to concerns over the operation of the ... annulment."<sup>99</sup>

Putting to one side the annulment standard saga, during this stage ICSID's self-contained dispute settlement system was not as divisive as in other stages of the institution's development. ICSID enjoyed wide support among numerous stakeholders because, among other reasons, it was framed and perceived as operating in a quasi-contractual sphere. ICSID was seen as simply enhancing the pragmatism of governments acting in a semi-private role by enabling dispute resolution in relationship-specific foreign investment protection.<sup>100</sup> In fact, with the exception of *Southern Pacific Properties (Middle East) Limited* and *Asian Agricultural Products Ltd.*, all the disputes during the first two stages originated in IIC (mining, oil, and other similar concessions), reinforcing a perception beneficial to the organization as a non-intrusive, opt-in system of protection.<sup>101</sup>

### **3. Economic Policy Stabilization: A "Role in Improving the Investment Climate"**

Facilitated by a relatively low number of cases (*i.e.*, 25 during its first 25 years) and the dominant discourse and expansion of the conservative economic revolution, the idea of ICSID as an "effective instrument of international public policy" became the main legacy of this stage.<sup>102</sup> During a time when a free market ideology permeated the WB, especially after Barber Conable was proposed as its president by U.S. President Reagan, the theory that "economic development could not be achieved without capital and ...

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<sup>98</sup> MASTERFUL-MISSIONARY *supra* 54.

<sup>99</sup> Parra, *ICSID and Bilateral Investment Treaties*, NEWS (Spring 2000).

<sup>100</sup> ICSID, AR/76.

<sup>101</sup> *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka* (1992) 30 I.L.M. 577. *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, 8 ICSID REVIEW 328 (1993).

<sup>102</sup> ICSID, AR/84.

developing countries would not obtain capital unless they provided adequate guarantees” became almost an incontrovertible orthodoxy in the organization. These ideas lead to an era of surges in IITs in the 90s. It also facilitated the narrative of ICSID as functioning in the space of what Shihata termed as “international public policy”.<sup>103</sup>

Shihata advocated for ICSID’s role in the process of economic development and demanded a space for ICSID to assume “a more important role in improving the investment climate at large, and in developing countries in particular.”<sup>104</sup> Consequently, this larger construction of the organization’s functions implied that success should also be measured “in its ability to [enable] flow of resources to developing countries under reasonable conditions.”<sup>105</sup> In its final analysis therefore, ICSID was the means to an economic end; investor-State dispute settlement was simply the enforcement side of a system designed to stabilize investment protection and increase flow of private investment to developing countries.<sup>106</sup>

New projects such as the *World and Investment Treaties*, the *News from ICSID*, which was initiated in 1984 with aims at disseminating information on ICSID activities, and more prominently the *ICSID Review* which was first published in April 1986 under the editorial direction of Shihata, enabled ICSID to become a source of systematic information on and analysis of ICSID practice and the laws applicable to FDI.<sup>107</sup> Shihata also commissioned studies of ICSID jurisprudence for the purpose of verifying its consistency as yet another “confidence-building measure.”<sup>108</sup> The Centre continued advising the use of ICSID clauses in IICs but also started responding to numerous requests for assistance in the drafting of IITs and foreign investment legislations.<sup>109</sup> The same impetus of the organization in promoting penetrating ideas beyond *lex fori* is evident from the following two projects ICSID was instrumental in crafting: (1) MIGA; and (2) the WB Guidelines on the Treatment of FDI.

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> ICSID, AR/85.

<sup>106</sup> Sykes, *Public v. Private Enforcement of International Economic Law: Standing and Remedy*, 34 J.LEG.STUD 631 (2005).

<sup>107</sup> ICSID, AR/86.

<sup>108</sup> ICSID, AR/84. This initiative led to Schreuer’s seminal treatise on the ICSID Convention See, CHRISTOPH SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* (2001) [hereinafter 1SCHREUER].

<sup>109</sup> ICSID, AR/89 p. 4.

MIGA was conceived as a “self-sufficient” institution providing risk insurance against losses caused by non-commercial risks such as expropriation, war and civil disturbance, to complement the “private sector arms” of the WB to incentivize long-term commitment of resources. Since the approval of the MIGA Convention in 1985 until the late 80s, ICSID played a significant role in communicating the developments of MIGA, including ratifications by States and managerial appointments, as well as advising States interested in becoming members on MIGA’s usefulness and procedures. Today, MIGA offers coverage and prices its guarantee premiums based on a calculation of both country and project risk. From a policy perspective MIGA and ICSID were thought to have complementary roles as risk reducing undertakings to promote international investment flows.<sup>110</sup>

A meaningful (and perhaps the only visible) collaboration between MIGA and ICSID started, at the dawn of the third stage, in April of 1991 with the preparation of the WB’s Report on the Legal Framework for the Treatment of Foreign Investment. The project was initially assigned to a small working group consisting of the General-Counsels of the WB, IFC and MIGA, and resulted in the issuance of the famous 1992 set of Guidelines on the Treatment of FDI.<sup>111</sup> Shihata argued that the guidelines had been a major success because they were issued in their final form without reservations by any member State, and “praised by such business organizations as the International Chamber of Commerce” as “a positive development in the field of international investment” law.<sup>112</sup>

In the years that followed, the collaboration between the different institutions of the WB and ICSID faded to a point where ICSID stopped “working with other units of the Bank”.<sup>113</sup> It is clear that leadership and skills in agenda-setting were instrumental for the collaborations. It may also signal the lack of horizontal structures, exacerbated by silos and a top-down culture often referenced by critics of the WB, which

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<sup>110</sup> World Bank, *Convention Establishing the Multilateral Investment Guarantee Agency*, Oct. 11, 1985, 24 I.L.M. 1598. See, Rowat, *Multilateral Approaches to Improving the Investment Climate of Developing Countries: The Cases of ICSID and MIGA*, 33 HARV. INT’LL.J. 103, 103-44 (1992) (discussing recent activities of ICSID and MIGA).

<sup>111</sup> WB, *Guidelines on the Treatment of Foreign Direct Investment*, 7 ICSID REVIEW 297, 306 (1992).

<sup>112</sup> Shihata, *The World Bank Group’s New “Guidelines on the Treatment of Foreign Direct Investment*, NEWS (Winter 1993).

<sup>113</sup> KINNEAR, *supra* 1.

prevented further cooperation once leadership changed.<sup>114</sup> Thereafter, with the IFC stepping-up the role of financier of the private sector, and MIGA acting as the insurer and performing advisory activities on political risk, ICSID entered a new stage in which some of the promises in the field of dispute settlement would finally be realized, but the role of the Centre as international policy maker would fade.

### **C. Idealism: ICSID as “Progressive Development of Law Governing Investment”**

ICSID’s third stage roughly encompasses between 1992 to 2002, or the second half of Shihata’s tenure, followed by the brief term of Ko-Yung Tung, a SG who delegated the day-to-day operations of the Centre to Parra (promoted as the first Deputy SG in 2000).<sup>115</sup> Other than the years that followed its foundation, at no other point has the Centre’s membership grown equal to the early years of this stage following the fall of the Berlin Wall.<sup>116</sup>

This stage of ICSID was mostly defined by the following events. First, on September 1, 1991 Lewis Preston succeeded Conable as President of the WB. A former Chairman of the Executive Committee of J.P. Morgan, Preston led the WB into the post-Cold War world, helping the former Soviet republics move toward market economies with an agenda that focused on trimming soviet-type governmental bureaucracies. This was an agenda he also adopted within the WB by re-organizing its management and promoting programs to focus primarily on results. While Shihata remained the principal of ICSID, Preston’s new set of priorities reflected the need to start demonstrating results with tangible evidence.<sup>117</sup>

Second, the fact that the once collectivists now adhered to the post-War international economic order was significant for ICSID, and meant that these countries would have to commit not only to the traditional macroeconomic responsibilities but also to

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<sup>114</sup> Interview with WBG officer, Friday, March 29, 2012, Washington D.C. (Shihata came from a different “leadership tradition” and decisions were taken by top-down. This, according to the expert, created a silos’ culture and inhibited cross-pollination among different units within the legal department.)

<sup>115</sup> Interview with WBG officer, Thursday, March 28, 2012, Washington D.C. (Explaining that Ko-Yung Tung’s leadership was “not exactly hands-off” however, but ICSID was not his “priority”. Ko-Yung Tung also entirely “trusted [Parra]”.)

<sup>116</sup> ICSID, NEWS (Summer 1993) p. 6.

<sup>117</sup> ICSID, AR/93 p. 4.

conducting some fundamental reforms in their foreign investment legislations and regulations before receiving financial assistance. Seizing on this historical juncture Shihata argued for a “progressive development of the law governing international investment law” supported by “sound regulation and informal custom and usages” and enforced by “well-functioning judiciaries”.<sup>118</sup>

In spite of Shihata’s efforts, enthusiasm, and ambition, this third stage was marked by several missed opportunities to develop a truly progressive international investment law. This was in part due to the Centre’s somewhat reactionary response to a proliferation of cases, many brought under IITs such as NAFTA’s Chapter Eleven, which not only triggered a surge in the visibility of the Centre but was also accompanied by a rise in critiques of globalization and the role of institutions such as the WB in geopolitics.

Rather than the Centre emerging as a leader in advocating for a progressive view of international investment law, what ultimately prevailed was the more traditional idea of “investment liberal policy frameworks” as a necessary for economic growth in the new “global production system”.<sup>119</sup> This reverberation of an old lore included the promotion of an idea that “restrictions and imbalances in FDI inflows and outflows are potential sources of conflict” to be resolved by arbitrators, or as Professor El-Kosheri would say, “the natural judge (*juge de droit commun*) in adjudicating investment disputes”.<sup>120</sup>

In fact, in his last report as leader of ICSID, Shihata adverted a new dynamic after years of the WB’s promotion of both IITs and investment promotion legislations with generalized consent to resort to ICSID.<sup>121</sup> Such policy instruments, promoted jointly by ICSID and the WB, played a fundamental role in the type of cases administrated by the Centre, which Shihata noted in his last report as SG:

[t]he growth in the caseload reflects the proliferation of investment laws and treaties with provisions setting forth advance general consents on the part of

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<sup>118</sup> Shihata, *Institutional and Legal Reform in Africa: Challenges of a New Era*, NEWS (Winter 1997) p. 2-4.

