

2013

The Protection of Foreign Direct Investments in Developing and Emerging Markets Through the Instrumentality of Arbitration: Fair Game?

Florence Shu-Acquaye
Nova Southeastern University - Shepard Broad College of Law

Follow this and additional works at: https://nsuworks.nova.edu/law_facarticles



Part of the [Antitrust and Trade Regulation Commons](#), and the [International Trade Law Commons](#)

NSUWorks Citation

Florence Shu-Acquaye, *The Protection of Foreign Direct Investments in Developing and Emerging Markets Through the Instrumentality of Arbitration: Fair Game?*, 9 *FLA. A & M U.L. REV.* 27 (2013), Available at: https://nsuworks.nova.edu/law_facarticles/364

This Article is brought to you for free and open access by the Shepard Broad College of Law at NSUWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of NSUWorks. For more information, please contact nsuworks@nova.edu.

HEINONLINE

Citation: 9 Fla. A & M U. L. Rev. 47 2013-2014

Provided by:

Nova Southeastern University Law Library & Technology Center



Content downloaded/printed from

HeinOnline (<http://heinonline.org>)

Fri Apr 15 12:56:22 2016

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=1935-5173](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=1935-5173)

THE PROTECTION OF FOREIGN DIRECT INVESTMENTS IN DEVELOPING AND EMERGING MARKETS THROUGH THE INSTRUMENTALITY OF ARBITRATION: FAIR GAME?

*Florence Shu-Acquaye**

INTRODUCTION	48
I. BILATERAL INVESTMENT TREATIES (BIT) AND FOREIGN DIRECT INVESTMENT (FDI)	51
II. INVESTMENT TREATY AND THE ROLE OF ARBITRATION AND FDI.....	55
A. <i>Substantive Rights</i>	56
B. <i>Procedural Rights</i>	57
III. CONTRACT-RELATED CLAIMS AND TREATY-BASED ARBITRATION	58
A. <i>Where Breach of Contract is of the Investment Treaty</i> .	59
B. <i>Where Only Breach of Contract is Claimed</i>	60
C. <i>Umbrella Clauses and Contract Claims</i>	61
D. <i>“Fork in the Road” Clauses</i>	63
IV. SETTLEMENT OF INVESTMENT DISPUTES ARBITRATION	64
A. <i>ICSID—the Role of ICISD in the BIT Regime</i>	64
B. <i>Investment Treaty Arbitration, National Courts and the Rule of Law</i>	68
C. <i>Most Favored-Nation Clauses and Dispute Resolution</i>	70
D. <i>Impact of Investment Treaty Arbitration on Developing Countries</i>	74
1. <i>CDC v. Seychelles</i>	76
2. <i>Argentina</i>	77
E. <i>Recognition and Enforcement of Award</i>	78
CONCLUSION	79

* Professor Shu-Acquaye is a Professor of Law at Nova Southeastern University, Shepard Broad Law Center. Professor Shu-Acquaye would like to thank Lance Bitterman and Elizabeth Michelle for their excellent research assistance.

INTRODUCTION

Investment treaties have tripled in the twenty-first century with over 170 countries signing onto bilateral investment treaties (BITs). Most BITs are made between a developed and a developing country, whereby a host country promises to protect home country's foreign direct investment (FDI) in exchange for the prospect of increased capital in the future.¹ Hence, BITs tend to reduce the expected risks to FDI in that they stabilize a host country's existing investment environment, as well as provide a substitute for weak domestic laws and institutions that are often ill-equipped to protect FDI.²

FDI, especially in emerging markets³ and developing countries,⁴ although attractive to investors, still pose some serious risk to investors who are still wary as to whether their investments will be protected from the host government interference or political risk; whether it will be accorded rights such as fair and equitable treatment; arbitrary or discriminatory measures impairing investment, expropriation, and the right to submit disputes with the host state to binding international arbitration (such rights are often well beyond those con-

1. Jeswald W. Salacuse & Nicolas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J., 67, 77 (2005).

2. Alec Johnson, Comment, *Rethinking Bilateral Investment Treaties in Sub-Saharan Africa*, 59 EMORY L.J., 919, 925 (2010).

3. "The term 'emerging markets' is used to describe a nation's social or business activity in the process of rapid growth and industrialization. Currently, there are approximately [forty] emerging markets in the world, with the economies of China and India being the largest." PAUL OBO IDORNIGIE, INVESTMENT TREATY ARBITRATION AND EMERGING MARKETS: ISSUES, PROSPECTS, AND CHALLENGES, 24, (2011), available at http://nials-nigeria.org/pub/INVESTMENT_TREATY_ARBITRATION_AND_EMERGING_MARKETS_-_ISSUES,_PROSPECTS_AND_CHALLENGES_BY_PROF._PAUL_OBO_IDORNIGIE.pdf. "In the 2008 Emerging Economy Report, the Center for Knowledge Societies defines Emerging Economies as those 'regions of the world that are experiencing rapid informatization under conditions of limited or partial industrialization.'" *Id.* at 25. The countries that are considered the top emerging markets include Brazil, Russia, India and China—or the BRIC nations. *Id.* at 26. However, in recent years several other countries have begun to come out as strong contenders for investment and manufacturing. *See id.* According to a report published by the Global Intelligence Alliance (GIA), a strategic market intelligence and advisory group, nations such as South Africa, Vietnam, Argentina and Turkey will join the list of up and coming markets. Alex Carrera, *The New Emerging Markets*, EXAMINER.COM (Apr. 10, 2013), <http://www.examiner.com/article/the-new-emerging-markets>. The study reveals that these nations will join the line up as countries that will be "highly sought after by international companies in 2012 to 2017." *Id.*

4. BITs between developing countries account for about 26 per cent of the total number of BITs. Mahnaz Malik, *South-South Bilateral Investment Treaties: The Same Old Story?*, INT'L INST. FOR SUSTAINABLE DEV. (IV Ann. F. for Developing Country Inv. Negotiators Background Papers., New Delhi), Oct. 27–29, 2010, at 1, available at http://www.iisd.org/pdf/2011/dci_2010_south_bits.pdf.

tained in the host state's domestic law).⁵ Investors can therefore minimize the political risk of investing in emerging markets and developing countries in particular by ensuring that their investments are covered by bilateral investment treaties. So, foreign investors are increasingly channeling their investments through companies established in jurisdictions that have ratified a bilateral investment treaty with the host state in which the investment is made.⁶ The critical question has been how to balance and protect the investment of foreign nationals *vis-a-vis* the interest of the host state. Such BITs are signed between states, which provide that nationals of each state, when investing in the other state, will be accorded fair and equitable treatment.⁷ Under most BITs, investments of nations shall not be nationalized, expropriated or subjected to measure having effect or equivalent to nationalization or expropriation except for public purpose and against payment of prompt, adequate and effective compensation.⁸

The encouragement of economic development of states through private cross-border investment is the *raison d'être* of the International Centre for Settlement of Investment Disputes (ICSID) Convention.⁹ Indeed under article twenty-five section one, the jurisdiction of ICSID

5. Gabriel Meyer & Matthew Colman, *South Africa: Arbitration in Africa*, MONDAQ (Mar. 28, 2007) <http://www.mondaq.com/x/47178/Commercial/Arbitration+In+Africa>.

6. *Id.*

7. "Many African governments have made efforts to alleviate these concerns by entering into bilateral investment treaties, and by adopting arbitration legislation, which respects party autonomy in accordance with the UNICITRAL Model Law on International Commercial Arbitration (the Model Law)". *Id.* The UNCITRAL Model Law was promulgated as a guide for legislation and has been widely adopted with the notable exception of the United States and the United Kingdom. *Id.* Arbitration as in most countries,

[I]n Africa can be held *ad hoc* or under an institutional arbitration body. The main recognized institutional arbitration centers in Africa are the Cairo Regional Centre for International Commercial Arbitration (CRCICA), the Lagos Regional Centre for International Commercial Arbitration (LRCICA) and the Arbitration Foundation of South Africa (AFSA), all of which are recognized in their respective regions of influence. *Id.*

8. IDORNIGIE, *supra* note 3.

9. The International Centre for Settlement of Investment Disputes (ICSID) was founded pursuant to the "Washington Convention" on the Settlement of Investment Disputes between States and Nationals of Other States, 1965. Rep. of the Exec. Dirs. on the Convention on the Settlement of Inv. Disputes Between States and Nationals of Other States, Mar. 18, 1965, ISCID/15, at 39 (Apr. 2006), *available at* https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf. Its purpose is to strengthen the partnership between countries in the cause of economic development by facilitating the settlement of disputes between states and foreign investors. *Id.* The World Bank, which sponsored the Convention and under whose auspices ICSID operates, believed that its creation would constitute "a major step towards promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it." *Id.* at 40.

over disputes depends on the existence of such an “investment.”¹⁰ BITs involving developing countries, including African states usually provide for the arbitration to be at the ICSID pursuant to the Washington Convention or the Additional Facility Rules, or *ad hoc* arbitration pursuant to the UNCITRAL Arbitration Rules. Arbitration at the ICSID pursuant to the Washington Convention is particularly appealing because such arbitrations are not subject to the procedural laws of any state and the awards of such tribunals are enforceable in the over 140 plus states that have ratified the Convention as if they were a final judgment of the courts of that state, subject to the state’s laws of sovereign immunity.¹¹

Even when there is a successful arbitration, that is an arbitration that has resulted in an award, the award would have to be enforced and usually in a country other than that where the award was issued. Many emerging countries, including African countries,¹² have ratified The New York Convention for the Enforcement of Foreign Arbitral Awards (The New York Convention).¹³ Arbitral awards are enforced under the New York Convention. The enforcing court is usually confronted with two competing values: the respect for international arbitration award and respect for the judgment of a competent foreign court. However, there are situations whereby such enforcement would be unworkable, for example, if enforcement would be denied because it is against the domestic public policy. Should that have an impact on the BITs?

This article examines the prospects of investment treaties and challenges faced by emerging markets and developing economies. Look to see the extent to which these investment treaties protect the host countries and the fundamental issues relating to the scope and application of the treaties in the context of arbitration. The paper therefore also examines investment treaties and Foreign Direct Investment (FDI), explore the extent that dispute resolution mechanism in investment treaties may impact an investor’s decision to invest in a

10. Convention on the Settlement Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, art. 25, ICSID/15, available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf. What is an “investment” is sometimes the question that has to be answered first before proceeding to the merits of the dispute. See Rep. of the Exec. Dirs. on the Convention on the Settlement of Inv. Disputes Between States and Nationals of Other States, *supra* note 9, at 44.

