
**The Power of Modest Multilateralism:
The International Centre for Settlement of Investment Disputes
(ICSID), 1964–1980**



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Abstract

In 1965, amid antagonism between capital-importing and capital-exporting states over investment protection, the World Bank created ICSID. ICSID facilitates the resolution of disputes between foreign investors and states. Since major initiatives to create investment rules have failed within the UN and OECD, ICSID is the only successful attempt to create a multilateral, inter-state organization dedicated to investment. This thesis probes the intellectual, political, and economic forces behind the creation and early development of ICSID.

This study combines archival work, oral histories, and interviews with econometric work. On this basis, it illuminates how ICSID's creators—mainly staff in the World Bank's Legal Department—adapted their ideas to suit the charged political context. When disseminating the idea of ICSID to states, they relied on ambiguity, expertise, and incrementalism. These three characteristics constitute an approach to organization building that I term “modest multilateralism” since the World Bank's President praised ICSID as “a modest proposal.” By illustrating how this approach operated in ICSID's case, I generate insights that are applicable to other international organizations.

ICSID's creation differs from the expectations of institutionalist IR theory in important ways. First, there was little state leadership, and ICSID's founding Convention is devoid of substance—it merely outlines a procedure. In this way, it takes the idea of ambiguity to its extreme. Second, ICSID's founders took steps to shield the organization from the politics of investment protection: they asked states to send legal experts, not elected representatives, and avoided deliberative debate. Third, ICSID's design was explicitly evolutionary. ICSID can operate alongside changing substantive rules—multilateral, bilateral, or domestic. Finally, contrary to previous accounts, in this thesis the ICSID Secretariat emerges as a dynamic agent. The Secretariat actively pursued ratifications and advance consents to investor-state arbitration. The creation of ICSID fostered a community of practice, which subsequently redefined international investment law through treaty making and arbitral practice.

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Abbreviations

AALCC	Asian-African Legal Consultative Committee
AIOC	Anglo-Iranian Oil Company
BIT	bilateral investment treaty
CFR	Council on Foreign Relations
DAC	Development Assistance Committee (OECD)
DESA	United Nations Department of Economic and Social Affairs
ECLA	United Nations Economic Commission for Latin America
ECOSOC	United Nations Economic and Social Council
ECT	Energy Charter Treaty
FCN	Treaty of Friendship, Commerce and Navigation
FDI	foreign direct investment
GATT	General Agreement on Trade and Tariffs
IBRD	International Bank for Reconstruction and Development
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IDA	International Development Association
IFC	International Finance Corporation
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organization
IMF	International Monetary Fund
IO	international organization
IPPA	Investment Promotion and Protection Agreement (UK)
IR	international relations
ITO	International Trade Organization

MAI	Multilateral Agreement on Investment (OECD)
MIGA	Multilateral Investment Guarantee Agency
MFN	most favored nation
MNC	multinational corporation
NAFTA	North American Free Trade Agreement
NFTC	National Foreign Trade Council (US)
NIEO	New International Economic Order
OECD	Organisation for Economic Co-Operation and Development
OPEC	Organization of the Petroleum Exporting Countries
OPIC	Overseas Private Investment Corporation
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
SADC	Southern African Development Community
SEC	Securities and Exchange Commission (US)
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UN CTC	United Nations Centre on Transnational Corporations
UNGA	United Nations General Assembly
UNIDO	United Nations Industrial Development Organization
USTR	United States Trade Representative
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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Prologue: The Abadan Refinery, 1951

On New Year's Eve 1951, Torkild Rieber, a Norwegian-born oilman, stepped off a plane in Tehran carrying a letter from Robert Garner, Vice President of the World Bank. The letter was addressed to Iranian Prime Minister Mohammad Mossadegh, and asked if he would accept the World Bank as a mediator in Iran's dispute with the United Kingdom (UK) over the Abadan refinery.¹

Abadan, the world's largest oil refinery, was sitting dormant. Mossadegh's government had nationalized it earlier that year, in May 1951. The Anglo-Iranian Oil Company (AIOC) had operated it previously. The UK government had been AIOC's primary owner and the refinery was the chief source of petroleum within the British sphere of influence. The company's profits provided valuable revenue for the UK's postwar economic recovery.²

The UK government considered the refinery vital, and pursued every option to reverse the nationalization. The UK government prepared plans to invade Abadan within days of the nationalization. For the next three years, Iranian troops patrolled the perimeter of the closed refinery, while British gunboats circled nearby.³

Although tensions ran high from 1951–3, both parties believed the dispute would be settled through negotiations. First, an AIOC delegation was sent to negotiate a more equal profit-sharing agreement. When company-state negotiations faltered, the British government moved to inter-state negotiations. Talks between the Iranian and the British governments broke down in summer 1951.

Alongside negotiations, the British government appealed to international institutions. Before direct negotiations broke down, the UK government appealed to the President of the

¹ Graves 1973: 603.

² Schwarzenberger 1969: 66. In addition to discounted oil, AIOC paid large sums in tax. For instance, in 1947 AIOC paid over 15 million pounds in tax to the British government. By comparison, AIOC paid less than 1 million to the Iranian government. Abdelrehim 2010: 111.