<sup>119</sup> Sauvart, *FDI and the Asia Pacific Region*, NEWS (Summer 1995) p. 4. (“[C]ountries wanting to attract FDI... need to establish liberal policy frameworks that incorporate most if not all of these standards.”)

<sup>120</sup> Parra, *ICSID and the New Trends in International Dispute Settlement*, NEWS (Winter 1993) p. 9. (Quoting El-Kosheri).

<sup>121</sup> ICSID, AR/02.

the States concerned to submit covered investment disputes to ICSID arbitration. Some two thirds of the cases pending in fiscal year 2000 were submitted to ICSID under such provisions...six were brought...under the [NAFTA].<sup>122</sup>

This new dynamic redefined the three functional narratives identified by Shihata earlier in his first annual report and led to the judicialization of investor-State arbitration. As a result of this confluence of factors, the third era of institutional development concluded with ICSID to some extent discarding its attempts to play a public policy role and focusing more intensely on case administration.

### **1. Transparency: A Form of Contestation of Investor-State Mode of Dispute Settlement**

If during the 80's IITs expanded, by the early 90's the signature of these types of treaties became a mere formality in diplomatic affairs, as heads of States sought to trumpet bilateral economic ties, especially after the publication of the Guidelines on the Treatment of FDI.<sup>123</sup>

In particular, NAFTA, signed in 1992 and in force since 1994, a treaty the Centre helped to formulate, became fundamental during this period and assisted in the transformation of the field. Once shielded from mainstream politics, ICSID became part of the focus of transnational civil society organizations and NGOs.<sup>124</sup> The first disputes under NAFTA's investment chapter, which ripened at a time when the anti-globalization awareness movement was gaining steam, contributed to a collective awakening with respect to the potential use of investor-State arbitration.<sup>125</sup> In 2001 Ralph Nader's Public Citizen published a report with an alarming title "*NAFTA Chapter 11 Investor-to-*

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<sup>122</sup> ICSID, AR/01.

<sup>123</sup> Interview with WBG officer, Thursday, March 28, 2012, Washington D.C. (Explaining that for some countries "the signing of BITs" became a "mere formality" in diplomatic affairs.)

<sup>124</sup> ICSID, AR/00.

<sup>125</sup> Thomas, *THE BATTLE IN SEATTLE: THE STORY BEHIND AND BEYOND THE WTO DEMONSTRATIONS* (2000). Also Parra, *Applicable Substantive Law in ICSID Arbitrations Initiated under Investment Treaties*, in *NEWS* (Fall 2000) p.10 (referring to concerns of "entrusting [the application of treaty standards] to investor-to-state arbitration" by NGOs.)

*State Cases: Bankrupting Democracy*<sup>126</sup> and the World Wildlife Fund co-sponsored a report entitled “*Private Rights, Public Problems*”.<sup>127</sup> In both reports, the NGOs argued that investor-State arbitration represented the bankruptcy of *public policy* and a form of *undemocratic* international law-making in the era of economic globalization.

Mainstream media soon joined the debate and in 2002 the NY Times published an article entitled “*Nafta's Powerful Little Secret*” in which investor-State arbitration was described as clandestine.<sup>128</sup> Adding insult to injury, the then newly-appointed SG, Harvard trained and former corporate and transactional lawyer Ko-Yung Tung, was quoted suggesting that transparency in the proceedings was less important than the “increased foreign investment [and] protecting investors”.<sup>129</sup>

Attacks on ICSID, investor-State arbitration, and what some perceived as the empowerment of transnational corporations via a private right of action for damages evidenced a new generation of opponents. With the expansion of the advanced general consents on the part of the States included in IITs it became more difficult for the Centre to characterize the Convention simply as *lex fori* for disputes involving quasi-private transactions and only of interest to a few. It is difficult to argue against the essentially public dimension of claims by investors seeking compensation for the Canadian government’s ban on the import and inter-provincial transportation of the fuel additive MMT (*Ethyl*),<sup>130</sup> Mexico’s denial of a permit to construct a facility for the disposal of hazardous waste (*Metalclad*),<sup>131</sup> or alleged injuries resulting from a California ban on the use or sale of the gasoline additive MTBE for environmental reasons (*Methanex*).<sup>132</sup>

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<sup>126</sup> Public Citizen, *NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy* (September 2001); Vicki Been, *Does an International ‘Regulatory Takings’ Doctrine Make Sense?* 11 N.Y.U. ENVIRON. L.J. 49 (2002).

<sup>127</sup> *Private Rights, Public Problems: A Guide to NAFTA’s Controversial Chapter on Investor Rights* (IISD & WWF, 2001).

<sup>128</sup> De Palma, *NAFTA’s Powerful Little Secret: Obscure Tribunals Settle Disputes, But Go Too Far Critics Say*, N.Y. Times, Mar. 11, 2001, 3, at 1.

<sup>129</sup> *Id.*

<sup>130</sup> *Ethyl v. Canada*, UNCITRAL (NAFTA) was settled for US \$13 million after an Award on Jurisdiction was issued on 24 June 1998, and after a domestic panel found Canada in breach of the inter-provincial Agreement on Internal Trade. See Joint Press Release, Industry Minister John Manley and Environment Minister Christine Stewart of Canada (20 July 1998).

<sup>131</sup> *Metalclad v. Mexico*, Award, (NAFTA Ch. 11. 30/8/00), 40 I.L.M. 36, 48–49 (2001) [hereinafter METALCLAD].

<sup>132</sup> *Methanex v. United States*, Award (NAFTA Ch. 11 Arb. Trib. 3/8/00) [hereinafter METHANEX].



Such criticisms challenged fundamental characteristics of the operation of investor-State arbitration. For many, ICSID symbolized how the confluence of the public and the private was being redefined by the decisions of a small group of lawyers in the shadow of national laws, without proper procedural frameworks allowing for public scrutiny and oversight. The critique stressed the public importance of the issues at stake in these claims, and questioned arguments made in the 80s that investor-State arbitration provided protection and insulation for ‘de-politicization’ and compartmentalization of economic conflicts.<sup>133</sup>

**a. “Transparency—Not Secrecy—Should be the Rule, and Not the Exception”**

While concerns over the degree of confidentiality that should apply to investor-State proceedings existed at least since *AMCO* was decided in 1985, NAFTA triggered a debate on transparency.<sup>134</sup> Ironically, as in the case of the rule of abstention of courts, the confidentiality of arbitration proceedings was also initially defended by States acting as respondents in an attempt to see their government’s reputation unaffected by investment disputes.<sup>135</sup> In *Metaclad*, for example, Mexico asked the tribunal to issue an order declaring that the proceedings were confidential after the company’s CEO had allegedly described the formal procedural steps to the company’s shareholders. The tribunal decided that unless the agreement between the parties limited publicity, each party was free to speak publicly,<sup>136</sup> because of its duty “to provide certain information about its activities to its shareholders.”<sup>137</sup> Never mind that *Metalclad* involved the regulation of a facility for the disposal of hazardous waste and raised constitutional issues in Mexico.

*Metaclad* triggered extensive commentary questioning the idea, embedded also in private commercial arbitration, that parties involved in a dispute are the sole

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<sup>133</sup> Lazar, *NAFTA Dispute Resolution: Secret Corporate Weapon?*, 1(3) 6 J. GLOBAL FIN. MARKETS 49 (2000).

<sup>134</sup> *AMCO supra* 96 at 102. (Indonesia requested a decision that claimants refrain from presenting their case outside the proceeding. The tribunal stated: “parties should refrain... from doing anything that could aggravate or exacerbate the dispute.”)

<sup>135</sup> Stevens, *Confidentiality Revisited*, NEW (Spring 2000) [hereinafter REVISITED].

<sup>136</sup> *METALCLAD supra* 143.

<sup>137</sup> *Id.*

stakeholders of investor-State arbitration.<sup>138</sup> The publication by ICSID of an article authored by Bart Legum (then an attorney at the U.S. Department of State) arguing for openness was a sign of the need for a new approach: In contemporary investor-State arbitration, transparency—not secrecy—should be the rule, and not the exception.”<sup>139</sup> The rule that ICSID should maintain a register for “all significant data concerning the institution, conduct and disposition”<sup>140</sup> of the proceedings was no longer satisfactory at a time where confidentiality as the main “benefit of arbitration” was being revisited by investor-State arbitration.<sup>141</sup>

### **b. We Shall “Adapt Regulations and Rules to Respond to Many Changing Demands”**

ICSID’s response was informed by the NAFTA experience as well as the domestic policy debates in North America. Several initiatives to entrench greater public access to information and to proceedings succeeded in easing some of the pressures on NAFTA’s investor-State arbitration process. This included an interpretive note by the NAFTA governments to confirm the absence of a presumption of confidentiality in proceedings, a process to allow for participation by non-disputing parties as *amici*, and open hearings in the arbitration proceedings.<sup>142</sup> Moreover, in the U.S. policy debate, the Trade Promotion Authority of 2002 (“TPA”) enacted by Congress mandated that subsequent investment treaty negotiations included certain safeguards in the mechanisms used to resolve disputes.<sup>143</sup> Similar objectives of the TPA were reflected in the 2004 U.S. Model BIT and the 2003 Canada’s Model FIPA.<sup>144</sup>

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<sup>138</sup> Coe & Pearce, *Arbitration Under NAFTA Chapter Eleven: Some Pragmatic Reflections Upon the First Case Filed Against Mexico*, 23 HASTINGS INT’L & COMP. L. REV. 311 (2000); Coe, *Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel Within NAFTA and the Proposed FTAA?*, 19 J. INT’L ARB. 185–207 (2002).

<sup>139</sup> Legum, *Federalism, NAFTA Chapter Eleven and the Jay Treaty of 1794*, NEWS (Spring 2001).

<sup>140</sup> Regulation 23(1) of the ICSID Administrative and Financial Regulations.

<sup>141</sup> REVISITED, *supra* 135 at p. 1.