11. Meyer & Colman, *supra* note 5.

12. *Id.* (“[I]ncluding Egypt, Nigeria and South Africa”).

13. Article 111 provides that “[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions . . . arbitral awards.” Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38.

particular state, examine the role of ICSID in settling investment disputes between States and Nationals of other States.¹⁴ One issue that has often arisen is the extent to which the international law protections afforded pursuant to the Convention may be utilized in “ordinary” commercial disputes, just because one party happens to be a state; whether disputes of significant financial importance to national states should be decided in a private dispute resolution system such as ICSID arbitration; whether, and the extent to which, contract claims could be referred to ICSID in the absence of a contractual clause providing for ICSID jurisdiction.

For example, to what extent may an investor rely on treaty-based protections in cases referred to ICSID through a BIT, but arising from contracts containing exclusive jurisdiction clauses in favor of a national court? Whether investment treaty arbitration promotes the rule of law and offers incentives to promote fair and lawful decision-making in national institutions. Does the availability of treaty arbitration and the corollary rule of law that emanates indirectly sets the pace to be followed by national courts? Discuss the impact of investment treaty arbitration on developing countries and how the playing field may be leveled for all parties involved. Whilst the doctrine of privacy may make sense in the traditional setting of arbitration, i.e. where a dispute is brought between two private parties, the doctrine sits less easily where one of the parties is a state or state entity. In such arbitrations the outcome has a consequence much wider than merely on the two parties at the hearing. An award against a state generally means a large payout, which can only ultimately come from the taxpayers. Likewise, the award may have an impact on the laws, policies and administrative acts of democratically elected governments.

I. BILATERAL INVESTMENT TREATIES (BIT) AND FOREIGN DIRECT INVESTMENTS (FDI)

BIT agreements started during the Post –Colonial Era after World War II when newly independent and economically undeveloped countries were formed.¹⁵ At that time, GATT was the organization regulating and protecting international trade, but with no correspond-

14. Since 2000, the demand for ICSID arbitration has grown rapidly as a result of claims based on bilateral investment treaties (BITs) in which states extend open ended invitations to investors to settle investment disputes through, inter alia, ICSID arbitration. Vinson & Elkins, Shai Wade & Mark Beely, *ICSID: Recent Trends in Jurisprudence* 2005.

15. Joshua Boone, *How Developing Countries can Adapt Current Bilateral Investment Treaties to Provide Benefits to Their Domestic Economies*, 1 *GLOBAL BUS. L. REV.* 187, 188 (2010).

ing organization dealing with investments.¹⁶ Compounding the issue was the fact that the U.N. General Assembly declared that each state has the right to expropriate foreign property.¹⁷ Consequently, with the unpredictability of newly formed economies, the right to expropriate, and with no protection for investments, developed countries sought to protect their investment as well as their investors.¹⁸ BITs offered the utmost means for obtaining this protection. A BIT is an investment treaty made between two sovereigns that safeguards investments made in the territory of the signatory countries.¹⁹ These treaties offer investors certain economic rights, including the right to arbitrate claims, consequently attracting FDI, which in turn brings to a country infrastructure projects, financing, new jobs and economic stability as a whole.²⁰ States use these investment treaties as “a means to satisfy the need to promote and protect foreign investment and with a view to enhancing the legal framework under which foreign investment operates.”²¹

The first BIT was concluded in 1959 between Germany and Pakistan and within seven years, France, Switzerland, the Netherlands, Italy, Belgium-Luxembourg, Sweden, Denmark, and Norway had established BIT programs.²² While the number of investment treaties has increased, there has also been a remarkable increase in FDI, which increased from \$200 billion in 1990 to over \$1trillion in 2000.²³ It is common for developing countries to sign BITs in order to attract more foreign direct investment (FDI). BITs have become the most important international legal mechanism for the encouragement and governance of FDI.²⁴ In fact, the preambles of thousands of BITs state that the purpose of BITs is to promote the flow of FDI.²⁵ Whether these trea-

16. *Id.* at 189.

17. *Id.*

18. *Id.*

19. Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 *GLOBAL BUS. & DEV. L. J.*, 337, 341 (2007). Multilateral treaties are similar to bit but involves more than two states, for example, North American Free Trade Agreement (NAFTA) is a treaty among the United States, Canada and Mexico. *See id.* at 360.

20. *Id.* at 338.

21. *Id.* at 341 (quoting MIRIAN KENE OMALU, *NAFTA AND THE ENERGY CHARTER TREATY*, 2 n.10 (1999)).

22. Kenneth Vandavelde, *A Brief History of International Investment Agreements*, 12 *U.C. DAVIS J. INTL. & POL'Y.*, 157, 169 (2005).

23. Franck, *supra* note 19, at 338.

24. Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 3 *WORLD DEV.*, 31, 33 (2005).

25. *Id.*

ties indeed do attract more FDI to developing countries is an ongoing debate. Some scholars suggest that investment treaties do increase FDI. For example, when considering U.S. BITs, Salacuse and Sullivan noted that there was a strong indication for the conclusion that BITs promote FDIs.²⁶ Nonetheless, there was an explosion in the number of BITs signed in the Global Era of the FDI. This explosion was explained by the debt crisis in the 1980, where developing countries needed capital finance development and therefore had no choice other than to seek BITs with developing countries.²⁷ By the 1990s, BITs signing became common for developing countries; with over 1,000 being signed, and by 2008, over 2,600 BITs were in place.²⁸ Some of the protections provided by these treaties include:

compensation for expropriation, freedom from unreasonable or discriminatory measures, fair and equitable treatment of investment, national treatment, promises that investment will receive full protection and security that is no less favorable than that accorded under international law, free capital repatriation, sovereign's commitment to honor and uphold the tenets of the treaty and honor the most favored nation requirements.²⁹

Likewise, virtually all of these treaties provide ADR provisions that allow states to bring claims regarding the application or interpretation of treaty provisions. In the same vein, investors can bring claims against states for treaty violations, referred to as investor-state Arbitration.³⁰ These ADR processes are arbitration proceedings governed primarily by either the International Centre for the Settlement of investment Dispute (ICSID), the United Nations Centre for International Trade Law (UNCITRAL) or the International Court of Commerce (ICC), with ICSID being the most widely used arbitration mechanism in investment treaty enforcement.³¹

It has been stated that BITs harm developing countries rather than help because they simply provide "foreign control over domestic economies by redistributing domestic wealth and power through the

26. Franck, *supra* note 19, at 352. Salacuse and Sullivan found that "when developing countries sign investment treaties with Organization for Economic Co-operation and Development (OECD) countries, FDI is likely to increase." *Id.*

27. Boone, *supra* note 15, at 189.

28. LUKE E. PETERSON, HUMAN RIGHTS AND BILATERAL INVESTMENT TREATIES: MAPPING THE ROLE OF HUMAN RIGHTS LAW WITHIN INVESTOR-STATE ARBITRATION, 11 (3d ed. 2009).

29. Boone, *supra* note 15, at 190.

30. See generally Susan D. Franck, *The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treatment Treaties Have a Bright Future*, 12 U.C. DAVIS. J. INT'L L. & POL'Y., 47 (2005).

31. Boone, *supra* note 15, at 190. "[O]ver 30 % of current BITs provid[e] for its use." *Id.*

transfer of control over local assets to foreign entities".³² Likewise, that those BITs really don't promote FDI flows to developing countries but rather primarily serve the purpose of providing high level of investment protection and liberalization to unstable markets.³³ This foreign control, although could be beneficial to the developing country,³⁴ does not necessarily increase domestic capital. That FDI would bring in a flow of foreign currency into the developing country is not necessarily the case, as for example, where the FDI acquire existing capital stock and therefore simply shifting control over existing capital and not bringing in new capital per se.³⁵ BITs act as a catalyst to remove money from the developing countries, as provisions in the BIT agreement often allows for the free repatriation of foreign investments. Free repatriation is a passport for investors to grab their money and run at the slightest indication of potential, political, social, or economic distress.³⁶ This of course impacts the host country's monetary status. BITs do not necessarily promote or increase domestic jobs as often assumed. They may instead create a decrease, for example, where the FDI brings in highly trained personnel from abroad to fill open positions, or use them to replace domestic management.³⁷ Other reasons BITs are frowned upon as not helpful to the developing countries or emerging economies include:

- BITs do not promote or require the transfer of technology to developing countries, especially as the foreign investor tends to develop the technology in the home state and then ship to the domestic country, where it is operated solely by non-domestic employees.³⁸
- BITs do not stimulate increased production, which is quintessential to the development of a stable, self-sufficient economy. Productivity is created by capital, natural resources and labor.³⁹ BITs do not necessarily increase capital

32. *Id.* (quoting Vandavelde, *The Economics of Bilateral Investment Treaties*, 41 HARV. INT'L L.J. 469, 484 (2000) (stating that "Marxist economies have characterized foreign investment as the decolonization of host states").

33. Boone, *supra* note 15, at 190-191.

34. *Id.* at 191. As the developing country can be provided foreign capital, jobs, technology, increased domestic production, and more developed domestic markets.

35. *Id.*

36. *Id.*

37. *Id.* at 191-192.

38. See Vandavelde, *The Economics of Bilateral Investment Treaties*, 41 HARV. INT'L L.J., 469, 482 (2000).

39. *Id.* at 478-479.

as they simply change the entity in control or decrease through repatriation.⁴⁰

- BITs do not help develop the local market nor increase market participation. Since BITs do not ensure that the market they are liberalizing is functioning properly before it liberalizes it. Consequently, it may allow in investment not suitable for the market thereby blocking any potential development.⁴¹ This is so because FDI may provide for low prices or set specific standards of quality that domestic competitors cannot compete with, and thereby being forced to close, leaving no local competition.⁴²

II. INVESTMENT TREATY AND THE ROLE OF ARBITRATION IN FDI

“It is not quite clear whether the expansion of BITs and the right to arbitrate treaty claims has incentivized foreign investment.”⁴³ However the existence of an investment treaty is an important variable that may affect decision to invest internationally.⁴⁴ Therefore, to the extent that dispute resolution mechanisms in investment treaties may impact an investor’s decision to invest or determine how a transaction is structured, it is worth exploring.⁴⁵ Especially given that countries are targeting effective alternative dispute resolution systems as a means of promoting foreign investment.⁴⁶

“An Investment Treaty is an agreement between two or more sovereigns that safeguards investment made in the territory of the signatory countries.”⁴⁷ States “promulgate these investment treaties as a means to satisfy the need to promote and protect foreign investment and with the mind set of enhancing the legal framework under which foreign investment operates.”⁴⁸ Given the number of BITs in existence, there are differences that may arise from each specific

40. *Id.* at 481.