³ Schwarzenberger 1969: 68-69.

International Court of Justice (ICJ) for arbitration.⁴ Before the ICJ could hear the case, the UK government appealed to the United Nations Security Council. The Security Council adjourned without acting.⁵ Mossadegh, who held a doctorate in international law from the University of Neuchatel, travelled to New York and made a compelling presentation. Public sympathy for his cause was high in America: he was Time magazine's Man of the Year in 1951, the year Abadan was nationalized.⁶ The British appeal to international institutions had backfired.

Concurrently, the United States (US) government was mediating the dispute. Two weeks after the nationalization, the US State Department issued a press release clarifying the American position.⁷ The US President discussed Abadan with Prime Minister Attlee before the nationalization took effect, and with Prime Minister Mossadegh soon after.⁸ Mossadegh was held in high regard by the Truman-era State Department.⁹ In October 1951, President Truman and Secretary of State Dean Acheson held talks with Mossadegh, which led to joint proposals.¹⁰

At this point, the World Bank got involved in the dispute. Why did it do so? Both states, but particularly Iran, needed the revenue from Abadan. Iran could not get the refinery running again without a loan.¹¹ The UK and Iran's common interest in restarting the refinery made the mediation look simple to some Bank staff, particularly Vice President Robert Garner. As Hector Prud'homme, the young Bank loan officer who went to Iran with Rieber, remembered:

A quick decision had to be made and just like that I think Garner pulled out of the hat, 'Well, why don't we say that we'll get Abadan running again...and we will hold [the profits] in escrow. They will grow at the rate of \$20 million a year, if not a month. Everybody's tongue will be hanging out, so then we'll say that the agreement is that the Bank will distribute this growing body of capital upon an agreement having been reached between the Iranians and the British. That will be bound to make the thing happen'.¹²

⁴ Elm 1992: 174–81.

⁵ Ford 1954: 124–126.

⁶ Elm 1992: 340. January 7, 1952 edition of *Time Magazine*.

⁷ US Department of State, "United States Position on Iranian Oil Situation." May 18, 1951.

⁸ Calendar of communication, "The Oil Crisis in Iran, 1951–53."

⁹ Secretary of State Dean Acheson and other officials referred to him as "the Gandhi of Iran." Elm 1992: 340.

¹⁰ Memorandum of Conversation, October 23, 1951.

¹¹ The refinery also needed 2000 technicians to operate at full capacity, and specialized shipping to reach its markets. Arguably, Iran could not access technicians or shipping without the cooperation of the British.

¹² Prud'homme Oral History 1985: 2.

Garner set out these terms to Mossadegh in Washington in November 1951.¹³ The World Bank would provide the funds, act as trustee for resumed operations during a two year interim period, and divide proceeds into three parts: one part to Iran, one part to the company, and one part into an escrow account to be distributed under the terms of the final settlement.¹⁴

The World Bank began to discuss Garner's ideas after his meeting with Mossadegh. Could the World Bank legally get involved with the Abadan refinery dispute? Aron Broches, Assistant General Counsel of the Bank, argued that the Bank could act. Most of the Bank's Executive Directors "had no difficulty in accepting these views" and the Bank decided to proceed.¹⁵

Garner then met with AIOC representatives and received encouragement from Anthony Eden, UK Foreign Secretary, Dean Acheson, US Secretary of State, and John Snyder, US Secretary of the Treasury.¹⁶ Only one hurdle remained: the Bank needed a clear-cut request to mediate from Iran.¹⁷ So Garner wrote his letter to Mossadegh, and gave it to Rieber and Prud'homme to deliver.

On New Year's Day 1952, Rieber and Prud'homme met with Mossadegh to discuss the letter.¹⁸ Iran was in the middle of elections and Mossadegh capitalized on the letter for political gain. In a report to Washington, Prud'homme summed up the response: "We almost got thrown out."¹⁹ Mossadegh's rejection of Garner's letter took the Bank's management by surprise. Yet the Bank knew Mossadegh's position was tenuous and that "the material basis for Iranian obduracy was weakening."²⁰ In addition, the US discontinued their negotiations in

¹³ Graves 1973: 599.

¹⁴ Graves 1973: 598.

¹⁵ Graves 1973: 600. The decision to act may have been affected by the fact that a high proportion of the Bank's small staff were former UK colonial administrators, including William Iliff, the Loan Director at the Bank (a position junior only to the Vice President and President) who came to the Bank after a long stint as financial counsellor of the British Embassy in Tehran. Iliff Oral History 1961: 1.

¹⁶ Garner Oral History 1961: 66.

¹⁷ Graves 1973: 601.

¹⁸ Throughout the mission, Prud'homme addressed Rieber as "Cap" for Captain, and Rieber called Prud'homme "boy." Rieber was the retired former chief executive officer (CEO) of Texaco, while Prud'homme was a cosmopolitan diplomat, nearly 40 years younger. Prud'homme conducted his conversations with Mossadegh in French, and described Rieber, with jocular respect, as "an old pirate." Prud'homme Oral History 1985: 3.