<sup>142</sup> For a discussion see Puig & Kinnear, *NAFTA Chapter Eleven at Fifteen: Contributions to a Systemic Approach in Investment Arbitration* 24 ICSID REVIEW 225, 259-61 (2010) [Hereinafter NAFTA EVOLUTION].

<sup>143</sup> S.Amdt. 3430, 107th Cong. (2002) [hereinafter 2002TPA].

<sup>144</sup> For a discussion of innovations in US investment treaty practice see Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement*, 19:4 AM. U. INT’L L. REV. 679 (2004).

A watered-down version of these reforms would later be reflected in the amendments to the ICSID Rules adopted in 2006.<sup>145</sup> ICSID's eventual response incorporated features typical of Western judicial systems, including the publication of awards or excerpts furthering the development of international law under a deeper formalized mode. At the same time, more publicity invited more scrutinizing and boosted the interest in the Centre's hermeneutics and methods of internal legal construction.<sup>146</sup>

## **2. International Judicialization: Constraining the Regulatory Activity of Governments**

The surge in the late-nineties of new cases relying on IIT created a related wave of criticisms against the Centre. For some, the decisions of ICSID tribunals undoubtedly showed that IITs provided unprecedented and sweeping substantive protections to transnational corporations. Without proper definition of the boundaries of delegated authority, some argued, these disciplines as enforced by the arbitrators stifled the legitimate regulatory activity of national governments.<sup>147</sup>

### **a. The Malleable Boundaries of Investor-State Arbitration**

NAFTA was again at the center of the hurricane in the general discussions about the standards of protections provided in IITs and the permissible boundaries of the system. The early development of the Minimum Standard of Treatment ("MST") provision of that treaty created tensions prompted by three decisions. The cases *Metalclad*, *S.D. Myers*, and *Pope & Talbot*, wrongly suggested that MST obliged governments to assure a transparent and predictable framework for business planning and investment, and that a violation of other provisions of NAFTA would also offend the MST, which required treatment additional to the requirements of customary international law.<sup>148</sup>

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<sup>145</sup> For a detailed review of the amendments, see, Aurelia Antonietti, *The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules*, 21 ICSID REVIEW 427 (2006) [hereinafter 2006AMENDMENTS].

<sup>146</sup> Interview with WBG officer, Thursday, March 29, 2012, Washington D.C. (This reform was a "cleaning" exercise and "had no connection" with the "criticism that arose from NAFTA.") Also, Parra, RULES DEVELOPMENT *supra* 15.

<sup>147</sup> For a critique of the investment regime, see SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (2d ed. 2004).

<sup>148</sup> METALCLAD, *supra* 142 at para. 110. Pope & Talbot v. Canada, UNCITRAL (NAFTA) (Final Award, 10 April 2001, para. 30, and S.D. Myers v. Canada, UNCITRAL (Partial Award) para 310.

Pushed by civil society organizations these decisions triggered also the intervention of the trade ministers of the three Parties to NAFTA by adopting a controversial interpretive statement binding future tribunals to follow a more restrictive approach to MST.<sup>149</sup>

A similar dissatisfaction with the interpretation of provisions under IITs arose in non-NAFTA ICSID decisions.<sup>150</sup> The increased level of scrutiny combined with the expansion of investor-State arbitration to other arbitral institutions intensified the discussion on fragmentation and the role of this decentralized form of dispute settlement to amplify the inconsistency of decisions.<sup>151</sup> This issue gained notoriety in the field as a result of *Lauder/CME* arbitrations administrated by the SCC, which sparked concerns about the potential for duplicative relief and effects of contradictory decisions in deciding cases with identical facts.<sup>152</sup>

While ICSID was not at the center of this “ultimate fiasco”<sup>153</sup> in which two identical cases came to conclusions diametrically apposite, it became clear that investor-State arbitration was no longer exclusive to the organization. Therefore, the problems in finding coherence, substantive and procedural, exacerbated by the absence of a homogenous, hierarchical meta-system available to address problems derived from an increasingly fragmented field became more obvious.<sup>154</sup>

### **b. “An ICSID Appeals Facility?”**

Overwhelmed with criticism over what exactly international investment standards meant, ICSID also looked at the North-American context to find ways to address

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<sup>149</sup> NAFTA EVOLUTION AT 244-7.

<sup>150</sup> *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction (25 January 2000), at 69. *Cf. e.g., Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 February 2005); *Loewen Group, et al v. United States*, ICSID Case No. ARB(AF)/98/3 (NAFTA), Award (26 June 2003); *Salini v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 45 (July 23, 2001), reprinted in 42 I.L.M. 609 (2003).

<sup>151</sup> Bjorklund, *Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals Is Not Working?* 59 HASTINGS L.J. 241, (2007).

<sup>152</sup> *CME v. Czech Republic*, Award, UNCITRAL Arbitration (Mar. 14, 2003); *Lauder v. Czech Republic*, Award, UNCITRAL Arbitration (Sept. 3, 2001).

<sup>153</sup> Reinisch, *The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? Some Reflections From the Perspective of Investment Arbitration* in I. Buffard, J. Crawford, A. Pellet, and S. Wittich (eds.), INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION. FESTSCHRIFT IN HONOUR OF GERHARD HAFNER, 107-126, 116 Koninklijke Brill NV (2008).

<sup>154</sup> Bjorklung *supra* 151.

predictability and consistency and demands for tribunals' oversight. The TPA provided that all future agreements negotiated by the United States should attempt to include an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions.<sup>155</sup> ICSID proposed to build a similar arrangement in the 2006 reforms, modeling an appellate jurisdiction on ICSID annulment.<sup>156</sup> Parra saw this appeals process as a key part of supporting predictable decisions, especially after a similar system was shown to be useful at the WTO and praised by many legal experts. Suffice it to say here that, at the time, ICSID found it to be premature, particularly in view of the difficult technical and policy issues to implement a workable appeal mechanism in the context of a decentralized dispute settlement system.<sup>157</sup>

### **3. Retrenchment: From Public Policy to Dissemination of Knowledge**

The increase in visibility of the institution and criticism against investor-State arbitration made Shihata's idea of ICSID as a public policy organization a toxic proposition. To its critics, ICSID represented the anti-thesis of public policy, a discipline broadly associated with autochthonous decision-making and the analysis of governmental decisions based on social science, including economics, sociology, political economy, etc.

In spite of these critiques, ICSID continued advising States in the formulation of dispute settlement clauses and investment promotion laws.<sup>158</sup> Additionally, during this third stage the organization also participated in an ambitious proposal in the field of international investment law: an attempt to develop multilateral investment code that could at least limit a race of deregulation to compete vigorously to attract FDI.

The defeat of the Multilateral Agreement on Investment ("MAI") combined with the extension of the reach of other arbitral institutions, signaled the end of ICSID's audacious attempt to act as a public policy institution, and consequently, a retrenchment with respect to ICSID's involvement in the codification of a substantive

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<sup>155</sup> 2002TPA *supra* 143.

<sup>156</sup> ICSID, *Possible Improvements of the Framework for Arbitration*, (Discussion Paper, 22 October 2004), available [www.worldbank.org](http://www.worldbank.org)

<sup>157</sup> RULES DEVELOPMENT *supra* 15.

<sup>158</sup> Parra, *Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment*, 12 ICSID REVIEW 287 (1997).

body of international investment law. Moreover, it made clear that little interest existed among key stakeholders in responding to Shihata's calls for a more enlightened discussion on investment law as a legal regime supported by regulation, sensible to customs and enforced by well-functioning judiciaries.

### **a. The Defeat of the Multilateral Agreement on Investment**

The 1990s appeared to provide almost the best conditions for a multilateral agreement to take shape. By the middle of the decade, OECD inflows of FDI had been deregulated in the context of major liberalization processes like NAFTA, MERCOSUR and the EU. With the demise of the socialist bloc, the Eastern European economies were also opening up to FDI inflows.

Despite these favorable conditions and the efforts of the OECD, there was no agreement on a MAI.<sup>159</sup> The efforts of the then 29 OECD member countries, 8 developing countries (observer status), ICSID and the IMF failed to yield a positive outcome. While the trigger was the announcement of France (the host country of the meeting) to withdraw from the negotiations because of perceived concerns regarding the threat liberalization posed to its cultural industry, the issues involved were more complex and more closely related to the political costs of such an agreement and the preference for bilateral negotiations.<sup>160</sup>

Explanations for the failure of the MAI negotiations have also pointed to the lack of transparency in the negotiations.<sup>161</sup> An impression was created that this agreement was an attempt by the transnational corporations to control the authority of sovereign nations (especially the developing countries) to regulate FDI within their territory while compromising on environmental, health, and labor standards. One of the clauses that attracted huge negative publicity was the 'standstill' clause, which could have prevented

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<sup>159</sup> Negotiations on a MAI were launched at the Annual Meeting of the OECD Council in May 1995, but discontinued in April 1998. See OECD, *Multilateral Agreement on Investment*, available at <http://www.oecd.org>.

<sup>160</sup> Sykes, *supra* 114. Also Muchlinski, *The Rise and Fall of the Multilateral Agreement on Investment: Where Now?*, 34 INT'L LAW. 1033, 1045-46 (2000). Mavroidis, *All Clear on the Investment Front: A Plea for a Restatement* in THE EVOLVING INTERNATIONAL INVESTMENT REGIME-EXPECTATIONS, REALITIES, OPTIONS, Alvarez *et al.* (eds). OUP p. 98 [Hereinafter EXPECTATIONS, REALITIES, OPTIONS].

<sup>161</sup> Tieleman, *The Failure of the MAI and the Absence of a Global Public Policy Network*, (1999) available at [http://www.gppi.net/fileadmin/gppi/Tieleman\\_MAI\\_GPP\\_Network.pdf](http://www.gppi.net/fileadmin/gppi/Tieleman_MAI_GPP_Network.pdf). Also, SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW, CUP, (2009).

the introduction of some new regulatory measures for FDI, including those regarding environmental protection. This clause was seen more as an agenda of the developed countries and evidenced that Shihata's calls for a "progressive" international investment law went either unheard or ignored. It also indicated a lack of consensus among countries, some of which had always been skeptical about a MAI and had felt that this would be an attempt to control the regulation of FDI policies.