41. *Id.* at 490.

42. *Id.* at 481.

43. Franck, *supra* note 19, at 339.

44. *Id.* Other variables influencing investment choices may include the potential financial risk to the investor, stability of investment environment, availability of appropriate human capital, access to enforcement procedures, personal and professional relationships and more.

45. *Id.* at 340.

46. *Id.*

47. *Id.* at 341.

48. *Id.* (quoting Mirian Kene Omalu, NAFTA and the Energy Charter Treaty 2 n.10 (1999)).

negotiation process, however there are also discernible trends regarding the rights that states offer.⁴⁹ The sovereign governments generally agree to protect investments made by nationals of another country and to sustain this goal BITs select “specific substantive rights that govern the host state’s treatment of an investment.”⁵⁰

A. Substantive Rights

Generally, a typical investment treaty provides investors with a combination of up to seven different substantive rights:⁵¹

- 1) The treaty generally provides a guarantee that investors will receive payment of adequate compensation if their property is expropriated.⁵²
- 2) The treaty generally prohibits the contracting states from hindering the free flow of capital by enacting currency controls.
- 3) The treaty prohibits the host state from discriminating on the basis of nationality. That is the host-states cannot treat investors worse than domestic citizens (national treatment) or other foreigners (most favored nation treatment).⁵³
- 4) The treaty generally requires the host state to treat investments fairly and equitably.
- 5) The treaty generally requires the host-state to provide full protection and security to investments.
- 6) The treaty generally requires contracting states to guarantee the investments will not receive treatment less favorable than the “minimum standards required by customary international law.
- 7) Lastly, the treaty would include provisions specifying that contracting states agree to honor commitments that they have given regarding an investment.

49. Gabriel Egli, *Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions*, 34 PEPP. L. REV., 1045, 1055 (2007) (quoting Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1530 (2005)).

50. *Id.*

51. Egli, *supra* note 49, at 1055–56.

52. *Id.* at n.17 (“[t]he U.S. Model BIT contains the following language: Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”), except: a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law and Article 5[Minimum Standard of Treatment](1) through (3)) (quoting 2004 United States Model Bilateral Investment Treaty art. 6(1)), available at http://www.jurispub.com/cart.php?m=product_detail&p=9251.

53. Egli, *supra* note 49.

Adding to these protections, the BIT must specify which investors and investments would qualify to receive those protections.⁵⁴ In sum, investment treaties promise that the host governments will not subject investors and their investments to inappropriate risk. International rules and enforcement mechanism not subject to the control or influence of host governments are seen as the simple means to protect investment and an integral part of investment treaties.⁵⁵ Substantive rights, although an important and great aspect of BITs for investors and their host governments, the procedural rights are quintessential as they provide for the mechanism for enforcement of the substantive rights.

B. Procedural Rights

Hence the real ingenuity of BITs is “the provision of procedural rights that give investors a mechanism to enforce the substantive rights directly.”⁵⁶ That is, “investors not only have rights, but they also have an agreed forum to redress [all] alleged wrongs.”⁵⁷ Prior to these BITs,

when a government’s violation of international law adversely affected an investment, the investor’s remedies were limited to (1) negotiating with the sovereign; (2) suing the sovereign in the Sovereigns own courts. . . ; (3) asking their home governments to negotiate diplomatically on its behalf; or (4) lobbying their home government to advocate a claim on their behalf before the International Court of Justice.⁵⁸

While some of these options afforded opportunities to resolve disputes, they were often inadequate in addressing investor’s complaints satisfactorily. Today, however, under investment treaties, sovereigns offer

54. Egli, *supra* note 49, at 1055–56. Generally the provisions dealing with the scope of a BIT’s application are found at the beginning of the treaty and deal with the following: “the form of the investment; . . . the area of the investment’s economic activity; . . . the time when the investment is made; . . . and the investor’s connection with the other contracting state.” Egli, *supra* note 49, at 1056 (quoting Salacuse & Sullivan, *supra* note 1, at 80).

55. *Id.*; see Jeswald Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT’L L.J. 427, 451 (2010) (the principles underlying the investment treaty regime include “[i]ncreased international investment fosters economic development and prosperity[;] . . . [f]avorable conditions in host countries leads to increased investment[;] . . . [that] [i]ncreasing the predictability . . . of [the] transactions has the effect of lessening perceived risk and [consequently promote] investment[;] . . . [that] [e]nforceable international rules that [restrict] host country governmental actions protect and [thus] promote investment.”).

56. Franck, *supra* note 19, at 343.

57. *Id.*

58. *Id.*

investors the right to arbitrate directly with them for any treaty violation, consequently, allowing for investors to initiate the adjudicative process to redress wrong government conduct.⁵⁹ So, these investment treaties provide a dependable and neutral forum for investors to enforce the rules of law articulated in a particular treaty.⁶⁰ Even better, most of the investment treaties allow investors to have some control over the method of dispute resolution they may eventually select.⁶¹ Investors may litigate or arbitrate their claims on an ad hoc basis under UNCITRAL Rules or at arbitral institutions such as the International Chambers of Commerce or Stockholm Chambers of Commerce. However, the most utilized form of dispute resolution under investment treaties is to arbitrate before the World Bank's International Centre for the Settlement of Investment Disputes ("ICSID")⁶²

III. CONTRACT RELATED CLAIMS AND TREATY-BASED ARBITRATION

The contracts between investors and States typically contain dispute resolution clauses.⁶³ But in spite of these clauses, there are claims related to investor-state contracts in international arbitration

59. *Id.*

60. *Id.* at 344.

61. Some treaties permit investors either to litigate their BIT claims before national courts or arbitral tribunals. Many treaties limit the acceptable dispute resolution mechanism to arbitral tribunals. Nonetheless, parties still have the choice to arbitrate before various international institutions, such as the ICC, the Stockholm chamber of Commerce or before an *ad hoc* arbitral body organized under the UNCITRAL Arbitration Rules. Franck, *supra* note 30, at 53-54.

62. Franck, *supra* note 19, at 344.

63. Some agreements provide for a broad scope and states that they shall apply to "any dispute between a contracting Party and an investor or other party." See The Promotion and Protection of Investment, Chile-N.Z., art. 10, Jul. 22, 1999, available at http://www.sice.oas.org/Investment/BITSbyCountry/BITS/CHI_NewZealand.pdf (stating "any dispute between a Contracting Party and an investor of other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute"). See United Nations Conference on Trade and Development, Series on International Investment Policies for Development, N.Y., *Investor-State Dispute Settlement and Impact on Investment Rulemaking*, 26 (Sept. 2007), available at http://unctad.org/en/Docs/iteiia20073_en.pdf. Other clauses limit the scope of application, for example stating that they shall only apply to disputes 'concerning an alleged breach of an obligation under the Agreement which causes loss or damage to the investor or its investment.' *Id.* This is the example of article fifteen, section one of the BIT between Japan and the Republic of Korea (2002) which provides that:

[f]or purposes of this Article, an investment dispute is a dispute between a Contracting Party and an investor of the other Contracting Party that has incurred loss or damage by reason of, or arising out of an alleged breach of any right conferred by this Agreement with respect to an investment of an investor of that other Contracting Party.

Agreement for the Liberalisation, Promotion and Protection of Investment, Kor.-Japan, art. 15, Mar. 22, 2002, available at http://unctad.org/sections/dite/ia/docs/bits/korea_japan.pdf.

that may result following the bilateral investment treaties (BITS). The determination of the scope of application of the investment treaty clauses has been greatly debated, with the debate focusing on whether the jurisdiction of an arbitral tribunal under the investment treaty is “limited to dealing with breaches of substantive provisions of the agreement or whether the jurisdiction can be extended to deal with claims arising from breaches of an investment contract.”⁶⁴ Generally these contracts include their own dispute settlement provisions under the domestic law. Consequently, when investors submit contract claims to the international arbitral tribunals, respondents often make an objection to the jurisdiction of the arbitral tribunal on the basis that arbitrators have the limited jurisdiction to only address claims related to the breaches of the agreement.⁶⁵ Arbitral tribunals recognize the fact that a breach of the contract and a breach of the applicable investment treaty constitute separate causes of actions.⁶⁶ This recognition of the two separate causes of actions does not necessarily mean that the international tribunal does not have jurisdiction to handle claims resulting under the contract.⁶⁷ There are different scenarios in which an arbitral tribunal may deal with a claim on an alleged breach of contract.

A. *Situation in Which Breach of Contract is Equal to a Breach of the Investment Treaty*

A violation of a contract obligation under international law would encompass the breach of a substantive obligation under the investment treaty agreement.⁶⁸ In other words, by breaching a contract with an investor, the host country breaches obligations characteristically included in most investment treaty, such as the principle of fair and equitable treatment, the promise to refrain discriminatory treatment of the investor or arbitrarily expropriating investor property.⁶⁹ Consequently, claims have been brought for example, for physical expropriation of farmland by government without immediate, adequate and effective compensation,⁷⁰ violation of fair and equitable treatment

64. United Nations Conference on Trade and Development, *supra* note 63, at 26.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. United Nations Conference on Trade and Development, *supra* note 63, at 26.