¹⁹ Graves 1973: 605.

²⁰ Graves 1973: 606.

favor of the World Bank's mediation, and Churchill and Truman gave their full public support to mediation by the Bank.²¹

The Bank's Executive Directors decided to redouble their efforts. Many days of intense negotiation followed, but no agreement was reached. There was nothing binding the parties to cooperate until a settlement was reached. Mossadegh could withdraw Iran's consent to mediate at any point; some in the Bank believed this reduced the likelihood that mediation would succeed.²² By March 1952, the Bank's first attempt at mediation had failed. Abadan remained dormant, and the British government (and other AIOC investors) remained outraged.

For some at the Bank, the failed Abadan mediation exposed a gap in the international architecture: the world needed some kind of machinery for resolving disputes between host states and investors.²³ The ICJ proceedings regarding Abadan, in summer 1952, solidified this view. The ICJ held that the relevant contract "is nothing but a concessionary contract between a government and a foreign corporation, [and the] United Kingdom Government is not a party to the contract."²⁴ There was no international institution with a mandate to resolve this type of dispute.

Aftermath

In August 1953, British and American intelligence services sponsored a coup d'état that removed Mossadegh from power. It was not until after the World Bank mediation broke down that meetings were held between British and American representatives "for the purpose of discussing joint war and staybehind plans in Iran."²⁵ An important part of the "staybehind plans" concerned who would run Abadan. The final Abadan settlement was largely a negotiation between American and British oil companies, with AIOC (renamed British Petroleum) retaining a 40 per cent stake in Abadan and being paid £25 million in compensation from the Iranian government and £214 million by the consortium of companies

²¹ Steering Group, "Iran." January 5, 1952: 4.

²² Broches Oral History, April 1984: 28–29.

²³ Iliff Oral History 1961: 44.

²⁴ Ford 1954: 124–53 and 164–212.

²⁵ Wilber 1954: 1.

who took up the remaining 60 per cent.²⁶ Within a year of the coup, Abadan was operating and the stock of AIOC/BP had tripled. The Iranian government's only adviser during these negotiations was Torkild Rieber.

In the immediate post-coup period, one of Mossadegh's former advisers asked: "If they were genuinely interested in our independence, was it not fairer to get compensation from us as they did in Mexico, and give us the freedom to run our oil industry?"²⁷ There was a widespread sense that the coup could have been avoided. During the November 1954 discussion of Abadan in the House of Commons, the minister who was being questioned left a final question unaddressed: was not the entire war unnecessary, since the whole affair could have been solved by negotiations?²⁸

Could military action in Iran have been avoided if there had been appropriate international machinery for resolving the dispute? It is hard to say, since the motivations for military action also included a perceived communist threat and control of vital oil supplies. Yet the Abadan incident did prompt serious reflection. How should complex, politically charged disputes between investors and host states be resolved?

Within a decade of Abadan, the World Bank proposed a new type of machinery dedicated to resolving disputes between investors and states. The same man who had argued that the World Bank could mediate in the Abadan dispute, Aron Broches, wrote the proposal. This "machinery" would provide better outcomes for all parties involved. This machinery—now called the International Centre for Settlement of Investment Disputes (ICSID)—is the subject of this thesis.

²⁶ Schwarzenberger 1969: 66-71.

²⁷ Hassan Sadr, writing on 23 August 1953. Quoted in Elm 1992: 327. Mexico nationalized its oil fields in 1938, paid full compensation to the US investors, and then was allowed to use a national company to hold and run the oil fields.

²⁸ Hansard, 1 November 1951 Commons Sitting: Persian Oil Agreement.

Introduction

The growth of foreign direct investment (FDI) is a defining characteristic of the postwar global economy. Yet while other areas of trade and finance have grown increasingly institutionalized at the international level, no centralized global rules exist to govern investment. Efforts to draft multilateral conventions on investment—in the 1940s, the 1960s, and the 1990s—have repeatedly failed. In 1975, Keohane and Ooms observed:

Writing about alternative international regimes to deal with direct foreign investment may seem to be somewhat like discussing a perpetual motion machine: most people would like one for their own purposes; no one has ever built one; and discussions about their construction often take on a certain air of unreality.²⁹

Amid the headline failures and unreality, however, one multilateral organization dedicated to investment has quietly endured for five decades: ICSID.

ICSID facilitates the settlement of disputes arising out of investment. It connects the disparate bilateral investment treaties (BITs), investment contracts, domestic legal frameworks, regional treaties like the North American Free Trade Agreement (NAFTA), and sectoral agreements like the Energy Charter Treaty (ECT) that govern investment. Despite its importance, ICSID, like many small international economic organizations, is poorly understood. This thesis advances our understanding of the role small organizations play in creating the institutional infrastructure of the global economy. It also develops a better conceptualization of ICSID, by presenting it as an actor in its own right and not merely as a passive facilitator of dispute resolutions. ICSID is the subject of a growing body of scholarship: legal scholarship on the ICSID Convention is proliferating, and international relations (IR) scholars increasingly incorporate ICSID in their work on investment treaties. Yet central questions of political economy remain:

What drove the creation of ICSID?