**b. Not the Only but "the Leading Center for the Resolution of Investment Disputes"**

By the end of this third stage, private arbitration facilities started administrating investment disputes, mostly relying on UNCITRAL Arbitration Rules, challenging ICSID's exclusive expertise in this field. Arbitration institutions such as the PCA, LCIA, ICC and SCC, with whom Shihata joined paths to promote their specialized services, and to develop, enlarge and share their network of experts, started accommodating investor-State arbitration. With this expansion, it became clear that a network of arbitrators (and litigators) possessed a tangible and transferable expertise in the field. While the Convention has uniquely binding enforcement provisions and ICSID's Secretariat institutional memory, many argued that ICSID was not that different from other arbitral institutions and consequently the role of the Secretariat should be limited to the "administration of disputes" like any other arbitral institution.<sup>162</sup>

With these emerging trends, in 1999 Shihata unambiguously acknowledged that ICSID was no longer the *only* institution dealing with investor-State arbitration but simply the "leader". He tried to re-cast the expertise of ICSID not as arbitration, but as a dispute settlement organization more broadly, offering expertise in other techniques like conciliation and fact-finding. Finally, his idea of a public policy institution was reconceived as a more modest goal or as an institution also "for the dissemination of knowledge on arbitration and foreign investment law."<sup>163</sup> The emergence of new arbitral institutions offering services in investor-State arbitration caught ICSID not only at a time of growth in its workload but of changes in leadership. Moreover, the increase of

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<sup>162</sup> *E.g.* Sutton, *Emilio Augustin Maffezini v Kingdom of Spain and the ICSID Secretary-General's Screening Power*, 21 ARB.INTERN'L 113, 125 (2005).

<sup>163</sup> ICSID, AR/99.

visibility of investor-State arbitration signaled the beginning of a fourth and more complicated stage as ICSID became the poster child of legal globalization.

#### **D. Pragmatism: ICSID as a “Leader in Administration of International Investment Disputes”**

Since 2003, ICSID has experienced a fourth stage in which its caseload has grown exponentially, almost exclusively due to claims involving IITs. As a testament to this trend, in 2007 ICSID registered a record number of 37 cases, more cases than in the Centre’s first 30 years combined. Moreover, a record 154 cases were active during that same fiscal year, almost half of the historical docket of the Centre. If success is to be measured in terms of number of cases, the institution is in a golden age.<sup>164</sup>

The majority of these recent cases—around one-third—have involved Latin-American countries. While in recent years Venezuela claims the title of regional repeat player, at least 44 cases feature Argentina as a respondent, perhaps validating prior concerns of abolishing the Calvo doctrine in the region.<sup>165</sup> In the fallout of Argentina’s economic crisis, aggravated investors quickly moved to seek reparation from Argentina after the first decisions confirming the jurisdiction of the tribunals were established. Investors also became more confident of the prospect of recovery after the tribunal’s award of compensation in *CMS Gas Transmission Company*, which was seen as a signal that future tribunals would take a rather critical view of Argentina’s main affirmative defense of state of necessity.<sup>166</sup> The decision was later condemned, yet not annulled, by a Committee caught between the tribunal’s incorrect doctrinal interpretations and the Convention’s deferential standard of review.<sup>167</sup>

This fourth stage is associated with the strengthening of the business of international investment adjudication. The “avalanche” of arbitration claims made law firms, primarily in traditionally arbitration-friendly locations like Washington D.C., Paris, Geneva and New York, but also in London, Brussels and Texas, more eager to

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<sup>164</sup> ICSID, AR/08.

<sup>165</sup> ICSID, *Caseload-Statistics 2011*, available <http://icsid.worldbank.org/ICSID/>

<sup>166</sup> *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Award, 44 ILM 1205, 1211.

<sup>167</sup> *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Decision on Annulment, ¶ 69 (Sept. 25, 2007).



participate in this new niche legal market.<sup>168</sup> At the same time, the firms' involvement in investor-State arbitrations helped the growth of their international commercial arbitration practices, perhaps also motivating other facilities to administer investment disputes.<sup>169</sup>

The growth of arbitration cases in ICSID and at other institutions signified the dilution of the Centre's specialization claim as well as the emergence of a body of rules relating to issues of procedure and remedies, both in cases where their constitutive instruments make provision for certain procedures and remedies, but also in cases where there are *lacunae* in their substantive rules.<sup>170</sup> The proliferation of arbitration clauses outside of ICSID became more common after the 80s, and allowed for other facilities to administrate disputes.<sup>171</sup> When measuring ICSID's success by its share of the 'market' of cases, the Centre's prospects look gloomier.

In addition to this increase in competition amongst dispute settlement facilities and the exogenous challenges faced by the Centre during this fourth stage, significant internal changes in the structure and leadership of the Secretariat affected its programmatic agenda for many years. After Ko-Yung Tung retired in 2002, Parra became a de-facto head of ICSID until the appointment of Roberto Dañino in 2004 by a departing President James Wolfensohn. However, in January 2006, Dañino resigned as ICSID's SG amidst controversy and Scott White served as Acting-SG until Ana Palacio joined the institution in June of 2006.<sup>172</sup> Rapidly thereafter Palacio resigned in April 2008 and Nassib Ziadé served as Acting-SG of ICSID until June of 2009, when the Canadian national Meg Kinnear took up leadership as the first full-time SG.<sup>173</sup>

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<sup>168</sup> *Latin America's Investment Treaty Claims Avalanche: Digging Through the Results Thus Far* hosted by the ABA International Law Fall Meeting on November 8, 2006. Also, Interview with investor-State arbitration specialist, Wednesday, March 27, 2012, Washington D.C. (Explaining how new players, firms with background in litigation, international business transactions, oil, gas and energy or international trade practices developed specialized groups seeking to gain opportunities to represent governments or investors by adding former government officials with substantial experience to enhance these teams.)

<sup>169</sup> See, Van-Harten, *A total lack of transparency. Why responsible companies and governments should avoid the revised ICC Rules in arbitrations involving states* (October 24, 2011) in [canadianlawyermag.com](http://canadianlawyermag.com) ("Based on limited data released by the ICC, there was an annual average of 69 ICC arbitrations involving a state or state entity from 2005 to 2009.")

<sup>170</sup> BROWN, *A COMMON LAW OF INTERNATIONAL ADJUDICATION*, OUP, 2007.

<sup>171</sup> See *supra* section B2(c).

<sup>172</sup> ICSID, AR/005/06/07.

<sup>173</sup> ICSID, AR/08/09).

During the early part of this period, ICSID was able to successfully adopt long overdue reforms, reflecting in part the NAFTA experience, which translated into the new 2006 Rules and Regulations.<sup>174</sup> As this section will explain, in part as a result of the 2006 reforms, another step in the direction of judicialization was accomplished. This, in turn, fostered new challenges that led to the acknowledgment on the part of the WB's leadership that ICSID should be administrated by a full-time SG, almost independently of the WB. The acknowledgement can be interpreted as a sign of the Centre's pragmatism in an attempt to effectively compete for the administration of international investment disputes and its new business oriented mission.

### **1. Procedural Efficiency: “Investors and States Might Lose Interest in ICSID”**

It is not a secret that ICSID has exhibited some difficulty in handling the exponential growth in the number of cases. At least since 2004, users of ICSID have raised complaints of ICSID as both procedurally and operatively inefficient.<sup>175</sup> Such critiques are often cast in terms of the rigidity of the ICSID arbitration system. Participants in arbitral proceedings contend that ICSID has burdensome timeframes and too many procedural steps, making the process both lengthy and costly. Legal practitioners have surmised that these issues have “encouraged a move to *ad-hoc* forms of arbitration, or to other arbitration facilities.”<sup>176</sup> Nigel Blackaby, a lawyer from Freshfields, a prominent firm involved in a number of investor-State cases before ICSID, epitomizes this perception in the following quote:

[A] large community of investors and States might lose interest in ICSID's facilities or suffer by having to incur great arbitration costs; parties may abuse the lengthy and costly proceedings as a dilatory tactic and business relationships could be severed.<sup>177</sup>

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<sup>174</sup> 2006 AMENDMENTS, *supra*, 159.

<sup>175</sup> ICSID, *Stakeholder Survey*, October 2004 available <http://icsid.worldbank.org/ICSID>. Also, Interview with WBG officer, Friday, March 30, 2012, Washington D.C. (Explaining that the organization was in such “disarray after [Parra] left that [Palacio] thought, at some point, to reorganize” the Secretariat.) This view however, was disputed by other WBG officers.

<sup>176</sup> Vis-Dunbar, *supra* 9.

<sup>177</sup> Perry, *US court refuses to set aside Argentina awards*, GLOBAL ARB.REV., June 11, 2010.

Concerns such as these also show a change in attitude among some of the Centre's actors and main beneficiaries such as foreign investors. The historical bargain of ICSID—allowing claims for compensation against States without the prerequisites of diplomatic protection or use of local remedies—is now perceived as an entitlement to “circumvent domestic courts” constrained by bureaucratic legalese used to mystify what, in the view of critics, should be a simpler process to determine compensatory damages.<sup>178</sup> When making such arguments in favor of procedural efficiency, ICSID critics often compare investor-State arbitration with traditional commercial arbitration and avoid referencing the uniquely binding enforcement provisions of ICSID or the challenges of litigating against a sovereign more generally.<sup>179</sup>

**a. “ICSID’s Financial Self-Sufficiency.”**

The preoccupations with efficiency are clear since Dañino's first year. A Harvard-trained lawyer and ex-Prime Minister of Peru with substantial experience advising transnational corporations,<sup>180</sup> Dañino announced a survey “of ICSID to identify areas of possible improvement”, promised enhanced “service delivery”, and “transparency and public access to proceedings” in the 2004 annual report.<sup>181</sup> He also pledged to promote the use of other dispute settlement techniques such as conciliation and mediation to bring efficiency to the dispute settlement process.<sup>182</sup> However, Dañino succumbed to old pressures from the WB and promised “ICSID’s financial self-sufficiency.”<sup>183</sup>

Although Dañino was ultimately responsible for the 2006 reforms (prepared by Parra), his short tenure as General-Counsel of the WB and SG of ICSID was overshadowed by personal circumstances. Moreover, the increase in cases before ICSID was clearly not matched with a similar contribution of resources. When the WB started seeing problems to grow its lending operations ‘thanks’ in part to the cheap credit and aggressive lending practices of the private financial sector (that today many regret) old

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<sup>178</sup> Remarks by Charles A. Beach, Corporate Litigation, Exxon Mobile Corporation at 6th Annual ITA-ASIL Conference: *When Arbitrations Go Bad* - 25 March 2009.