70. Tradex Hellas S.A. v. Republic of Albania, ICSID (W. Bank) Case No. ARB/94/2, Decision on Jurisdiction, ¶ 1 (Dec. 24, 1996), 14 ICSID REV.: FOREIGN INVESTMENT L.J. 161 (1999). available at <http://www.italaw.com/cases/1110>; see Michael Nolan & Edward

for lack of openness in regulations dealing with an investor's loan;⁷¹ and discriminatory treatment centered on the government's failure to stop looting of claimant's property by the military.⁷²

B. Situation in Which Only a Breach of Contract is Claimed

This situation is where an investor's claim is based only on the breach of contract under the international investment agreement. Because many investment dispute treaty settlement clauses provide that arbitration procedures may apply with regards to "any" or "all" disputes which arise "in connection with" or "arising out" of an investment, questions as to whether such language offers arbitration tribunals with jurisdiction to hear a claim based exclusively on an alleged breach of contract, but not on a violation of the treaty itself.⁷³ The jurisprudence in this area has been inconsistent depending on how broad or limited the language is interpreted to mean. Some tribunals have concluded that the "any" or to "all" disputes language assumes jurisdiction over just contractual claims, including when the dispute goes to the performance of a contract.⁷⁴ In the case of *Salini v. Morocco*,⁷⁵ article 8 of the investment agreement provided that the investor-state dispute settlement mechanism applied to "all disputes or differences" between contracting party and covered investor. The tribunal viewed that "the terms of [article] 8 are very general, and that the reference to expropriation and nationalization measures, which are

Baldwin, *The Treatment of Contract-Related Claims in Treaty-Based Arbitration*, 21 MEALY'S INT'L ARB. REP., June 2006, at 1, available at <http://www.milbank.com/images/content/1/1/1109/0606-Nolan.pdf>.

71. Emilio Agustín Maffezini v. Kingdom of Spain, ICSID (W. Bank) Case No. ARB/97/7, Decision on Objections to Jurisdiction, ¶ 38 (Jan. 25, 2000), 16 ICSID REV.: FOREIGN INVESTMENT L.J. 212 (2001), available at <http://www.italaw.com/sites/default/files/case-documents/ita0479.pdf>.

72. Am. Mfg. & Trading, Inc. v. Democratic Rep. of the Congo, ISCID (W. Bank) Case No. ARB/93/1, Award (Feb. 10, 1997), 36 I.L.M. 1534, 1557 (1997) [English original]; 12 INT'L ARB. REP., No. 4, at Sec. A (Apr. 1997); 5 ICSID REP. 14 (2002).

73. Investor-State dispute settlement and impact on investment rulemaking at pp. 26-27.

74. *Id.*

75. *Salini Costruttori S.P.A. v. Kingdom of Morocco*, ICISD (W. Bank) Case No. ARB/00/4, Decision on Jurisdiction, ¶ 60-61 (July 23, 2001), 42 ILM 609, 623-24 (2003), available at <http://italaw.com/documents/Salini-English.pdf>. The tribunal stated:

the Tribunal [indicating] considers that the scope of application regarding the nature of the disputes is limited as to the persons concerned. In this case where the State has organized [sic] a sector of activity through a distinct legal entity, be it a State entity, it does not necessarily follow that the State has accepted *a priori* that the jurisdiction offer contained in [a]rticle 8 should bind it with respect to contractual breaches committed by the entity. *Id.*

matters coming under the unilateral will of a State, cannot be interpreted to exclude a claim based in contract from the scope of application of this Article.” The tribunal read the investor-state dispute settlement clause as limiting the jurisdiction to all investment-related disputes between a covered investor and the contracting party, thereby limiting jurisdiction of the tribunal to contracts in which the state itself, and not any other state entity was a party.⁷⁶ Another popular case cited in favor of recognizing the jurisdiction of the arbitral tribunal over merely contractual claims when the investor state dispute settlement provision was considered sufficiently broad is the case of *Societe Generale de Surveillance S.A. (SGS) v. Philippines*.⁷⁷ In contrast to this decision, other arbitral tribunals have held that the broad wording of the investor-state dispute settlement provision is not sufficient to establish jurisdiction with regard to a merely contractual claims.⁷⁸ In the case of *Societe General de Surveillance S.A. v Pakistan*,⁷⁹ for example, it was found that the tribunal lacked jurisdiction with respect to claims based on alleged breaches of contract, that did not tantamount to breaches of the substantive obligations in the BIT.⁸⁰ The SGS decisions therefore present two different conclusions as to whether observance of obligation clauses should be read as consent to treaty-based arbitral jurisdiction over breach of contract claims.⁸¹ The discussion takes another dimension when the investment treaty agreement includes an “umbrella clause.”

C. Umbrella Clauses Within the Investment Treaty Agreement

An umbrella clause is a provision often included in BITs under which the contracting parties undertake to comply with any obligation

76. *Id.*

77. ICSID (W. Bank) Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, ¶ 131–35 (Jan. 29, 2004), 8 ICSID Rep. 515, 564–67(2005). In this case, the applicable investment agreement was the BIT between Switzerland and the Philippines, and the investor-state dispute settlement provision of which applied to “disputes with respect to investments” was considered as general to allow the submission of all investment disputes, and that the term “disputes” was not limited to the legal classification of the claim. Consequently, the tribunal found the term to include a dispute arising from an investment contract. *See id.*

78. United Nations Conference on Trade and Development, *supra* note 63, at 28.

79. ICSID (W. Bank) Case No. ARB/01/13, Decision on Objections to Jurisdiction. ¶ 323–24 (Aug. 6, 2003), 18 ICSID REV.: FOREIGN INVESTMENT L.J. 301 (2003), available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC622_En&caseId=C205.

80. *See id.* at 323–24.

81. Nolan & Baldwin, *supra* note 70, at 3.

they have undertaken under the investments.⁸² The provision is often framed as follows: “[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.”⁸³ Or as “[e]ither Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investor of other Contracting Party.”⁸⁴ In international law, it would be accepted generally through the effect of an umbrella clause that a breach of a contract becomes a treaty violation.⁸⁵ Investors have contended in ICISD cases that an observance of obligation clause is a State’s consent to have claims for breach of contract obligations entertained by treaty-based arbitration tribunals.⁸⁶ Although the two SGS cases present two different conclusions as to whether the observance of obligation clauses should be read as consent to treaty-based arbitral jurisdiction over breach of contract claims, as stated above, some later decisions suggest that the *SGS v. Philippines* reasoning is more persuasive. For example, in *Eureko v. Poland*,⁸⁷ the tribunal embraced the view that the umbrella clause provided jurisdiction over contract claims between the state and an investor.⁸⁸ The tribunal held that contractual obligations fall within the plain meaning of the requirement to observe any obligations that States has entered into.⁸⁹ This trend of following the *SGS v. Philippines* case’s reasoning and permitting claims for contractual obligations pursuant to an umbrella clause is not followed by all tribunals.

82. United Nations Conference on Trade and Development, *supra* note 63, at 28.

83. Agreement between the Government of Hong Kong and the government of Japan for the promotion and protection of Investment (May 15 1997, Art. 2 (3) available at http://www.law.hku.hk/ccpl/database/bilateral-query_1Page35.html).

84. Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 GEO. MASON L. REV. 135 (2006) (citing *Pakistan*, ICSID (W. Bank) Case No. ARB/01/13 at ¶¶ 97-99).

85. United Nations Conference on Trade and Development, *supra* note 63, at 28.

86. Nolan & Baldwin, *supra* note 70, at 3.

87. *Eureko B.V. v. Poland*, Partial Award on Liability, ¶ 246 (*ad hoc* arbitration of Aug. 19, 2005), available at <http://www.investmentclaims.com/decisions/Eureko-Poland-LiabilityAward.pdf>.

88. Contractual arrangements between the investor and the host country were subject to the jurisdiction of the tribunal pursuant to the application of the umbrella clause included in the 1992 Bit between the Netherlands and Poland. “The Tribunal stated that the ‘plain meaning—the ordinary meaning—of a provision prescribing that a State “shall observe any obligation it may entered into’ with regard to certain foreign investments is not obscure.” See *id.*

89. Nolan & Baldwin, *supra* note 70, at 2.

For example, in *El Paso Energy v. Argentina*,⁹⁰ the tribunal instead adopted the reasoning of *SGS v. Pakistan* tribunal. The arbitral tribunal argued that the effects of an umbrella clause were potentially very extensive that evidence was required to show that those effects were in fact intended by the contracting parties to the BIT.⁹¹ Likewise, in *Joy Mining v. Egypt*,⁹² the tribunal also rejected the view that an umbrella clause has the ability of transforming any contract claim into a treaty claim.⁹³ The decisions by some tribunals that allow breaches of contracts to be brought based on observation of obligation clause is said to conclude that the umbrella clause has the effect of internationalizing contractual obligations.⁹⁴

D. “Fork-in-the Road” Clauses

Some investment treaty agreements include provisions that prevent the same investment dispute from being addressed in more than one dispute settlement forum, thereby requiring the host country to respond to the same claims more than once. Needless to say, this may result in inconsistent decisions. The possibility that an investor may present a dispute to the domestic court of the host country and then concurrently or subsequently submit the same dispute to international arbitration is of concern. To avoid this potential outcome, some agreements require the investor to decide from the very beginning whether the dispute shall be resolved in domestic tribunal or through international arbitration.⁹⁵ Consequently, once the dispute is submitted to either forum, the choice is definitive. This technique is known in treaty practice as the “fork-in-the road” provision. An example of such a provision could read as follows: “[o]nce the investor has submitted

90. ICSID Case No. ARB/03/15, Decision on Jurisdiction, (Apr.27, 2006), 21 ICSID 488, available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC511_En&caseId=C17.

91. United Nations Conference on Trade and Development, *supra* note 63, at 29.

92. Joy Mining Mach. Ltd. v. Egypt, Award on Jurisdiction, ICSID (W. Bank) Case No. ARB/03/11 (2004); available at <http://www.worldbank.org/icsid/cases/joy-mining-award.pdf>.

93. See *id.* The transaction in this case involved bank guarantees that were found by the tribunal to be simply a contingent liability and not “investments” for the purpose of Article 25 (1) of the ICISD Convention. So here, unlike in *SGS v. Pakistan*, the position of the arbitral tribunal in *Joy Mining v. Egypt* was not to comment on whether an umbrella clause would transform a claim based on an investment contract into a treaty, but rather the tribunal simply considered that in a case where a contract is not an investment, the investment could not be converted into a covered investment by virtue of an umbrella clause. See also United Nations Conference on Trade and Development, *supra* note 63 at 29.

94. Nolan & Baldwin, *supra* note 70, at 4.

95. United Nations Conference on Trade and Development, *supra* note 63, at 30.

the dispute to the competent tribunal of the Contracting Party in whose territory the investment was made or to international arbitration that election is final.”⁹⁶ Another approach used in international investment agreement to this issue is known as the “no-U-turn” which provides the investor with option of making a final decision on the venue for the dispute at later time, including even after the investor has submitted the dispute to a tribunal in the host country.⁹⁷ So using this technique would allow the investor to opt for international arbitration for example, as long as domestic tribunal has not been decided.⁹⁸ Both approaches endeavor to avoid the same investment from being addressed in more than one forum at the same time (*lis pendens*).⁹⁹

IV. SETTLEMENT OF INVESTMENT DISPUTES-ARBITRATION

Once a government has violated a treaty obligation,¹⁰⁰ the investor may get the ball rolling for arbitration by picking one of the neutral arbitrations listed in the investment treaty and then submit a Notice and request for arbitration.