Why do states join ICSID? Why not?

Has ICSID influenced the international legal regime on investment? If so, how?

How has ICSID endured amid the contentious arena of investment protection?

These questions are the subject of this thesis. The chapters that follow probe the intellectual, political, and economic forces behind the creation and early development of ICSID.

²⁹ Keohane and Ooms 1975: 169.

This thesis illuminates how ICSID’s creators—mainly staff in the World Bank’s Legal Department—adapted their ideas to suit the charged political context of investment protection. In the early 1960s, there were formidable obstacles to creating a multilateral organization on investment, as demonstrated by the failure of the Havana Charter and the struggles of the Draft Conventions at the Organisation for Economic Cooperation and Development (OECD). ICSID’s founders knew they had to circumvent these obstacles, so they relied on ambiguity, expertise, and incrementalism to do so. These three characteristics constitute an approach to organization-building that I term “modest multilateralism.”³⁰ I draw from existing literatures on compliance with international law, epistemic communities, and norm entrepreneurship to flesh out modest multilateralism. It explains ICSID’s success and generates insights about how other international organizations (IOs) are created and come to be effective. These insights are relevant for IR scholars with an interest in investment governance, legal scholars with an interest in investor-state dispute resolution, and policy organizations.

Modest Multilateralism and IR Theory

The modest multilateralism approach differs from the expectations of institutionalist IR theory in important ways. Modest multilateralism is an explicitly evolutionary logic. ICSID’s founders sought to create a procedure, within which a practice of peaceful dispute resolution could emerge. ICSID’s founding Convention outlined a procedure that could operate alongside any type of substantive rules on investment—multilateral, bilateral, or domestic. ICSID’s founders took steps to shield the organization from the politics of investment protection: they asked states to send legal experts, not elected representatives, and avoided deliberative debate. They did not seek a negotiated, substantive deal. Yet the creation of ICSID fostered a community of practice, which subsequently redefined international investment law through treaty making and arbitral decisions.

³⁰ George Woods, President of the World Bank, often praised ICSID as “a modest proposal”—presumably not intending to echo Jonathan Swift’s essay of the same name.

Adopting the modest multilateralism approach corrects a deficiency within existing IR explanations of investment treaties, which overlook the agency of the ICSID Secretariat. Many influential scholars assert that “ICSID clauses” are the most important element of an investment treaty, and use sophisticated theories and methods to explain the spread of treaties with ICSID clauses.³¹ Yet these scholars overlook the origins of these clauses: it was the ICSID Secretariat who promulgated and promoted them. That reality presents a profound challenge to accounts based on competition or coercion, but which modest multilateralism can explain. Modest multilateralism also challenges Maurer’s argument that postwar institutions have depoliticized investment disputes.³² While in aggregate his argument is accurate, micro-level archival work reveals that it was the framers’ awareness of their political constraints—and masterful operating within them—that enabled ICSID’s actions to look apolitical on the surface. Modest multilateralism is broadly compatible with accounts of the BIT policymakers as boundedly rational³³ and with accounts of the international investment regime as a complex adaptive system³⁴ but there are important differences. The relationship between modest multilateralism and other approaches is explored more in section 2.4.4.

Modest Multilateralism and Legal Scholarship

Applying political economy methods to legal developments can open up new questions and illuminate the broader context in which law operates. The modest multilateralism approach to ICSID can help identify the drivers of investment law’s rapid evolution. In 2003, Andreas Lowenfeld noted that while rules governing investment were unsettled in 1964, the conclusions of thousands of BITs, combined with widespread acceptance of the ICSID Convention, meant a wholesale change in the relevant general law. He concluded that the substantive investment protections contained in BITs have moved “to the level of customary law effective even for nonsignatories.”³⁵ Jose Alvarez, Stephen Schwebel and others concur.³⁶

³¹ Ginsburg 2005; Franck 2007; Yackee 2007, 2008; Kerner 2009; Allee and Peinhardt 2010; 2011; 2014; Simmons 2014.

³² Maurer 2013.

³³ Poulsen (forthcoming).

³⁴ Pauwelyn 2014.

³⁵ Lowenfeld 2003: 125.

³⁶ Schwebel 2004; Kaufman-Kohler 2006; Paulsson 2006; Commission 2007; Schreuer and Weiniger 2008; Alvarez 2009.

Modest multilateralism illuminates how ICSID's creation accelerated the evolution of investment law.

Legal scholars increasingly seek to explain why the international regime on investment takes the shape it does. Van Harten's critique of investment treaty arbitration led him to suggest a public law framework, and even an investment treaty court, to address concerns about accountability, openness, transparency, and independence.³⁷ Schill's depiction of a "multilateralizing" investment regime focuses attention on most-favored nation (MFN) clauses as well as many other elements of the regime that make it effectively multilateral.³⁸ Montt builds on network effects to argue that states were compelled by circumstances to join the investment regime.³⁹ Increasingly ICSID itself is a subject of study. Parra's institutional history provided a wealth of new evidence and insight on the development of ICSID.⁴⁰ Puig emphasizes ICSID's influence on investment law, and argues the organization is both more resilient and more dynamic than recognized.⁴¹ Modest multilateralism can enrich all these accounts, by providing both a new way to understand ICSID as an organization, and a fresh approach to its influence.