<sup>179</sup> Reinisch, *Methods of Dispute Resolution*, OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, 2008, p. 701.

<sup>180</sup> ICSID, *New Secretary General of ICSID*, NEWS (Winter 2003).

<sup>181</sup> ICSID, AR/04.

<sup>182</sup> Onwuamaegbu, *Resolution of Oil and Gas Disputes at ICSID*, NEWS (Winter 2003).

<sup>183</sup> ICSID, *New ICSID Initiatives*, NEWS (Winter 2003).

internal pressures grew to make ICSID a self-sufficient organization like MIGA, IFC or IBRD and stop subsidization.<sup>184</sup> This combination of the dramatic increase of cases and un-matched resources exacerbated ICSID's difficulties in administering cases.<sup>185</sup> Consequently, some users and arbitrators became more vocal about the need for efficient and professional case management.

[Insert figure 4 here]

Figure 4: ICSID Staff & Cases Growth (1967-2011)

The tendency on the part of ICSID's leadership to respond in a reactive manner to efficiency concerns continued for some years. For example, in 2007 the Centre acknowledged the need "to upgrade the technological means by which the Centre can achieve more efficient case management"<sup>186</sup> and "strengthen and modernize [the Centre's] operations."<sup>187</sup> By the end of 2007, the Secretariat was reorganized into staff teams, three working on case administration and a fourth on "knowledge management, publications and ICSID's institutional matters," and promised a case management system to improve case administration.<sup>188</sup> In an attempt to address critiques of inefficiency, in 2009 ICSID heralded that the "average time taken to register a case after receiving a request was reduced by over 50 percent year-on-year."<sup>189</sup> By 2010 the Centre touted operational efficiency as one of its main metrics of success. The number of proceedings registered was also loudly trumpeted as a sign of trust among key stakeholders.<sup>190</sup>

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<sup>184</sup> ICSID, *Caseload-Statistics* 2011.

<sup>185</sup> Interview with WBG officer, Friday, March 30, 2012, Washington D.C. (explaining that Dañino promise of ICSID self-sufficiency as a "mistake" that left the institutions without an argument to ask for more resources at "a very busy time.")

<sup>186</sup> ICSID, AR/07.

<sup>187</sup> ICSID, AR/08.

<sup>188</sup> Ziade, *Challenges and Prospects Facing ICSID*, EXPECTATIONS, REALITIES, OPTIONS, p. 123-4.

<sup>189</sup> *Id.*

<sup>190</sup> ICSID, AR/09.

**b. The Amendments of 2006: “New Criticisms of Process, Calls for Change”**

The 2006 amendments resulted from criticisms of process and transparency emerging from early NAFTA litigation,<sup>191</sup> and were first mooted in a Discussion Paper published by the Secretariat in 2004 raising areas of possible improvement.<sup>192</sup>

Parra observed the increasing case load and changing nature of cases and acknowledged the merits of “new criticisms of process, calls for greater efficiency and transparency –the latter particularly in view of the public importance of issues at stake in many of the new cases.”<sup>193</sup> In response, the 2006 amendments included provisions allowing non-disputing parties to attend oral hearings of ICSID cases and submit briefs to tribunals (also known as *amicus curiae* briefs), the publication of excerpts of non-public awards as well as other provisions to make decisions more accessible, and a process to deal with frivolous claims summarily.<sup>194</sup>

By means of this reform ICSID’s investor-State process acquired characteristics more similar to that of domestic courts.<sup>195</sup> Perhaps as a result of this change the intellectual control over decisions, predictability of cases, and neutrality of arbitrators has become a more salient issue, defining investor-State arbitration since 2006.<sup>196</sup>

**2. The Second Step of Judicialization: Transnational Legal Process**

Similar to Shihata’s first stage, the current stage is marked by signs of disagreements regarding the Centre’s role as a dispute settlement system. The subject of these disagreements can be organized broadly into three large issue areas: (1) *predictability*, or concerns over the uncertainty surrounding the meaning of key treaty provisions in part as a result of conflicting decisions and in part as a result of persistent issues with ICSID’s control mechanism; (2) *compliance*, or concerns over the role of domestic

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<sup>191</sup> ICSID, AR/04.

<sup>192</sup> Antonietti, *supra* 159.

<sup>193</sup> RULES DEVELOPMENT at 56.

<sup>194</sup> *Id.* Also, Brown & Puig, *The Power of ICSID Tribunals to Dismiss Proceedings Summarily: An Analysis of Rule 41(5) of the ICSID Arbitration Rules*, 10 LPICT 227 (2011).

<sup>195</sup> Kingsbury *et al*, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, in 50 YEARS OF THE NEW YORK CONVENTION: ICAA INTERNATIONAL ARBITRATION CONFERENCE 5, 5 (van den Berg ed., 2009).

<sup>196</sup> Kim, *Note, The Annulment Committee’s Role in Multiplying Inconsistency in ICSID Arbitration: The Need to Move Away from An Annulment-Based System*, 86 N.Y.U.L.REV. 242, 243 (2011).

courts in the enforcement of ICSID awards; and (3) *neutrality*, or concerns over the pool of super-elite arbitrators. These concerns result—in part—from the new expectations of investor-State arbitration, and at some level of generality, resemble a reverberation of the ample commentary and criticism on the Centre’s functions in the 80s.

**a. Predictability: “Annulment Remains an Exceptional Remedy”**

One of the most dramatic protests against ICSID since 2006 came from investors disappointed with the outcome of cases involving awards against Argentina, which after years of litigation, were annulled by different Committees.<sup>197</sup> The decisions in *Sempra & Enron*, according to the counsel for these investors, reflect the way in which the Committees abused their mandates under the ICSID Convention. Against this background, practitioners in the field of investor-State arbitration have defended the use of alternatives to ICSID that provide greater finality of awards in light of the “interferences” of ICSID’s Committees, which is a feature specific to the Centre.<sup>198</sup>

In response to this criticism the Centre has maintained that only six decisions have annulled the award in full *i.e.*, *Klöckner*, *Amco*, *Mitchell*, *MHS*, *Enron & Sempra* out of a total of 11 decision annulling awards. Without ignoring the possibility that the importance of the decisions may lie also in their precedential value, the leadership has also publicly stated that “as was intended by the drafters of the ICSID Convention annulment remains an exceptional remedy, and is not simply a *de novo* review of the original award.”<sup>199</sup> In addition to the persistent problems over the annulment procedure the uncertainty surrounding the meaning of key treaty provisions continues to be problematic. In an attempt to shelve these arguments, ICSID has distanced itself from the inconsistencies of decisions by arguing that such is the job of the arbitrators and there is little the Centre can do, pointing to the feedback received prior to 2006 against the creation of an appeal mechanism facility.<sup>200</sup>

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<sup>197</sup> *Sempra v Argentina, Decision on Annulment*, ICSID Case No ARB/02/16; IIC 438 (2010). *Enron et al. v. Argentine*, ICSID Case No. ARB/01/3, Decision on Annulment (30 June 2010).

<sup>198</sup> Letter from Sempra and Enron Counsel to ICSID Secretariat, Summer 2010, (On file with author).

<sup>199</sup> KINNEAR, *supra* 1. *Remarks by Kinnear in SEVENTH ANNUAL SEMINAR ON INTERNATIONAL COMMERCIAL ARBITRATION: HOW TO HANDLE COMPETITION ISSUES IN AN INTERNATIONAL COMMERCIAL ARBITRATION*, October 13, 2010.

<sup>200</sup> Ziade, *Challenges and Prospects Facing ICSID*, EXPECTATIONS, REALITIES, OPTIONS, p. 124.

The current position of the organization also reflects unsuccessful attempts to foster a conversation and modernize the role for the Secretariat in response to these new pressures for coherence. Indeed, Nassib Ziade, a Cambridge trained-lawyer, dual Lebanese and Chilean national and the former Executive Secretary of the WB Administrative Tribunal, was at the forefront of this battle during his short tenure as Chief Counsel and, after the departure of Ana Palacio, Acting-SG.<sup>201</sup> After boosting the budget and instituting the necessary accounting and financial reporting controls within the institution following a revealing internal auditing process,<sup>202</sup> Ziade embarked on a public campaign to increase support for the Secretariat providing more than mere administrative and procedural guidance to ICSID Tribunals.<sup>203</sup> He contended that modern Secretariats had the potential to assist tribunals in the substance of decisions, and thereby respond to demands for intellectual coherence, finality and doctrinal precision.<sup>204</sup> Ultimately, Ziade failed to obtain support for steering ICSID's Secretariat in a direction that would have meant a larger role in assisting in the techniques of rendering decisions.<sup>205</sup>

**b. Compliance: "Award Should be Complied With as Final Judgment of the Final Court"**

To some degree, the problem with the enforcement of awards echoes concerns that led to a discussion on the rule of abstention in the 80s. The current debate was triggered by Argentina's decision to rely on different tactics to delay (or ignore) the payment of its pecuniary obligations resulting from a number of awards.<sup>206</sup> In this process, Argentina departed from the traditional understanding of the provisions that govern the recognition and enforcement of ICSID awards. For Argentina, foreign investors seeking

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<sup>201</sup> ICSID, *Ana Palacio Leaves ICSID*, 25 NEWS (SUMMER 2008).

<sup>202</sup> ICSID, AR/08.

<sup>203</sup> Ziade, *Achieving Efficiency in Arbitration: The Role of the Institutions*, 25 NEWS (Winter 2008).

<sup>204</sup> Interview with former WBG officer, Friday, March 30, 2012, Washington D.C.

<sup>205</sup> For a discussion see *UNCITRAL Notes on Organizing Arbitral Proceedings*, U.N. COMM'N ON INT'L TRADE LAW, U.N.GAOR Doc. A/51/17 (1996). Also, Stephen M. Schwebel, *Attainments of Eduardo Valencia-Ospina as Deputy Registrar and Registrar of the International Court of Justice*, LEIDEN J. INT'L L., 13, pp 341-342 (noting that secretariats "are often called upon for advice in the techniques of [the rendering of decisions].")