A. ICSID—the Role of ICSID in the BIT Regime

The World Bank, as an international institution that gave loans to its member countries in order to foster production and development, understandably plays an important role in international investment. This role is consistent with the World Bank’s underpinning, which is to encourage international investment by private investors.¹⁰¹ No doubt, in the early days of the BIT movement, the World Bank received requests to assist in the settlement of disputes among member states.¹⁰² The World Bank attempted to resolve disputes but there were concerns about the proper role of the bank, and that concern caused the Bank to

96. Agreement Between the Government of the Republic of Chile and the Government of the Republic of Indonesia on the Reciprocal Promotion and Protection of Investments, Chile-Indon., art. IX ¶ 3, April 7, 1999; available at http://www.sice.oas.org/investment/BITSbycountry/BITS/CHI_Indonesia.pdf.

97. *Id.*

98. *Id.*

99. *Id.*

100. This may include for example, the government conduct may involve the enactment of a law that redenominates local currency, the breach of a government privatization contract or the failure to provide police protection. Franck, *supra* note 19, at 344–345.

101. Egli, *supra* note 49, at 1058 (citing Vincent Orlu Nmehielle, *Enforcing Arbitration Awards Under the International Convention for the Settlement of Investment Disputes (ICSID Convention)*, 7 ANN. SURV. INT’L & COMP. L. 21, 23 (2001).

102. *Id.*

consider new solutions.¹⁰³ One of the solutions presented in 1961, examined the feasibility of creating an arbitration mechanism that could cater for the needs of both investors and governments.¹⁰⁴ Consequently, the final result of the proposal was the birthing in 1966 of ICSID under the International Convention for the Settlement of Investment Disputes (ICSID Convention).¹⁰⁵ Thus on October 14, 1966, ICISD came into existence as an autonomous international agency under the auspices of the World Bank.¹⁰⁶ ICSID's purpose was to "provide proceedings for conciliation and arbitration of investment disputes between contracting states and nationals of other contracting States."¹⁰⁷ That is, ICISD sought to assure foreign investors that they would receive protections from any unilateral engagement of a host country.¹⁰⁸ So, the Convention therefore sought to remove major impediments to the free international flows of private investment posed by non-commercial risks and the absence of specialized international methods for investment dispute settlement.¹⁰⁹ Today, ICSID is consid-

103. David R. Sedlak, Comment, *ICSID's Resurgence in International Investment Arbitration: Can the Moment Hold?*, 23 PENN. ST. INT'L L. REV., 147, 160 (2004).

104. *Id.* at 150–155.

105. *Id.* at 151.

106. This was "after years of preparatory work by legal experts from Africa, Asia, Europe, Latin America and the United States, and after approval by the Board of Governors of the World Bank." *Id.* It was opened for signature on March 18, 1965 and entered into force on October 14, 1966. *See id.* at 168. As evidenced by its large membership, considerable caseload, and by the numerous references to its arbitration facilities in investment treaties and laws, ICSID plays an important role in the field of international investment and economic development. *See id.* at 152. As of November 2005, the cumulative number of known claims at ICISD reached 219, compared with only 75 in 2000. United Nations Conference on Trade and Development, *Latest Development in Investor-State State Dispute Settlement, IIA Monitor No.4*, 1 (2005), available at <http://bit.escwa.org.lb/CMSPages/GetFile.aspx?nodeguid=a7831054-0ed6-4040-8480-4b2c7a16116e>. Of the 219 known investment treat claims, 132 have been administered by ICSID, 65 under UNCITRAL Rule and 22 under other arbitration rules. *Id.* at 1–2.

107. Egli, *supra* note 49, at 1059 (quoting Raul Emilio Vinuesa, *Bilateral Investment Treaties and Settlement of Investment Disputes Under ICSID: The Latin American Experience*, NAFTA L. & BUS. REV. AM. 501, 504 (2002)).

108. Nmehielle, *supra* note 98, at 23. ICSID therefore tended to balance the power inequity between investors and host countries by providing an international dispute forum. *See Sedlak, supra* note 100, at 153.

109. *About ISCID*, ICSID, <https://icsid.worldbank.org/ICSID/ICSID/AboutICSID/Home.jsp> (last visited Oct. 1, 2013). Therefore ICSID as an autonomous international institution was established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID or as it often referred to as the Washington Convention) with currently 158 signatory States to the ICSID Convention. Of these, 147 States have also deposited their instruments of ratification, acceptance or approval of the Convention. Recourse to the ICSID facilities is always subject to the parties' consent. *See generally Background Information on the International Centre for Settlement and Investment Disputes (ICSID)*, ICSID (Jan. 20, 2013), <https://icsid.worldbank.org/ICSID/>

ered to be the leading international arbitration institution devoted to investor-State dispute settlement.¹¹⁰ The ICISD Convention provides for the creation of an Administrative Council,¹¹¹ a Secretariat,¹¹² a Panel of Arbitrators and a Panel of Conciliators, as the principle organs that play the important role in easing the arbitration process.¹¹³ However, the actual work of hearing disputes and ruling on the merits is the work of the arbitral panels which is organized under the support and according to the rules of ICSID.

Taking a closer look at the arbitral process— The arbitral tribunals assembled under ICISD act as international courts. As with court system, the jurisdiction to hear a dispute is quintessential. Article 25 (1) of the ICISD Conventions deals with Jurisdiction and provides:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.¹¹⁴

In view of this section, apparently, once ICISD arbitration is provided for in a BIT, the consent of states that have signed the ICISD Convention is automatically presumed. This means therefore that, once a sovereign state signs a BIT that permits ICISD arbitration, it may not be able to withdraw thereafter from arbitration with an investor from the other signatory country.¹¹⁵ Consequently, many countries

FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&icsidOverview=true &language=English.

110. *Id.*

111. The Administrative Council is composed of one representative from each state that is a party to the ICISD Convention. Convention on the Settlement Investment Disputes Between States and Nationals of Other States, *supra* note 10. Per art. 5 of ICISD, the president of the World Bank Serves as the chairman of the Council. *Id.* at art. 5. As the governing body of ICISD, the Council has many duties including exercising powers necessary to implement the provisions of the ICISD Convention. *Id.* at art. 6(1)(a)-(g).

112. As the principal administrative body of the ICISD, the secretariat is for the day-to-day operations of the Centre. *Id.* at art. 11. The Secretary-General, the main officer of the Centre carries out the duty of Registrar as well as has the power to authenticate awards resulting from the ICISD process. *Id.* at art. 9.

113. Convention on the Settlement Investment Disputes Between States and Nationals of Other States, *supra* note 10, art. 3-16. ICISD arts. 3-16, Mar. 18, 1965, available at <http://cil.nus.edu.sg/rp/il/pdf/1965%20Convention%20on%20the%20Settlement%20of%20Investment%20Disputes-pdf.pdf>

114. Art. 25 (1), March 18, 1965.

115. Egli, *supra* note 49, at 1061.

find themselves locked into the ICSID system because of their BITs.¹¹⁶ In those cases in which governments have failed to abide by their commitments to the investors, governments invariably find themselves involved in international arbitration proceedings, and in many cases arbitral tribunals have held them liable to substantial damage awards to injured investors.¹¹⁷

Initiating arbitration under ICISD may be done by a state that is a party to the ICISD Convention or by a national of a state that is a party to the Convention. The secretary General then registers the request for arbitration¹¹⁸ and then arbitral tribunal is formed in accordance with the agreement of the parties.¹¹⁹ In the absence of an agreement, the tribunal will be composed of three arbitrators, with each party selecting one arbitrator and the third (the president of the Tribunal) is selected by the agreement of the parties.¹²⁰ However, if the parties cannot agree on the appointment of arbitrators, the Chairman of the Administrative Council, after consulting the parties will appoint the remaining arbitrators.¹²¹ Thereafter, the exact order of the process depends on the relevant arbitration rules as well as the parties' preferences.¹²² Normally the parties submit memorials delineating their case, exchange evidence, submit more written submissions, then debate issues of law and fact during oral hearings. Ultimately, the tribunal will determine if an award is warranted.¹²³

116. *Id.*

117. Salacuse, *supra* note 55, at 447. An example is the case of CME Czech Republic B.V. v. Czech Republic, an UNCITRAL arbitration under the Netherlands-Czech Republic BIT, which resulted in an award and payment of US \$355 million to the injured investor in 2003. CME Czech Republic B.V. v. Czech Republic, Final Award, UNCITRAL Arbitration (Mar. 14, 2003), available at <http://italaw.com/sites/default/files/case-documents/ita0180.pdf>.

118. Nmehielle, *supra* note 101, at 28.

119. *Id.*

120. ICSID art. 37 (2)(b), Mar. 18, 1965 available at <http://www.jus.uio.no/lm/icsid.settlement.of.disputes.between.states.and.nationals.of.other.states.convention.washington.1965/portrait.letter.pdf>.

121. ICISD art. 38, Mar. 18, 1965 available at <http://www.jus.uio.no/lm/icsid.settlement.of.disputes.between.states.and.nationals.of.other.states.convention.washington.1965/portrait.letter.pdf>.