Recent legal scholarship also confronts the implications of the international investment regime. Pauwelyn argues the regime may be "more symmetrical than traditionally assumed" because it limits the ability of home states to use diplomatic pressure.⁴² Bonnitcha develops a framework to identify the costs and benefits of different levels of substantive protection for foreign investors under investment treaties.⁴³ Schultz and Dupont probe explicitly distributive questions, such as: does investor-state arbitration harm developing states for the benefit of a wealthy few in the global North?⁴⁴ These studies are a marked contrast to earlier scholarship, which focused on developing the practice of international investment law.⁴⁵

³⁷ Van Harten 2007.

³⁸ Schill 2009(a).

³⁹ Montt 2009.

⁴⁰ Parra 2012.

⁴¹ Puig 2013.

⁴² Pauwelyn 2014: 31–2.

⁴³ Bonnitcha 2014.

⁴⁴ Schultz and Dupont 2013; 2014.

⁴⁵ In the first decades, individuals working within its Secretariat produced most of the scholarship relating to ICSID. In subsequent decades, as a community of practice developed, individuals outside the Secretariat began to

Modest Multilateralism and Policy Organizations with an Interest in Development

The burgeoning policy literature on international investment governance stands to gain from rigorous political economy scholarship. Public interest critiques of the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) often highlight ICSID and investor-state arbitration.⁴⁶ In the 1990s, advocacy against the Multilateral Agreement on Investment (MAI) shone a spotlight on investor-state arbitration.⁴⁷ Many pieces written for a public audience present ICSID as a stooge of corporate interests. ICSID's structure—designed to elevate investment disputes away from local institutions and out of the public gaze—validates these charges in many ways. Yet ICSID is not a corporate creation. Civil servants seeking to remove the threat of force from investment disputes and facilitate development created it. Moreover, capital-importing states took the decision to join ICSID. Why? No study has addressed this question before.⁴⁸ A better understanding of when different elements of the system emerged would clarify that they are distinct and provide more (and more nuanced) options for states seeking reform of the system.⁴⁹

ICSID and the International Investment Regime

ICSID's framers sought to create machinery that could work alongside any type of substantive law. Since 1965, three types of substantive rules have come into force; the ICSID Convention has operated in conjunction with all three types of rules. The table below details how these types of rules appear in practice. The scope of the rules increases as one reads down the table, moving from an individual contract to proposed multilateral agreements.

write about ICSID, yet most books were written for practitioners, and sought to summarize the developments in arbitral practice. Recent examples of this type of work include: Reed, Paulsson, and Blackaby 2004; McLaclan, Shore, and Weiniger 2007; Newcombe and Paradell 2009; Dolzer and Schreuer 2012. Paulsson (2014: v) described this in his foreword to a recent interdisciplinary book on arbitration: “the authors of this volume have set out to fill a void they perceive in the literature on international commercial arbitration, due to the circumstance that it is preponderantly written by insiders, and is therefore mostly practice-oriented and imbued with a natural inclination to self-validation.”

⁴⁶ The public interest in investor–state arbitration is so strong that the European Commission has paused TTIP negotiations, launched a public consultation on “investment protection and investor-to-state dispute settlement,” and has received nearly 150,000 submissions in this regard. European Commission 2014.

⁴⁷ UNCTAD 1999; Malanczuk 2001.

⁴⁸ Echandi (2011) probed what developing countries expect from the international investment regime. He presents many interesting ideas, but his chapter is only 16 pages long, is not ICSID-specific, and focuses on the period after 1990. Other scholars have focused on developing countries in the regime (Odumosu 2006; Franck 2007; Gottwald 2007; Gallagher and Shrestha 2011), but their emphasis is on case outcomes in recent years.

⁴⁹ Lavopa, Barreiros, and Bruno 2013.

Table 1: Type of Substantive Rule and Relationship to ICSID

Type of Investment Governance	How ICSID Operates	Examples
Individual Investment Contracts	ICSID is written into individual contracts between investors and host states	Contracts are often private. For public discussions, see <i>SGS v Pakistan</i> , and <i>SGS v Philippines</i>
Domestic Law	ICSID is written into domestic legal frameworks on foreign investment	Albania's Foreign Investment Law of 1993, or Venezuela's Foreign Investment Law of 1999 ⁵⁰
BITs	ICSID is written into bilateral investment agreements, signed between host states and home states	Thousands in force; for example Argentina-France BIT
Bilateral Free Trade Agreements, with Investment Chapters	ICSID is written into the investment chapter of a trade treaty	US-Chile Free Trade Agreement
Plurilateral Investment Agreements	ICSID is written into treaties negotiated at a regional level or for a specific issue area	NAFTA, ECT
Multilateral Investment Agreements	ICSID could be written into treaties negotiated multilaterally	Attempts include ⁵¹ : Havana Charter (1948) OECD MAI (1998)

Investment contracts were the basis of consent in ICSID's first cases. Across ICSID's entire history, however, investment contracts have been the basis of consent for only 19% of cases. BITs were the basis of consent for over 63% of cases. Domestic law provided the basis of consent for 8% of cases, and plurilateral agreements for nearly 10% of cases.⁵² The basis for consent will continue to shift in the future: most likely toward plurilateral agreements and investment chapters in trade treaties. By itself, this development does not threaten ICSID. The separation of procedure from substance makes ICSID adaptable.