<sup>206</sup> *Diplomatic Exchange between Secretary Geithner, Ambassador Chiaradia and Texas Congressman Culberson* available <http://www.embassyofargentina.us>.

the payment of ICSID awards should expect to be treated like creditors of final local judgments, even if this entails having to comply with certain local procedures.<sup>207</sup> While the doctrinal validity of this interpretation of the Convention is debatable, the principles underneath Argentina's interpretation are frequently invoked by other nations.<sup>208</sup>

Argentina's bravado has shown that ICSID and the WB have little power to compel payment of awards when faced with States unwilling or unable to pay an award. Within the WB, this issue is mildly regulated by an operation policy that may force the IO to stop new loans to a member country when a dispute over default, expropriation, or governmental breach of contract comes to the attention of the Bank.<sup>209</sup> On the other hand, the Bank has an incentive to lend, and indeed measures its own effectiveness by using lending as its main indicator. This misalignment of incentives has forced the United States (the state of nationality of many investors affected by Argentina's position) to make use of a diplomatically-unappealing veto power in international financial institutions to prevent certain loans to Argentina as well as suspending trade benefits.<sup>210</sup> Sadly for the Centre, this issue has shown that the "automatic enforcement" of ICSID awards, considered the main advantage of the Convention compared to non-ICSID awards "is [now] hard to gauge".<sup>211</sup>

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<sup>207</sup> Bottini, *Recognition and enforcement of ICSID awards*, TDM 1 (2009), [www.transnational-dispute-management.com](http://www.transnational-dispute-management.com). Also, *Statement of the Government of Argentina, The 2001/2002 Crisis: Impact on Public Utilities Operators* available at <http://www.embassyofargentina.us/v2011/files/sitiowebciadiv8en.pdf>

<sup>208</sup> Gov't, Dep't of Foreign Aff. & Trade, *Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity* 14 (Apr. 2011), (Australia's government rejected BITs conferring "greater legal rights on foreign businesses than those available to domestic businesses.")

<sup>209</sup> World Bank OP 7.40 (and related BP 7.40), Disputes Over Defaults on External Debt, Expropriation and Breach of Contract, [www.worldbank.org](http://www.worldbank.org).

<sup>210</sup> Mercopress, *US will vote against loans to Argentina in World Bank and IDB*, September 29, 2011, available at <http://en.mercopress.com/2011/09/29/us-will-vote-against-loans-to-argentina-in-world-bank-and-idb>. Interview with WBG officer, Thursday, March 29, 2012, Washington D.C. (explaining "doubts" that the Latin-American group of the Bank would ever agree to stop lending to Argentina.) Also, Alexandrov *et al*, *United States suspends Argentina's preferential trade status for failure to pay ICSID arbitral awards*, March 30 2012, available at <http://www.lexology.com/>.

<sup>211</sup> Bernardini, *ICSID versus Non-ICSID Investment Treaty Arbitration* available [www.arbitration-icca.org/media/0/12970223709030/bernardini\\_icsid-vs-non-icsid-investent.pdf](http://www.arbitration-icca.org/media/0/12970223709030/bernardini_icsid-vs-non-icsid-investent.pdf) (According to professor Bernardini, the limited review and full compliance of the awards, in the past considered an advantage of the system, are no longer so evident. Thus, compared to the enforcement of non-ICSID awards, ICSID awards are losing their attractiveness.)



ICSID has reacted albeit timidly by following-up and requesting the cooperation of the parties when a clear indication exists that a party has not paid.<sup>212</sup> In the meeting of the organization's General Council in October of 2010, the SG asserted that an ICSID award should be complied with as "if it were a final judgment of the final court in that State".<sup>213</sup> It is unclear however, if these actions have fostered confidence among users as there is no mechanism to verify the payment of final awards and ICSID itself relies only in anecdotal evidence.<sup>214</sup>

**c. Neutrality: "Commitment to Diversity [and] Conflict-of-Interest Avoidance"**

The push towards a judicial-like system of international investment disputes has inevitably collided with the party-appointed aspect of arbitration as administered by the Centre, as well as the size of the pool of experts. While concerns over the potential consequences of an elite community of "grand-old-men" has been discussed since the classic study by Professors Dezalay & Garth,<sup>215</sup> this issue came to a dramatic point with the Additional Opinion rendered in *Vivendi* by Professor J. H. Dalhuisen in 2009.<sup>216</sup> Dalhuisen accused ICSID's Secretariat of attempting to interfere with the final text of the decision in an Annulment case where the main issue was whether Professor Kaufmann-Kohler should have disclosed an alleged conflict of interest. The case conveys how the choice of arbitral institution may carry policy implications for States and how difficult is to verify the independence and impartiality of the processes even in an IO that publishes most of its final decisions.<sup>217</sup> Infuriated by the implications of Dalhuisen's contentions, Argentina lodged a complaint against ICSID before the General Councils meeting.<sup>218</sup>

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<sup>212</sup> KINNEAR, *supra* note 1.

<sup>213</sup> Meeting of ICSID General Council dated October 8th, 2010.

<sup>214</sup> Interview with WBG officer, Thursday, March 29, 2012, Washington D.C. (Reporting on the lack of a "verification" mechanism as a problem.)

<sup>215</sup> YVES DEZALEY & BRYANT GARTH, *DEALING IN VIRTUE* 54 (1996).

<sup>216</sup> Additional Opinion by Professor J. H. Dalhuisen, *Compañía de Aguas del Aconquija SA et al v Argentina* (ICSID Case No. ARB/97/3 Annulment Proceeding) (2009).

<sup>217</sup> Van-Harten, *Policy Linkages of Investor-State Dispute Settlement*, 82 TRADE HOT TOPICS February 2011 available [www.thecommonwealth.org/files/235737/FileName/TradeHotTopics82.pdf](http://www.thecommonwealth.org/files/235737/FileName/TradeHotTopics82.pdf)

<sup>218</sup> Perry, *Argentina to lodge complaint against ICSID*, GLOBAL ARBITRATION REVIEW, October 8, 2010.

Faced with increasing public disapproval on this issue, ICSID's management joined the campaign discussing ethical issues in international courts and tribunals lead by reputable scholars like Professor Philip Sands.<sup>219</sup> However, the failure to issue specific guidelines to prevent or limit conflicts in investor-State cases make Ziade's words in the 2008 annual review seem perfunctory:

In making the appointments, the Centre continued its commitment to diversity, conflict-of-interest avoidance and ensuring the availability of appointees to participate in an efficient case- handling process.<sup>220</sup>

### **3. Delinking ICSID and the Development Mission: Secretary-General A “Full-Time Job”**

Meg Kinnear, a former Chief of the Trade Law Bureau of Canada was elected SG of ICSID in 2009, two years after Robert Zoellick, also a Harvard trained lawyer, became President.<sup>221</sup> Zoellick, a former U.S. Trade Representative (“USTR”) and Goldman Sachs Vice-president, had the unenviable challenge of leading the WB during the biggest systemic crisis since the great depression.<sup>222</sup>

Kinnear joined ICSID amidst enormous challenges: operational shortcomings continued, budgetary constraints kept biting, concerns over the predictability of the system increased and Latin-American defectors had begun to withdraw from ICSID (*i.e.*, Bolivia, Ecuador) or threaten to leave (*i.e.*, Venezuela, Nicaragua, Argentina) to create a regional facility.<sup>223</sup> Moreover, traditional problems such as the limited pool of arbitrators in an increasingly scrutinized field, the lack of diversity and gender parity in the arbitrators' pool, the increasingly rapid revolving door between counsels, arbitrators and government and institution's officials, and a general dissatisfaction with investor-

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<sup>219</sup> Sands, *Conflict and conflicts in investment treaty arbitration: Ethical standards for counsel* in EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION, (Brown & Miles eds), CUP (2010). Ziade, *How Many Hats Can a Player Wear: Arbitrator, Counsel and Expert?* 24 ICSID REVIEW (2009), p. 49-65; Bishop & Stevens, *The Compelling Need for a Code of Ethics in International Arbitration: Transparency, Integrity and Legitimacy* at <http://www.josemigueljudice-arbitration.com>

<sup>220</sup> ICSID, AR/08.

<sup>221</sup> ICSID, *Meg Kinnear Elected ICSID Secretary-General*, 26 NEWS (2009).

<sup>222</sup> ICSID, *New Chairman of the Administrative Council*, 24 NEWS (2007). Also KINNEAR (“Mr. Zoellick had been the USTR when we'd been working on the Notes of Interpretation I'd been working on that project for the Canadian delegation”).

<sup>223</sup> Vincentelli, *The Uncertain Future of ICSID in Latin America* available [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1348016](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1348016).

State arbitration among civil society organizations remained. Acknowledging the challenges, Kinnear publicly confirmed finding many of the criticisms “thoughtful”, and added that ICSID should “listen carefully” and “consider concrete responses to [valid] criticisms”.<sup>224</sup>

From an institutional perspective, Kinnear’s appointment as first full-time SG constituted a recognition of the new realities: not only was it clear the challenges required the full time attention of an experienced public servant and outsider to the Bank, but showed how distant the goals of ICSID are from the development mission of the WB. In fact, the separation cemented what was the result of a slow process of disinterest on the part of the WB in truly understanding international economic conflict resolution and its role in development. The process had been developing gradually since Shihata retired, which caused a “collective trauma” among the Legal-Vice-presidency.<sup>225</sup> It was exacerbated by a top-down culture prominent in an institution with limited coordinating structures and stymied by what some consider a timid atmosphere where failure is hidden and success exaggerated.<sup>226</sup> Indeed, by the time Kinnear was appointed, she:

[did not] think that the relationship has changed or that there [was] any prejudice from this position being separate.... ICSID is still so different and distinct from the rest of the Bank that I don’t think it’s prejudiced in terms of the most recent events.<sup>227</sup>

Kinnear’s perspective also reflects the paradoxical evolution of the Centre. Currently, ICSID presents itself as a “not for profit institution that competes” with other for profit dispute settlement facilities; as an institution embedded in an IO but managed as a “business” that should not be “operating at a loss”; as part of an important IO that imposes bureaucratic weaknesses (*i.e.*, procurement procedures and rigid employment

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<sup>224</sup> Vis-Dunbar, *supra* 9.