122. Eric Gottwald, *Leveling the Playing Field: Is it time For a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?*, 22 AM. U. INT'L L. REV. 237, 249 (2007). At the start of the dispute, the tribunal chairman and the parties hold a procedural meeting where the parties get broad flexibility to determine the format of the proceedings, including the timing and number of pleadings and whether to do away with oral hearing. *Id.*; see also ICISD Convention Regulations and Rules, R 20, Doc. ICISD doc available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

123. *Id.* at 249. "Opportunities to challenge tribunal awards are limited[,] [T]he investment treaty arbitration system has no appellate review and . . . [has] very limited

It is worth noting that most BITs require consultation and a waiting period, usually six months before submitting a claim to arbitration. That is both parties should initially seek to resolve the dispute through consultation and negotiation. This is the case with the US-Rwanda BIT, which provides that “the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation” and requires that “six months have elapsed since the events giving rise to the claim” before it goes to arbitration.¹²⁴

B. *Investment Treaty Arbitration, National Courts and the Rule of law*

Investment arbitration has the capacity to fuel domestic support for the rule of law. The real question is whether investment treaty arbitration promotes the rule of law and offers incentives to promote fair and lawful decision making in national institutions. Does the availability of treaty arbitration and the corollary rule of law that emanates indirectly sets the pace to be followed by national courts? Some argue that investment treaty arbitration creates an environment that prevents domestic growth of the rule of law.¹²⁵ Some commentators submit that the existence of international dispute resolution for foreign investment impedes the development of the rule of law in national courts because it creates a regime that offers a privilege to foreign investors and eliminate investment disputes from local courts.¹²⁶ In fact, professor Ginsburg suggest that the “decision to bypass domestic courts may reduce court’s incentives to improve performance by depriving key actors from a need to invest in institutional improvement.”¹²⁷ This school of thought is also corroborated by professor Ron Daniels who advocates that investment treaties have “subverted the evolution of robust rule of law institutions in the developed world. . .because foreign investors rationally refrain from championing good and generalized rule of law reforms in developing state, preferring instead

grounds for annulment.” *Id.* (quoting Franck, *supra* note 49, at 249). Also a party’s option for challenging an award would depend on whether it was rendered under ICISD Convention or under other set of arbitration rules. See Franck, *supra* note 49, at 1545–57.

124. UNCTAD, *Bilateral Investment Treaty, 1995-2006: Trends in Investment Rulemaking*, q 105, UN Doc. UNTAD/ITF 2006/5 (2007).

125. Franck, *supra* note 19, at 365.

126. *Id.* (citing Mark Halle & Luke Eric Peterson, *Investment Provisions in Free Trade Agreement and Investment treaties: Opportunities and Threats for Developing Countries*, UNDP ASIA-PAC. TRADE & INV. INITIATIVE, Dec. 2005, available at <http://www.snap-undp.org/elibrary/Publications/InvestmentProvisions.pdf>).

127. Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 INT’L L. REV. OF L. & ECON. 107, 119 (2005).

to protect their interests by relying on the BIT rule of law enclave.”¹²⁸ However, the World Bank suggests that investment treaty arbitration is not a substitute for local institutions, but instead it can be a source complimenting domestic institutional reform.¹²⁹ BITs are said to be more rather than less effective in promoting higher institutional quality.¹³⁰ This is even so where these investment treaties are used to indicate the desire to involve in institutional reform and to abide by the rule of law, advancing the opportunity to arbitrate investment claims might simply create a “race to the top” to decide disputes impartially and justly.¹³¹ Promoting the development of the rule of law in national courts does not only advances local judicial institutions but also foster confidence in the general process of deciding investment disputes, especially given that national courts may become involved in investment treaty disputes.¹³² There are three ways in which national courts may be involved in investment treaty disputes:¹³³ 1) Like many BITs, the BIT agreement may allow investors to bring their claims in national courts under certain circumstances, so investors may choose to litigate treaty violations.¹³⁴ 2) National courts tend to provide important support to the investment arbitration process. Although court’s role is limited in ICISD arbitration proceedings, it the role becomes vital in enforcing ICISD arbitration awards.¹³⁵ The integrity of local courts that supports the fair resolution of investment disputes is therefore quintessential in the general process of resolving treaty disputes.¹³⁶ 3) Because Investment treaties do not preclude investors

128. Franck, *supra* note 19, at 366 (citing Ronald J. Daniels, *Defecting on Development: Bilateral Investment Treaties and the Subversion of the Rule of Law in the Developing World*, draft Mar. 23, 2004, available at <http://www3.unisi.it/lawandeconomics/stile2004/daniels.pdf> (stating that a Bit is a stand-alone territory in which foreign investors can be shielded from the legal and political risks of contracting in the home state and depending on its institution)).

129. Franck, *supra* note 19, at 367.

130. *Id.* (referring to the analysis in Mary Hallward-Driemeier, analysis in *Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit-and They Could Bite*, (June 2003), 21, available at <http://elibrary.worldbank.org/content/workingpaper/10.1596/1813-9450-3121>).

131. *Id.*

132. *Id.* at 368.

133. *Id.*

134. Not all investment treaties adopt a model that allows investors to choose between court litigation and arbitration. Franck, *supra* note 19, at 368.

135. *Id.* “In . . . an *ad hoc* UNCITRAL arbitration, national courts may play an even greater role. For example, they might evaluate challenges regarding arbitrator’s impartiality and independence or determine whether the arbitrators awarded damages in a procedurally incorrect manner.” *Id.* at 369.

136. *Id.*

from bringing claims for violations of national law, investors may bring claims associated to their investment before national courts. So while investors may bring international law claims to international tribunals, they may concurrently refer domestic disputes to national courts.¹³⁷

An example of bringing simultaneous claims is the *Occidental v. Ecuador*, where the Republic of Ecuador changed its interpretation and application of tax law. *Occidental*, as a result, followed domestic remedies related to Ecuadorian administrative law before an Ecuadorian national court, as well as began arbitration proceedings under the treaty for the apparent violation of international law.¹³⁸ So the potential role of national courts in settling investment disputes demonstrates that there is good reason and incentives to develop the rule of law in national courts and consequently foster the integrity of the dispute resolution process.¹³⁹ In the same vein, this shows that choosing to arbitrate investment treaty disputes does not mean that local courts are unable to follow the rule of law and demonstrate impartial justice.¹⁴⁰ There is therefore a symbiotic relationship between domestic courts and treaty arbitration decision-making that promotes adherence to the rule of law and thus support the integrity of investment treaty arbitration.¹⁴¹

C. *Most favored-Nation Clauses and Dispute Resolution*

MFN treatment has been an important feature of international trade for centuries.¹⁴² Today MFN clauses have extended into international investment policy.¹⁴³ “To provide MFN treatment under

137. *Id.* at 370.

138. *Id.*

139. *Id.*

140. *Id.* at 372.

141. *Id.*

142. Organization for Economic Co-Operation and Development, Most-Favoured-Nation Treatment in International Investment Law (Sept. 2004) 3, available at <http://www.oecd.org/daf/inv/internationalinvestmentagreements/33773085.pdf> <http://www.oecd.org/daf/inv/internationalinvestmentagreements/33773085.pdf>

143. MFN treatment was made one of the essential obligations of commercial policy under the Havana Charter where members agree “to give due regard to the desirability of avoiding discrimination as between foreign investors” United Nations Conference on Trade and Employment, Havana, Cuba, Nov. 21, 1947–Mar. 24, 1948, *Final Act and Related Documents*, art. 12, ¶ 2(a)(ii), U.N. Doc. E/Conf. 2/78 (Apr., 1948). After the Charter was unsuccessful, i.e., failed to come into force in 1950, the inclusion of MFN clauses became a general practice in the many bilateral, regional and multilateral investment related agreements. See *Most-Favoured-Nation Treatment in International Investment Law*, OECD (Sept. 2004), <http://www.oecd.org/daf/inv/internationalinvestmentagreements/33773085.pdf>.

investment agreements is generally understood to mean that an Investor from a party to an agreement, or its investment, would be treated by the other party 'no less favorably' with respect to a given subject-matter than an investor from any third country, or its investment."¹⁴⁴ MFN treatment clauses are therefore commonly found in most international investment agreements, and any provisions provided for a BIT will be available to every other country with which the host country has a BIT with an MFN clause.¹⁴⁵ While MFN is a standard of treatment which has been linked by some to the principle of the equality of States, the prevailing view is that a MFN obligation exists only when a treaty clause creates it. In the absence of a treaty obligation (or for that matter, an MFN obligation under national law), nations retain the possibility of discriminating between foreign nations in their economic affairs.¹⁴⁶ So, MFN clauses raise the "level of protection guaranteed by each BIT completed by a country to the level guaranteed by that country's most protective BIT"¹⁴⁷ Given that the inclusion of an MFN clause in a BIT can raise the level of protection to that of the most protective BIT, it is not uncommon to find investors and host states disagreeing over the correct scope of any clause.¹⁴⁸ Interpretation of MFN clauses may lead to inconsistent results depending on whether the interpretation of the scope of the MFN clause is expansive or narrow.¹⁴⁹

For example, a broad interpretation was used in the *Maffezini v. Kingdom of Spain* case.¹⁵⁰ The investors here tried to avoid specific language within a BIT that mandated a waiting period to expire before a case could be submitted to ICSID arbitration. Contending that the MFN clause be interpreted broadly, the investors asserted that they too be allowed to select individual BIT provisions offered in other BITs. That is, the investors contended that the MFN clause in the BIT applied to their dispute and so allowed them to the procedure that was in

144. *Id.* at 2.

145. Stephen Fietta, *Most Favored Nation Treatment and Dispute Resolution Under Bilateral Investment Treaties: A Turning Point?* 8 INTL Arb. L. rev. 131, 131 (2005).

146. Most-Favoured-Nation Treatment in International Investment Law, *supra* note 143, at 3.

147. Federico Godoy, *Bilateral investment treaties: Most favored-Nation treatment* Godoy, *Bilateral investment treaties: Most favored-Nation treatment* 1-2 (2002).

148. Egli, *supra* note 49, at 1065.

149. MFN clause arbitration can be divided into two depending on the interpretation given: 1) expansive interpretations of the scope of MFN clauses and 2) the narrow interpretations of the scope of MFN clauses. *See id.* at 1066.

150. *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (Jan. 25, 2000), 5 ICSID Rep. 85, 102, available at <http://www.italaw.com/sites/default/files/case-documents/ita0479.pdf>.

one of the host state's other BITs.¹⁵¹ The Tribunal concluded that dispute resolutions provisions are "inextricably related" to the substantive rights granted under Bits. That is the tribunal asserted that given the main objective of a BIT to protect investors from the random and discriminatory practices of host states, "it would be illogical to exclude from the scope of such protection the field of procedural justice."¹⁵² Unfortunately, ICISD arbitral tribunals have failed to present a unified approach in dealing with the appropriate effect of MFN clauses on dispute settlement provisions.¹⁵³ This inconsistent ICISD tribunal decisions concerning very much the same issues in different cases¹⁵⁴ demonstrates a marked lack of coherence, raising a legitimate crisis for the tribunal.¹⁵⁵ Likewise this different approach to and interpretation of the scope of the FMN clause foster a loss of certainty regarding the meaning and application of FMN clauses.¹⁵⁶ More importantly, the effect of legitimacy and certainty may result in the increased number of challenges to ICISD tribunal decisions.¹⁵⁷ Three approaches have been suggested for limiting the effect of inconsistent MFN clause decisions.¹⁵⁸ 1) annulment of inconsistent decisions-the ICISD convention provides an independent control mechanism, which precludes domestic courts from reviewing ICISD tribunal decisions.¹⁵⁹ This control mechanism is reflected in Art 52 of ICISD Convention, which allows for the annulment of awards in a very limited number of situations.¹⁶⁰ This annulment proceeding does not however permit review of the legal merits of a decision, but rather provides an ad hoc committee of three arbitrators to examine the procedural appropriate-

151. *Id.*

152. Egli, *supra* note 49, at 1068 (quoting KATIA SCHOLZ, HAVING YOUR PIE . . . AND EATING IT WITH ONE CHOPSTICK - MOST FAVORED NATION CLAUSES AND PROCEDURAL RIGHTS 3 (2004)).