⁵⁰ Potestà (2011: 156-162) provides more examples of domestic laws that provide consent to ICSID jurisdiction.

⁵¹ In parentheses are the years in which negotiations were discontinued.

⁵² ICSID 2014-1: 10. These figures include ICSID and ICSID Additional Facility cases.

Separating substance from procedure has fundamental implications for the governance of investment. Investment treaties are a bilateral system. They institutionalize preferential treatment.⁵³ ICSID provides this bilateral system with a multilateral varnish, but does not deliver benefits typically associated with multilateralism. When substantive treaties are negotiated within a multilateral framework, it facilitates information sharing and capacity building, as states form blocs, pool resources, and develop expertise. Institutionalizing a multilateral treaty in a formal organization creates a visible, physical hub, which encourages research and learning. With only a procedural mandate, ICSID cannot act facilitate information or provide a hub in the same way.

Structure of the Thesis

The thesis proceeds in three sections: the first contextualizes, the second generates findings through detailed analysis, and the third evaluates the generalizability of these findings using alternate methods. Chapters one and two situate the creation of ICSID, and comprise the first section. Chapters three, four, and five analyze ICSID's creation and development in detail using process tracing. Chapters six and seven test the findings of the previous chapters, and form the third section.

Chapter one introduces the practical problem of international investment. It also contextualizes the emergence of the ideas and legal traditions that were brought together to form ICSID. Historically, armed intervention, negotiation, arbitration, and local courts have all been methods of dispute resolution. The key point of contention between capital-importers and capital-exporters in the 19th and early 20th centuries was diplomatic protection, and, specifically, the legality of armed intervention. Then, in the early 20th century, the idea of non-intervention gained support, reinforced by efforts to institutionalize arbitration and create permanent international judicial institutions. The international organizations that emerged after World War II did not include rules or machinery to govern investment. Yet the idea for such machinery existed in the minds of many postwar planners, and enabled the World Bank's

⁵³ MFN clauses extend the preferential treatment to other treaty partners, in a way that multilateralizes both substantive and procedural investment protection. Schill 2009 (a, b). Radi (2007); UNCTAD (2011) discuss its application to procedural protection, and Cole (2012) discusses recent developments.

management to present ICSID as filling a gap in the international architecture. The absence of dispute resolution machinery became more noticeable with the rising tensions of decolonization. Chapter one concludes by identifying how each of these developments shaped the framing of ICSID.

Chapter two frames the theoretical problem, and draws from the existing literature on organization building to elaborate the modest multilateralism approach. It begins from Lowenfeld's observation of a marked evolution in customary international law on investment. It defines international law as a process, and argues that ICSID provided a framework—a visible organization with state recognition—within which law could be developed. My focus is the building of ICSID as an organization. I describe the major challenges faced by the World Bank (ICSID's primary creator), and then analyze how the Bank used ambiguity, expertise, and incrementalism to surmount these challenges. In the final section, I probe the cross-national variation in receptiveness to the Bank's strategy. If a capital-importing state has a weak intrinsic ability to attract investment, it is more susceptible to the idea of ICSID. In this way, traditional determinants of FDI shape the contours of the international investment regime.

Chapter three sets out the context in which the World Bank created ICSID, and analyzes the Bank's strategy to disseminate the idea of investor-state dispute resolution. This chapter employs process tracing to identify the institutional constraints and drivers that shaped the outline of ICSID. ICSID was not created through the initiative of private investors or member states acting on their behalf. ICSID emerged fully formed out of the World Bank's Legal Department. The Bank structured ICSID's creation to prevent opposed states from uniting, and to allow universal participation but not deliberation. Four regional consultative conferences were held in 1964 and 1965. At these conferences, the Bank relied on expertise and ambiguity to advance the idea of ICSID.

Chapter four evaluates how states responded to the World Bank's dissemination of ICSID. The chapter analyzes records from the four conferences held in 1964 and 1965. These records

show that a sizeable minority of state representatives adopted the Bank's language and framing of ICSID. The majority, however, were skeptical. Several experts questioned the premise that ratifying ICSID could have an effect on inward investment flows. Others brought up the legal implications of the Convention. Despite these concerns, the Convention had enough support to open for ratification. The Bank's incremental strategy and use of ambiguity successfully assuaged the concerns of many representatives. The Convention secured nearly 40 ratifications in its first five years. State ratification decisions were largely aligned with their legal experts' positions at the conferences.

Chapter five argues that the ICSID Secretariat was a dynamic agent during ICSID's first five years. Using archival records from 1967–1972, this chapter demonstrates that the Secretariat actively pursued ratifications and, more importantly, advance consents. The Secretariat pursued advance consent in contracts, treaties, and domestic laws. The Secretariat promulgated model clauses, and then promoted the use of these clauses. ICSID did not have a single case during this period, but thousands of advance consents to ICSID were provided. The chapter ends with descriptive statistics on the early spread of advance consent clauses.