<sup>225</sup> Interview with WBG officer, Friday, March 30, 2012, Washington D.C. (Reporting a “collective trauma” after Shihata retired. His leadership style was described as “controlling and hierarchical” and decision-making process where “centralized”).

<sup>226</sup> Goldin (former WB vice-president), *The World Bank is Flirting with Irrelevance*, *Financial Times*, March 5, 2012.

<sup>227</sup> KINNEAR *supra* 1.

rules) but enhances the ability to provide a service more transparently; and, as one of five organizations of the WB that does not work with any other units of the organization.<sup>228</sup> The role of the organization is hard to square with most public IOs in the world.<sup>229</sup>

What is more evident is that Shihata's grand vision of an institution working within the Bank's development mission has clearly evolved as ICSID has limited its direct participation in the complex interplay between commercial structures and the public interest. An aspect of cynicism is evident in the Centre's convenient reverberation of the following un-nuanced orthodoxy:

...The flow of private investment capital remains central to global economic development, and the availability of effective and independent dispute resolution at ICSID is one very important way in which such flows can be encouraged. ICSID arbitrators and conciliators play a fundamental role in this process...<sup>230</sup>

In this most recent stage, ICSID has become a facility to enable a private right of action against governments, and an organization whose success is measured almost exclusively in terms of the rise of number of disputes and metrics for operational efficiency, a measure of success openly rejected in the past.<sup>231</sup> Due to many factors that impacted its institutional development, ICSID is for now another "international arbitration institution in the field of investor-State dispute settlement".<sup>232</sup> This view can be summarized in the following quote of Ms. Kinnear:

[ICSID's] mission remains to provide facility users with expert, timely, cost-effective, and independent dispute settlement. [ICSID's] priority is to enhance service delivery, [...] maintaining ICSID's place as the leader in administration of international investment disputes.<sup>233</sup>

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<sup>228</sup> *Id.*

<sup>229</sup> Interview with investor-State arbitration expert, Wednesday, March 28, 2012, Washington D.C. (explaining that while ICSID is a "public international organization" its role should be like "any other arbitration institution").

<sup>230</sup> ICSID, AR/08.

<sup>231</sup> *E.g.*, ICSID AR/73/76/83/84.

<sup>232</sup> ICSID, AR/09.

<sup>233</sup> ICSID, AR/10.

### **III. Conclusion**

This history of ICSID's institutional development contains insights for international legal scholars and for social scientists. The concluding section proceeds as follows. Part I emphasizes the role of ICSID in the development of international investment law. Part II assesses the long-term and power-transferring dynamics of ICSID. And Part III briefly discusses how our understanding of IOs can be improved in light of the history presented here.

#### **A. ICSID and the Development of International Investment Law**

The 1965 ICSID Convention was first promoted as a minimalistic intervention; an opt-in system or *lex fori* for arbitration of investment disputes. Time has proven the deep reach of the Convention, as well as ICSID's status as not simply another arbitration facility. In fact, the Convention gave origins to a constantly evolving IO specialized in international investment dispute settlement, and enabled the expansion of investor-State arbitration. Once well established, ICSID cemented the promotion of a particular understanding of the role of FDI in national economic development, a vision of international economic cooperation and an idea of the 'rule of law' now implanted in international investment law.

Securing this place in the global political order has required strategic choices and self-promotion, adaptations to respond to external pressures (including changes in the economic and political landscape) and internal initiatives (from the SGs and WB officials) to push the organization in new directions. Throughout the processes of promotion, innovation and adaptation, three ideas have permeated ICSID's development. These ideas have been used either openly to justify the very existence and main activities of the organization or implicitly to establish the evaluative criteria for the assessment of the organization. The three ideas reflect the ways in which the WB problematized international economic conflicts involving FDI, embedding a preference for a kind of expertise, a format of interaction among narrowly defined stakeholders of FDI, and the definition of the legitimate channels and legal spaces to re-introduce politics in a politically-charged social order. The three ideas have been through intense

and cyclical periods of scripting, contestation, and reinterpretation, but ultimately have impacted fundamentally the development of international investment law.<sup>234</sup>

First, the idea of *specialization* has served to justify ICSID as a forum for a type of dispute settlement process and a preference for a particular expertise to resolve these economic conflicts. Second, the idea of *de-politicization* has served to consolidate the investor-State mode in international investment dispute settlement, investors and host States as the primary stakeholders of the dispute process, and ICSID as the preferred venue for the resolution of such disputes. Third, once well established, ICSID quickly enlarged its authority by promoting the WB's particular vision of the role of law and conflict resolution as a means for *economic development*. In this sense, ICSID represents an institution, a mode of interaction in dispute settlement and an idea of cooperation for development.

With constantly changing economic and political landscapes and with little empirical evidence of how these three foundational ideas operate in practice (despite the strong conceptual case for all of them), the role of the organization has undergone cyclical criticism that cuts to its core. For example, the idea of specialization has been challenged by other dispute settlement organizations claiming to be capable of conducting similar processes more effectively, by local judges reclaiming expertise in the original contexts where these conflicts arise, and by the changing demands of expertise ranging from private business to public policy disputes. Moreover, the investor-State mode has been challenged by demands for transparency, calls for the participation of other stakeholders and in general the constant judicialization of the arbitration process, slowly transforming investor-State arbitration into a broader investor-Stakeholder process. Finally, the legal conceptions advanced by ICSID have been challenged by different analyses (resulting in part from controversial cases) showing how actual democratic choices are overlooked and the regulatory space of States diminished by attempts to deter actions that may give rise to ICSID proceedings. Such dynamics also affects the capacity of governments to act in the public interest by way of innovative policy-making in response to changing social, economic, and environmental conditions.

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<sup>234</sup> Puig, *Recasting ICSID's Legitimacy Debate: Towards a Goal-Based Empirical Agenda*, (forthcoming 36 FILJ 2012).

The constantly changing economic and political landscapes, and the resulting changes in demands and internal pressures within the organization may explain also the transformations in the criteria used by ICSID to measure its own success. While different indicators have been advanced historically for this particular purpose, including membership of the organization, the participation in the proceedings by States, the proportion of settlements by disputants, or the global trends of FDI, the institution currently seems fixated on proclaiming the growing number of disputes as a main marker of its success. For one, this justification shows a deep contraction of authority as a means to revitalize the IO. However, this pragmatism is also at odds with the historical discourse used to advance the goals of the organization. Many would ask why this metric for success is appropriate for a process where host States (mainly developing) are facing investors before elite international arbitrators? The answer is not immediately evident, though many would argue that this pragmatism is due in large part to ICSID's excessive preoccupation with competition from other facilities to the detriment of a more meaningful engagement with the discourse around international investment law and its historically claimed role in economic development.

What this account confirms is that ICSID's role has not been limited to enhancing different methods of international investment dispute settlement. ICSID was designed to formalize FDI protection, and establish a mechanism for enforcement of such commitments that would deter opportunistic and rapacious behavior on the part of governments against foreigner investors. However, ICSID has also had a major role in the development of modern international investment law, which is not limited to the case law of its arbitration process, but extends to the framing of conflicts over FDI, the promotion of normative ideas for dealing with these conflicts, the characterization of short and long-term goals of the dispute settlement process and the definition of the relevant stakeholders involved.

## **B. ICSID and Long-Term Institutional Dynamics**

Two interwoven processes explain ICSID's long-term institutional development: top-down transnational institution building and bottom-up process of judicialization. Each involves specific and distinct power-transferring dynamics.

## **1. Top-Down Process: Transnational Institution Building**

ICSID's development certainly represents transnational institution building where rules for protection for foreign investors were progressively structured and stabilized in an international space. In this rather conventional account of globalization, the power-transferring dynamic is a familiar one: the expansion of authority by international actors has come at the expense of domestic actors, particularly state courts' legal and political autonomy.<sup>235</sup> Over time, using the WB's agenda-setting powers, infrastructure, and economic resources, ICSID relied on three ideas to justify the delegation of authority to the IO (*i.e.*, specialization, de-politicization and economic development) and inflicted subtle, indirect but permanent pressures on the authority of domestic courts (*e.g.*, demanding expertise, questioning neutrality, and promoting abstention).<sup>236</sup> The Centre has achieved the institutionalization of previously contested rules, a relatively functional system for its enforcement, as well as the formation of a transnational network of experts not necessarily associated with any particular national identity.

Looking at ICSID's development only through this lens may leave us with the false idea that the resistance was ineffectual at best and counterproductive at worst. For example, the Arab and South-American countries' attempts to create regional competing institutions had gone nowhere; the Latin-American States initially opposed to ICSID eventually surrendered to the idea of de-politicization that eroded the regionally unifying Calvo doctrine; the defeat of the MAI created a fragmented field that encouraged a race of deregulation to compete to attract FDI; and weak domestic judiciaries in developing (and some developed) countries were surpassed by the internationalization, excluding them from a new source of politics. Under this view, ICSID is simply the transmission belt of a regime that privileges disassociation from domestic law in the process of stabilizing a heavily contested field of law privileged by capital-exporting countries and multinational corporations. Lawyers and neo-classical economists in the North and the South, NGOs, UNCTAD, U.S. and European

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<sup>235</sup> See Santos, *Law, Politics, and the Subaltern in Counter-Hegemonic Globalization*, in RODRÍGUEZ-GARAVITO AND DE SOUSA (EDS.), *LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY*, CUP, (2005), pp. 1-26.

<sup>236</sup> See *supra* at 2(B).



institutions and foundations (*e.g.*, ASIL, AAA, LCIA and ICC), state officials in NAFTA region, and transnational legal and economic networks have all interacted to promote the value of ICSID, its legal and economic assumptions and its formal legal regime.