153. Johnson, *supra* note 2, at 1079.

154. See Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8 (Aug. 3, 2004), available at <http://www.italaw.com/sites/default/files/case-documents/ita0788.pdf>; Salini Construction S.P.A. and Italstrade S.P.A. v Has available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowDoc&docId=DC634&caseId=C218>.

155. Hashemite Kingdom of Jordan.; Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (Jan. 25, 2000), 5 ICSID Rep. 85, 102, available at <http://www.italaw.com/sites/default/files/case-documents/ita0479.pdf>.

156. Maffezini v. Kingdom of Spain, 5 ICSID Rep. at 3.

157. *Id.* at 1080.

158. See Egli, *supra* note 49, at 1081-82.

159. *Id.* at 1081.

160. See art 52 (1) of the International Convention for the Settlement of investment Disputes, Mar. 18, 1965.

ness of the award.¹⁶¹ Therefore, the annulment mechanism is undoubtedly a useful feature offered by ICISD, but is not an effective tool for review of inconsistent decisions for errors of substantive law thus inadequate as a forum for solving the inconsistencies concerning MFN clauses.¹⁶² 2) Amending the ICISD Convention. That is clearly drafting a provision that would either expressly ratify or reject the application of MFN clauses to dispute resolution provisions, where the parties have not expressed so.¹⁶³ However, such an amendment would be unfeasible given the increasing number of contracting states, and the wording of ICISD Art. 66 (1) providing “each amendment shall enter into force 30 days after. . .all Contracting States have ratified, accepted or approved the amendment.”¹⁶⁴ 3) The creation of an Investment Arbitration Appellate Court to address the inconsistent decisions of tribunals. The goal of this purported body would be the harmonization of decisions regarding disputed legal interpretations.¹⁶⁵

The widespread of MFN clauses means that signing for example a US-BIT should attract FDI from other countries.¹⁶⁶ A US-BIT has heightened standards through MFN clauses.¹⁶⁷ The BIT between the US and Rwanda, for example, provide foreign investors extensive rights, such as the right to quick compensation for direct or indirect “measures equivalent to expropriation or nationalization.”¹⁶⁸ Likewise, the US Rwanda BIT also sets high standards for treatment of FDI, assuring that investments will be granted “fair and equitable treatment and full protection and security,” “non- discriminatory treatment”¹⁶⁹, “national treatment”¹⁷⁰ and most favored nation” treatment.¹⁷¹ So, foreign investors from countries that have agreed to less

161. Art 52 (3) of the International Convention for the Settlement of Investment Disputes, Mar. 1965 available at <http://www.jus.uio.no/lm/icsid.settlement.of.disputes.between.states.and.nationals.of.other.states.convention.washington.1965/portrait.letter.pdf>. The three arbitrators are appointed by ICISD and if the committee finds any of the listed defects, it may annul the award completely or partially.

162. Egli, *supra* note 49, at 1081 (citing Franck, *supra* note 49, at 1547–48).

163. That is, unless otherwise provided by the parties, no MFN clauses should apply to the express dispute settlement provisions contained in the investment treaty. *Id.* at 1082.

164. *Id.* at 1082.

165. Egli, *supra* note 49, at 1082.

166. Johnson, *supra* note 2, at 934.

167. *Id.*

168. Treaty Concerning the Encouragement and Reciprocal Protection of Investment, US-Rwanda, art. 6, Feb. 19, 2008, S Treaty Doc. 110-23 (2008).

169. *Id.* art. 5.

170. *Id.* art. 3.

171. *Id.* art. 4. See generally Johnson, *supra* note 2, at 933.

protective BITs with host countries would certainly benefit from a U.S. BIT's heightened standard via MFN clauses.¹⁷²

D. *Impact of Investment Treaty Arbitration on Developing Countries*

Developed nations sign investment treaties largely to protect their investment and nationals abroad, while developing countries tend to sign investment treaties in an effort to promote FDI.¹⁷³ So, BITs reduce the expected risks to FDI in two ways: First, they stabilize a host country's existing environment and secondly, they provide fortification for weak domestic laws and institutions that are usually ill-equipped to protect FDI.¹⁷⁴ By signing a BIT developing countries, as capital importers bear most of the risk investor litigation that is intrinsic in signing a BIT¹⁷⁵ so when deciding whether to sign a BIT, developing countries should weigh the potential benefits of increased FDI against increased exposure to litigation from investors.¹⁷⁶ Two thirds of the 219 known investment treaty claims filed is against developing countries government.¹⁷⁷ In 2005, 37 different developing nations are said to have been defendants in investment treaty arbitration, with many facing multiple claims.¹⁷⁸ Developing nations' experience with investment treaty arbitration is mostly as defendants.¹⁷⁹ Developing countries face a plethora of challenges with investment treaty arbitration claims, including the cost of litigation, possibility of a sizable award, limitations on its freedom to implement government policies considered inconsistent with treaty obligations.¹⁸⁰ For example, the Czech Republic was ordered to pay \$270 million plus interest to a Dutch based broadcasting firm when the tribunal found that the media regulatory authorities had breached the terms of the Netherlands-Czech Republic BIT.¹⁸¹ In the same vein, an ICSID tribunal awarded a U.S. energy company \$133 million in 2005 after finding

172. Salcuse & Sullivan, *supra* note 1, at 107.

173. Mary Hallward-Driemeier, *do* Bilateral Investment treaties Attract Fdi-

174. Johnson, *supra* note 2, at 920.

175. Gottwald, *supra* note 119, at 244.

176. *See id.* (quoting Unclad, *Bilateral Investment Treaty in the Mid-1990* at 3, UN).

177. UNCTAD, *Latest Development in investor -state*, at 9-10.

178. *Id.*

179. Gottwald, *supra* note 119, at 250.

180. *Id.*

181. *See id.* (citing *CME Czech Rep. B,V, (Neth) v. Czech Rep., Final Award*, ¶ 649 (UNCITRAL Arb. Proceedings, Mar. 14, 2003)).

Argentina in violation of the Argentina-U.S. BIT.¹⁸² The investor law suits impacts developing nation's freedom to regulate in the public interest.¹⁸³ In a number of cases, foreign investors that provided water and sewage in developing countries have filed investment treaty claims with state and local authorities.¹⁸⁴

As the number of investor claims seems to be growing, there are concerns over how well- equipped developing nations are to deal with the challenges of litigating these claims.¹⁸⁵ Foreign investors who initiate investment claims tend to hire impressive international law firms with specialty in investment treaty arbitration. That is the developed nations are more likely to have the resources and legal expertise to ably defend them. On other hand, developing nations do not have the same resources and may be forced to hire outside counsel to defend investment treaty claims.¹⁸⁶ Evidently, the cost of treaty arbitration is very high and beyond the means of many developing country, let alone Less Developed Countries (LDCs).¹⁸⁷

182. See *CMS Gas Transmission Company v. The Argentine Rep.*, ICSID Case No. ARB/01/8, Award (May 12, 2005), at 136, available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC504_En&caseId=C4.

183. Gottwald, *supra* note 119, at 251.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* The cost of the Czech Republic to defend two of its investment treaty claims related to the regulation of its media sector was about 10 million. Gottwald, *supra* note 119, at 251. However, over the years developing nations are building expertise in defending against investment treaty arbitrations. For example, Argentina defended many claims filed against them without using outside council, but rather used substantial expertise that was built for the purpose of defending arbitration treaty claims. However, building such expertise is time consuming and challenging, especially given that it may require the diversion of resources from other prioritized legal matters. *Id.* at 255. Likewise, developing country council seeking to find relevant precedent on arbitration treaty claims, may be faced with the challenge of finding incomplete sources for prior arbitral awards. Access to arbitral case law which is important in the field of public international investment law is paramount, yet there are fairly a low number of decided cases. This is compounded by the lack of public knowledge that an investment treaty dispute exists. Of the key arbitral for a, only ICISD uphold a public registry of claims. See *List of Pending Cases*, ICSID, <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtIsRH&actionVal=ListPending> (last visited Sept. 29, 2013). In some cases even when the existence of a claim is made public, the tribunal award may not be published. Generally, the investment treaty arbitration for a may only publish awards with the consent of both parties-ICISD Convention, art. 48 (5) available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf. Some awards remain unpublished although informally known and traded by law firms and arbitrators in the field. This asymmetry of information gives arbitration insiders and practitioners within this network the unfair advantage of having access to an array of authority to fight and win cases, whereas those without the resources to hire a major international firm are deprived of the authority to defend against investor claims. This deprivation invariably creates an unfair competitive

Looking at some investment treaty arbitration cases from developing countries to see the difficulties developing nations may face locating necessary precedent or just basic forms of legal authority would be helpful in corroborating the analysis.

1. The Seychelles Experience: *CDC v. Seychelles*¹⁸⁸

From the onset, it is worth pointing out that the investor claim against Seychelles was based on a contract ICISD arbitration clause and not on a bilateral investment treaty.¹⁸⁹ The Commonwealth Development Corporation (CDC), a UK-owned development finance company filed a request for arbitration with ICISD against the Republic of the Seychelles. The request alleged that the Republic of Seychelles failed to honor two loan guarantees it had given as security for a loan to its public Utility Corporation (PUC) to purchase electric generators. Both loan guarantees provided that any potential dispute from the contract will be settled according to the UK law.¹⁹⁰ A team of lawyers from a major international law firm based in London with specialty practice in investor-state arbitration represented CDC.¹⁹¹ On the other hand the Republic which has never been sued by a foreign investor ever, was represented solely by its Attorney General, who had no prior experience litigating ICISD or other claims and was a civil law lawyer.¹⁹² This inexperience in the investor claim was compounded by limited internet access, the lack of access to Lexis-Nexis and treatises on ICISD.¹⁹³ Consequently, the Attorney General defended the Republic with a copy of the ISCID Convention and Rules and an outdated law treatises.¹⁹⁴

The tribunal found the Seychelles had no valid defense to CDC's default claim under UK law; that the Seychelles counter-memorial did

advantage for wealthier nations. See Gottwald, *supra* note 119, 257; and also BITs and Development, Policy Making at 26, 2004, http://www.iisd.org/pdf/2004/trade_bits.pdf.