Chapter six compares “the ICSID approach” to investment law with “the UN approach” between 1972 and 1980. At the United Nations (UN), capital-importing states put forward resolutions on investment in the General Assembly and at the United Nations Conference on Trade and Development (UNCTAD) and spurred the creation of the United Nations Centre for Transnational Corporations (UN CTC). The ICSID Administrative Council—which, like the General Assembly, operates with a one-state, one-vote system—widened access to investor-state arbitration during these years, moving in the opposite direction of the UN General Assembly. The Administrative Council approved the creation of the Additional Facility, approved reciprocal agreements with regional arbitration centers, and approved ICSID's appointing authority. Chapter six concludes by arguing that, ultimately, the slow evolution of legal practice facilitated by the ICSID approach had a greater influence on investment law than the UN resolutions.

Chapter seven tests the conclusions of previous chapters using different methodological tools. Can the reasoning used to explain why many states joined ICSID also explain why some states did not? Or why states ratified ICSID at different times? The chapter develops hypotheses to explain the variability in ratification, and evaluates these hypotheses using event history models. The findings here suggest refinements to widely cited literature on BITs. The bulk of the variation in when states ratified the ICSID Convention can be explained solely by reference to traditional determinants of FDI. If a state has characteristics that give it an advantage in attracting FDI, it is less likely to ratify ICSID. External pressure and institutional quality may influence ratification in a few cases, but traditional determinants of FDI matter in all cases.

Methods

I employ two complementary modes of analysis: historical and statistical. This section first elaborates the strengths and weaknesses of process tracing, the most suitable historical method, and how I use the method. The logic of event history models, the chosen statistical technique, is discussed in chapter seven.

Process tracing is the best method to study an evolutionary process like ICSID's development. Process tracing is "the use of evidence from within a case to make inferences about causal explanations of that case."⁵⁴ It allows a step-by-step depiction of ICSID's development. I employ a type of process tracing—analytic explanation—which requires strong guidance from theory. As George and Bennett observe:

One variety of process tracing, analytic explanation, converts a historical narrative into an analytical causal explanation couched in explicit theoretical forms. The extent to which a historical narrative is transformed into a theoretical explanation can vary. The explanation may be deliberately selective, focusing on what are thought to be particularly important parts of an adequate or parsimonious explanation.⁵⁵

My explanation deliberately focuses on the World Bank's strategy, which I argue is the primary determinant of ICSID's development. This focus is necessary for a compelling analytic explanation, but it risks a confirmation bias. One shortcoming of process tracing is

⁵⁴ Bennett and Checkel (forthcoming).

⁵⁵ George and Bennett 2004: 211.

that researchers focus on supporting the hypothesis that interests them most, while giving little attention to evidence that supports alternative explanations.⁵⁶ I design my chapter structure to counteract this tendency towards confirmation bias. I examine four time periods, one in each chapter. As the table below illustrates, the chapters alternate in their focus between the Bank's action and state responses. Chapters three and five are zoomed in, to focus on actions taken by the World Bank/ICSID. Chapters four and six are zoomed out, to consider the actions of states and the wider context of the Bank or ICSID's actions. Chapters four and six actively seek non-confirmative evidence.

Table 2: Chapters, Actors, and Questions

Chapter	Primary Actor	Time Period	Questions
Chapter Three	World Bank's strategy	1951–1964	What drove the creation of ICSID? What characterized the Bank's strategy for disseminating the idea of ICSID?
Chapter Four	State responses and the Bank's rejoinders	1964–1966	To what extent was the Bank's strategy successful? What is the nature of state opposition to ICSID?
Chapter Five	ICSID's strategy	1966–1972	To what extent was ICSID passive machinery during its first five years? Who promoted advance consent, and how?
Chapter Six	State responses and ICSID's rejoinders	1972–1980	To what extent was ICSID able to carry on its active promotion of investor-state arbitration? How?

I use the above chapter structure to guard against an overly path-dependent explanation, another potential hazard of process tracing. The hazard here lies in assuming that, since the Bank was the dominant actor in one stage, it was the dominant actor in all stages. George and Bennett caution:

The investigator must recognize the possibility of path dependency in order to construct a valid explanation. Path dependency can be dealt with in several ways, for

⁵⁶ George and Bennett 2004: 217.

instance in identifying key decision points or branching points in a longitudinal study. However, the investigator must avoid assuming that certain outcomes were necessarily excluded once and for all by the resolution of an earlier branching point.⁵⁷

Chapters three, four, five, and six focus on different branching points. Using the chapter structure rigorously—not just continuing the same narrative in a new time period—prevents an overreliance on path dependency. For example, even if chapters three and four were to find strong evidence of World Bank leadership, chapter five might find that the World Bank led only until the point when ICSID was created, and then capital-exporting states took over. Or chapter six might find that leadership of ICSID was seized by capital-importing states during the 1970s, as at the UN. Treating the chapters as independent analyses allows for more robust conclusions.