## **2. Bottom-Up Process: Judicialization as Equilibrium**

The bottom-up process, associated with investor-State arbitration as a dominant element in ICSID's institutional development and international investment law as fundamental by-product, evidences the value of legal processes and law-centered strategies to affect and change IOs for global governance. In this sense, the history of ICSID highlights the judicialization of the international investment dispute settlement process that has resulted in the recurrent and oft-successful contestation of an institution purposely created to disconnect the law from its politics. In this more nuanced account of this source of globalization, the power-transferring dynamic has resulted in the empowerment of a relatively unconstrained group of international arbitration professionals. It also highlights the growing acceptance of investor-State arbitration as method to resolve conflicts over the treatment of FDI and the availability of law-centered strategies as a way of reconnecting law and politics, whether by actors interested in resisting or benefiting from the processes and impacts of globalization.

Several examples exist of how different stakeholders have supported this process of judicialization, affecting ICSID's long-term development. For example, 'nationalistic' regimes like Venezuela and Ecuador can reclaim national resources at a fraction of the cost and, at the same time, insulate themselves from diplomatic pressures by supporting international arbitration. Meanwhile, grassroots movements and civil society organizations validate the use of arbitration and denounce its less legalized alternatives—conciliation and mediation and resulting out-of-court settlements—as insufficiently transparent. Moreover, the support of transparency and third-party participation in the arbitration process by, for example, NGOs and NAFTA countries not only helps the advancement of counter-hegemonic legal discourse against the traditional status of the State and investors as the sole actors in processes of construction and enforcement of international investment law, but also contributes in the judicialization trend by increasing the demands for correctness, use of balancing approaches and consistency. These new demands, at the same time, serve as a reminder of the broader

stakeholders of the process of FDI and are used by States on opposite sides of the political spectrum.<sup>237</sup>

### **3. Some Resulting Recommendations**

Through this lens, the assessment of ICSID becomes more complex than either the facile critique of ICSID as “imperialist” tool or complacent assessments of success based on the global growth of FDI or the number of cases administrated.<sup>238</sup> Examining these institutional dynamics also opens possible space for agreement among commentators on areas that the organization’s leadership would be wise to address, such as the reform of Rules and Regulations, internal working methods and academic and doctrinal engagement. Indeed, ICSID’s second stage in the mid-80s, when the organization dealt with distrust on the part of Latin-American countries, competition for authority by domestic courts, and disparate standards applied by Committees in the review of arbitral awards, offers guidance on possible forms for such efforts. The processes and power-transferring dynamics described above suggest three general lines of exploration.

First, a clear framework for addressing ethical conduct of professionals involved in ICSID proceedings seems to be increasingly necessary. The growth in proceedings has not corresponded with a proportionate increase in the number of arbitrators in ICSID. Around 350 arbitrators have sat on similar number of tribunals (387 until 2011) and repeat appointments are very common. Furthermore, the majority (286 arbitrators) have also acted as counsel for investors in at least one proceeding and many testified as experts in other proceedings.<sup>239</sup> This close-knit network of lawyers has increased also the revolving door between counsels, arbitrators and government and institution officials.

By embracing transparency as its main asset ICSID could stay ahead of other dispute settlement facilities. A framework for addressing ethical conduct should be welcomed by all States, especially those that have made claims of unethical behavior by arbitrators

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<sup>237</sup> Argentina has framed an effective contestation and deflected criticisms for not paying arbitration awards by citing the inequality of treating similar cases in different ways, while the United States has argued for an appeals system that improves correctness and control over outcomes.

<sup>238</sup> Vyas, *Venezuela's Chavez: Won't Accept Rulings By ICSID Court*, *Wall Street Journal*, (Jan. 8, 2012) available <http://online.wsj.com/article/BT-CO-20120108-703460.html>.

<sup>239</sup> Waibel et al., *Are Arbitrators Political?* (draft, on file with author) (forthcoming).

in proceedings, as well as arbitration users who run the risk of truncated or otherwise irregular proceedings due to insufficient assessments of ethical conflicts. The institution could reestablish a healthy balance of power between the IO and the arbitration professionals and increase user confidence by enacting measures designed to increase pressures to appoint decision-makers without probable conflicts and result in the eventual expansion and diversification of the network of arbitrators.

Second, ICSID could re-adopt the system for the appointment of Committees that requires prior experience of at least one of the members. As discussed, part of user dissatisfaction with ICSID derives from Committees deciding requests in an inconsistent manner and taking a broad view of their powers, arguably blurring the line between annulment and appeal.<sup>240</sup> By adopting a system of continuity, ICSID could further increase user confidence. Moreover, ICSID could complement this system by requiring that once appointed, Committee members refrain from serving as arbitrators in subsequent cases during the term of their appointment. Such measures would calibrate the process of judicialization in a manner that promotes both stability as well as the legitimacy of the review process.

Third, clarifying the provisions in the Convention addressing the automatic enforcement of awards would reestablish trust in the main comparative advantage associated with the ICSID system. Argentina's defiant interpretation of Article 53 has undermined years of efforts towards stabilization and transnational institutional building. While Argentina's approach is disruptive, analyzing its actions in an historical context also shows that attempts to reclaim authority by national authorities are not unprecedented. As in the past, ICSID should actively promote the abstention of courts as essential to the proper implementation of the Convention, as well as clarify the controversial provisions. Such clarification could be accomplished through a background paper, an action by the Administrative Council of the kind proposed by Shihata to clarify the exceptional nature of the annulment proceedings or, more dramatically, a request for an Advisory Opinion to the ICJ by the WB.

The institutional actions described in this section may go a long way toward remedying the main problems that have plagued ICSID's most recent period. They do

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<sup>240</sup> Schreuer, *From ICSID Annulment to Appeal, Half Way Down the Slippery Slope*, 10 LPICT (2011).

not, however, address all the problems, including fundamental ones such as the lack of a monitoring system for compliance of awards or a standardized system to obtain feedback from litigants. Yet, these actions have the unique advantage of combining high levels of institutional discretion and past experience, making them more attainable to address the problems associated with the long-term institutional dynamics.

### **C. ICSID and IOs in Complicated Political Environments**

ICSID's history evidences four critical factors that drive how IOs implement their legal mandates and evolve over time: (1) early political choices by leaders seeking to increase the global relevance of the organization; (2) adaptation to the preferences of dominant stakeholders; (3) resource constraints imposed by principals; and (4) the structure of the organization itself.

This Article shows a now-forgotten period of innovation led by a first generation of ICSID officials who expanded the role of international law as a framework for international investment disputes by praising the flexibility of the Convention, layering the system with the Additional Facility and carefully navigating controversial features of ICSID's constituent instrument. Their success was followed by that of Shihata's, whose agenda-setting and issue-framing strategy further expanded the reach of the organization as one for institutionalizing inter-State relations. By emphasizing the paradigm-shifting nature of the Soviet collapse, Shihata used the occasion to propel ICSID beyond its infancy, enlarging its authority with the promotion of ICSID and IIA as a means for economic development. Though these early choices cannot be detached from their political goals of stabilizing a contested social order and promoting specific legal ideas, they were first and foremost motivated by the immediate goals of ensuring the survival of ICSID and increasing the global relevance of the WB.

ICSID's history cannot be told without including the role of dominant stakeholders such as lawyers involved in investor-State arbitration, arbitrators, U.S. and European institutions (*e.g.*, ASIL, AAA, LCIA and ICC), and government officials in the NAFTA region. These actors have been integral to the institution's development, either because they had more at stake with the changes of the institution or were effective in impacting the process of transformation. ICSID's interaction with these actors has resulted in transformations that are a product of a blend of soft law and reforms to secondary

instruments (Rules and Regulations), changes in working methods, evaluative criteria and institutional priorities, academic engagement and organizational linkages. Revealed is the flexibility built into the ICSID system, and how dominant stakeholders use their awareness of the legal background of an institution when adapting to new conditions.

Also revealed by ICSID's history are both the beneficial and troublesome aspects of the organization's structure, including the method of financing its operations. In part thanks to its proximity to the WB, ICSID survived its early years and constructed a credible narrative around the need for international investment protection that led to ICSID's eventual expansion of authority through the advancement of generalized forms of consent to ICSID and the promotion of the Guidelines on the Treatment of FDI. However, design features also contributed fundamentally to ICSID's long-term development, in particular to its eventual contraction of authority. For example, the decentralized and semi-structured adjudicatory dispute settlement process that authorize arbitrators to serve as judges of their own competence and decide on any question of procedure that has not been covered by the Convention or the Arbitration Rules, enabling a trend of judicialization; a detached Administrative Council composed of finance ministers who may not have always fully realized the role of ICSID and its relationship with a multilateral development bank and a Secretariat in charge of the day-to-day actions historically composed of lawyers, fostering a gradual divorce between ICSID and the WB; and, the resource constraints imposed by reducing subsidization, forcing ICSID to adapt by devoting its limited and at points modest resources to fulfill its most basic functions. This vignette in the organization's history serves as a case study of the conditions from which change emanates in IOs and how the decisions adopted to face immediate challenges are also a product of the available choices enabled by the structure of the organization.

Finally, ICSID's institutional development expands our understanding of the ways in which institutional settings have distributive impacts. While the influence of institutions enjoys a certain degree of complexity and fluidity that too often escapes the analysis of legal commentators, this study demonstrates how IOs can serve as spaces to use and re-introduce politics. The difficulty remains in understanding the direction of these distributional impacts, in part because of how both actors interests and legal

forms evolve. As different interpretations accumulate, the lines between winners and losers can be blurred, giving rise to new strategies, coalitions and opportunities for effective contestation and gradual reforms of institutions. In this sense, an analysis of the investment treaty field without a clear understanding of the institutional setting and conditions in which it developed and evolved will surely render limited possibilities for effective reform. Such analyses tend to miss the specific institutional ecologies, *i.e.*, the long-term processes, power dynamics and social, economic and political conditions that influence the diversity of institutional forms.<sup>241</sup> In this sense the ability to influence institutional ecologies by unleashing the use of legal forms is one of the main values and perils of formalization of transnational social orders.<sup>242</sup>

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<sup>241</sup> BAUM, .J., & SINGH, J. V., *EVOLUTIONARY DYNAMICS OF ORGANIZATIONS*, OUP, (1994).

<sup>242</sup> Shaffer, *Transnational Legal Process and State Change*. *LAW & SOCIAL INQUIRY* 37: 229 (2012).