188. ICISD Case No. ARB/02/14, Annulment Proceeding, (June 29, 2005), available at <http://italaw.com/documents/CDCSeychellesAnnulmentDecision.pdf>.

189. This does not necessary change the outcome in that the Seychelles encountered problems in finding legal expertise and authority. See *CDC Group PLC v. Rep. of the Seychelles*, ICISD Case No. ARB/02/14, Award, ¶ 3–6. (Dec. 17, 2003), available at <http://www.transnational-dispute-management.com/article.asp?key=295>.

190. *Id.* at ¶ 7–9.

191. *Id.* at 1; Gottwald, *supra* note 119, at 261.

192. Gottwald, *supra* note 119, at 261. The Attorney General's daily work typically involves criminal, constitutional and administrative law. *Id.* at 262.

193. *Id.* at 261.

194. *Id.* at 262.

not comply with the tribunal directions and that its principal defenses relied on a long overruled English contract law.¹⁹⁵

2. The case of Argentina

Argentina faced a similar problem of lack of legal access in defending investor claims in 2003, when facing an imminent default on its humongous foreign debt, it passed emergency economic legislation, that ended parity between the US dollar and Argentina pesos; converted dollar deposits and loans to pesos, and took off the right of public utilities to hike rates in dollars.¹⁹⁶ As a result of these actions, massive losses occurred to foreign investors who were in possession of the majority of Argentina's public debt as well as owned many of the utilities companies.¹⁹⁷ Numerous law suits were brought by transnational corporations against Argentina claiming violations of BITs.¹⁹⁸ By the end of December 2004, Argentina was a defendant in over thirty-seven pending investor-state arbitration claims, with over thirty-two of them filed at the ICISD.¹⁹⁹ Defending the claims was a challenge, given insufficient access to legal and human resources.²⁰⁰

The fairness of investor-state arbitration and the knowledge of the constraints that particular treaty provisions place on the exercise of sovereignty by national governments has been questioned.²⁰¹ This challenge of investor-state arbitration as a regime decision making process is on the following grounds: that the process is not transparent; it fails to account for the disparity in economic terms of regime members; that arbitrators are not indeed independent and tend to have an investor bias; that participation in the arbitral process is very costly for developing countries and that arbitration decisions overstep on the

195. *Id.*

196. Gottwald, *supra* note 119, at 263 (citing South Centre, *Will investment Rules Shrink Policy Space for Sustainable Development? Evidence from the Electricity Sector*, 17-19 (2003), available at http://www.econbiz.de/en/search/detailed-view/doc/all/will-investment-rules-shrink-policy-space-for-sustainable-development-evidence-from-the-electricity-sector-cho-albert/10003381958/?no_cache=1).

197. South Centre, *supra* note 193, at 16–17.

198. *Id.*

199. *Id.*

200. Although three years later and with the experience of litigating several ICISD cases, Argentina Solicitor General Office looked like an investor-state arbitration practice as one would find in any major international law firm. Gottwald, *supra* note 119, at 264.

201. Salacuse, *supra* note 55, at 469 (citing KONRAD VON MOLTKE, A MODEL INTERNATIONAL INVESTMENT AGREEMENT FOR THE PROMOTION OF SUSTAINABLE DEVELOPMENT (2004) (requesting for the adoption of a new BIT that would better take into consideration the interests of developing countries)).

rightful exercise of sovereignty by the host countries.²⁰² Because of these reasons, Bolivia in 2007 and Ecuador in 2010 officially withdrew from ICISD.²⁰³ In the same vein, Venezuela terminated its BIT with the Netherlands,²⁰⁴ while Bolivia declared its intent to renegotiate its BITs. So in all, governments pay the price for treaty provisions that tends to limit their flexibility in enacting laws and regulations in the public interest, if that would negatively affect investors. The withdrawing of Ecuador, Bolivia and Venezuela from the international regime raises questions as to whether their initiatives are the start of an effort to change or even dismantle the regime or whether it is only a deviation with no impact on investment regime.²⁰⁵ This is a legitimate question especially given that a withdrawing nation may suffer adverse consequences given the very purpose of an investment treaty is to reduce political risk to investors, so withdrawing as such may send a negative signal that may result in an avoidance of foreign capital or technology to that country. So withdrawal from a country only increases the perceived political risk and a boycott of foreign investment.²⁰⁶ Waiting till the expiration of an investment treaty is generally advisable. Investment treaties generally provide that they shall be in force for ten or fifteen years.²⁰⁷ Upon the expiration of the period, the treaty may continue for an additional fixed period or as ended by one of the parties.²⁰⁸

E. Recognition and Enforcement of Awards

The value of any arbitration really depends on whether the winning party can enforce its claim against the losing party. To this effect, Art. 54 (1) of the ICISD Convention provides that:²⁰⁹ “Each Con-

202. *Id.*

203. Bolivia Submits a Notice under Art. 71 of the ICISD Convention, ICISD News Release (ICISD Washington D.C.), May 16, 2007 available at http://www.lw.com/upload/pubContent/_pdf/pub1939_1.pdf.

204. United Nations Conference on Trade and Development, Recent Developments in International Investment Agreements, *IIA Monitor No.2*, 6 (2008), available at http://unctad.org/en/Docs/webdiaeia20081_en.pdf.

205. Salacuse, *supra* note 55, at 471.

206. *Id.*

207. See agreement on Encouragement and Reciprocal Protection of Investment between the State of Eritrea and the kingdom of the Netherlands, Eri-Neth, art 13, April 14 2004.

208. *Id.* at 472. See agreement between the Government of the Republic of Indonesia and the Government of the People's Democratic Republic of Algeria Concerning the promotion and Protection of Investments, Indon-Alg., art. 13, Mar. 21, 2000.

209. International convention for the Settlement of Investment Disputes art. 54 (1) March 18, 1965.

tracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.” A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state. Although the ICISD Convention thus provides for the recognition of awards, and which is the norm, Art. 55 seem to encroach on that norm as the language of that section allows for an excuse in favor of a state party to a dispute by stating that “Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of the State or any foreign State from execution.”²¹⁰ This could become an issue when a State’s domestic law prevents execution of award because of its provisions affording sovereign immunity.²¹¹ This is compounded by the fact that the ICISD Convention does not vary or surpass the rules of immunity from execution against a state which fails to comply with an ICISD award.²¹² However, both the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the ICISD Convention have tried and tested mechanisms to enforce arbitral awards.

CONCLUSION

I believe leveling the playing field for developing and emerging markets is quintessential for investment treaty arbitration. Developing countries and emerging markets, unequal access to legal authority, expertise and resources undermines the legitimacy of investment treaty arbitration process.²¹³ So while investment treaty arbitration has grown, its validity is undermined by reports from developing nations of a lack of affordable access to legal authority and expertise needed to defend investor claims.²¹⁴ The suggestion that a Legal Assistance Center for developing nations in investment treaty arbitration be created is a plausible solution. Such a Center would reinforce and strengthen the legitimacy of the investment treaty arbitration process by warranting that developing countries have affordable access to le-

210. *Id.* art 55.

211. Egli, *supra* note 49, at 1063.

212. *Id.*

213. Gottwald, *supra* note 119, at 240.

214. *Id.* at 274.

gal information and expertise.²¹⁵ This would simply promote fairness and an efficient and effective arbitration process.²¹⁶

The paper has also shown that BITs can promote legal spillover by encouraging a symbiotic relationship between BIT and local court litigation²¹⁷ open transparency provisions that ease foreign investor involvement in the lawmaking process build pressure on host government to enact laws and institute legal reforms designed to solidify its commercial law.²¹⁸ In the same vein, BITs that requires investors to seek local relief offer local courts with the chance to enunciate and develop principles of domestic commercial law. Thus these local courts could eventually become capable of effectively adjudicating complex investment claims and thus be able to compete with international arbitral bodies for the business of resolving commercial disputes.²¹⁹

Developing countries have also made known their interest in avoiding overly restrictive BITs provisions. This is evidenced by the increased number of BITs renegotiated due to changed circumstances.²²⁰ Renegotiations are expected to be on the rise as countries revise their model BITs to reveal the growing international acknowledgment that BITs should consider legitimate host-country interests.²²¹ BITs end up imposing policies that are insufficient for some countries and impracticable for others. Countries are asking whether traditional BITs with broad investor protection clauses that diminish host countries freedom to regulate in the public interest is appropriate.²²² In the wake of global financial crisis, there is a growing recognition that host countries should be allowed a degree of control over the kinds of FDI they allow within their borders.²²³ BITs that provides for intermittent revaluations of a host country's circumstances

215. *Id.* at 265.

216. *Id.*

217. Johnson, *supra* note 2, at 959.

218. *Id.*

219. *Id.*

220. Karl Sauvand & Lisa Sachs, *The Effect of Treaties on Foreign Direct Investments: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*, Oxford University Press (2009).

221. Malik, *supra* note 4; 2009 UNCTAD World Investment Report: Transnational Corporations, Agricultural production and Development, 45 UN. Doc UNCTAD/wir/2009 at 32.

222. In 2007, twenty three percent of all new BITs were the product of renegotiations. See Malik, *supra* note 4., SCTR & Morrocan Dept. of Inv., recent Development s in Regional and Bilateral Investment Treaties 10-12 (2008) available at http://www.iisd.org/pdf/2008/dci_recent_dev.pdf.

223. Johnson, *supra* note 2, at 963.

and allows corresponding amendments of its terms would be helpful in promoting sustainable economic development.”²²⁴

224. *Id.* at 960. “Norway’s proposed model BIT for example, establishes a joint committee with [the power] to ‘discuss issues related to corporate social responsibility . . . the goal of sustainable development, anticorruption, employment and human rights, and . . . consider any other matter that may affect the operation of this Agreement.’” *Id.*