Ultimately, the purpose of this thesis is to articulate the concept of modest multilateralism and to illustrate how the concept operated in the case of ICSID. My aim is to understand, in detail, how a controversial idea became a taken-for-granted pillar of an international legal regime—particularly when more ambitious initiatives in the field of investment law, like the Havana Charter and the OECD Conventions, failed to have a lasting impact. ICSID’s creation and early years provide rich insights into this process. In many ways ICSID is an unrepresentative international organization, yet it may teach us something about how small international organizations become influential. Process tracing of deviant cases offers an opportunity to differentiate and enrich general theories.⁵⁸

Analytic explanation through process tracing is a demanding approach. It requires the researcher to “sink a huge anchor in details.”⁵⁹ In this endeavor, I benefited enormously from Parra’s expert history of ICSID as well as Poulsen’s archival work on European BITs.⁶⁰ Yet extensive evidence gathering was still required. Information on pre-1980 ICSID is not readily available in an archive,⁶¹ and the key individuals are not available for interview.⁶² In this

⁵⁷ George and Bennett 2004: 212–3.

⁵⁸ George and Bennett 2004: 215.

⁵⁹ Goldstone 1991: 60.

⁶⁰ I also benefited from enriching conversations and exchanges with Parra and Poulsen, and am grateful for their generous approaches to scholarship.

⁶¹ In my experience, records from this period fall somewhere between the World Bank archives and ICSID Secretariat, and were not made available—but this may change as the dedicated current Secretary-General improves transparency at the Secretariat.

context, the most rewarding approach proved to be finding and interviewing current and recently retired officials, and letting their recollections of the past direct my search for evidence.⁶³ This was not a perfectly effective approach, as I was unable to verify certain claims that seem highly likely to be true, and if true, constitute important additions to knowledge about ICSID. However, this approach yielded surprising and in some cases pivotal insights. The World Bank's oral histories were also an unexpectedly rich resource. Broches, Delaume, and others spoke candidly, enabling me to piece together what happened using multiple points of view. I also benefited from—and grappled with the influence of—what Toye and Toye call “the American mania for recording.”⁶⁴ The US National Archives provide a singularly complete set of records about ICSID ratification. With the assistance of an archivist, I was able to view original documents and note details like the number of times Senator Fulbright had to cross out words in his notes before he got the full name of ICSID right.

Since ICSID's history is relatively new terrain for scholars, I spent a significant amount of time identifying meaningful features of the context and the relative positions of the primary actors. Goldstone emphasizes that these are crucial prerequisites to historical explanation. He argues:

To identify the process, one must perform the difficult cognitive feat of figuring out which aspects of the initial conditions observed, in conjunction with which simple principles of the many that may be at work, would have combined to generate the observed sequence of events.⁶⁵

The essence of historical explanation is relating events together through a process. Many scholars who use a process tracing method focus on specifying intervening steps. Intervening steps are within-case observations that occur between the proposed cause and outcome.⁶⁶ In the case of ICSID ratification, some intervening steps are unique to particular states. My primary interest is the international level rather than domestic processes. Therefore, the focus

⁶² Broches died in 1997; most other officials from this period are also deceased.

⁶³ In all, I interviewed 36 current and former officials, but all interviews were conducted off the record except for my interview with the current Secretary-General. No interview is cited in this thesis except my interview with the Secretary-General, and no claim made in an interview that I could not verify with external written evidence is advanced.

⁶⁴ Toye and Toye 2004: 13.

⁶⁵ Goldstone 1991: 59.

⁶⁶ Gerring 2008; Bennett and Elman 2006.

here is on the process that was common to all states, and in this case most of that process revolved around the Bank's strategy for disseminating the idea of ICSID.

The framework presented in chapter two is the result of many cycles of comparing my expectations against observed evidence. Mahoney argues that the iterative nature of process tracing is a strength of the method:

Process tracing can yield strong results even when the test is formulated as a response to the serendipitous discovery of data. This kind of *post hoc* process tracing seems quite common in qualitative and case-oriented research. Like detectives, qualitative and case-oriented researchers begin their investigations with an outcome to be explained and several different theories and hunches. In the course of the investigation, they discover unanticipated [evidence]. They formulate new hypotheses and carry out process tracing tests in light of these discoveries.⁶⁷

My explanation became more specific as I uncovered new evidence. After I found sufficient evidence to establish that the primary actor was the World Bank, I focused my explanation on the Bank's actions. The characteristics of modest multilateralism emerged during multiple iterations in which theory was compared against empirical observations. The nature of analytic explanation means that much of the application of theory occurs before the material is written: in a sense, some analytical scaffolding is removed from the final text.

The process traced here passes a hoop test; that is, the argument or hypothesis jumps through a hoop to warrant further consideration.⁶⁸ Passing a hoop test does not confirm the hypothesis, though it can lend considerable support to it.⁶⁹ My primary argument is that the Bank's strategy (cause) is necessary for state ratification (the observed outcome). Hoop tests are more difficult, and thus more useful, when the necessary condition is rare or abnormal.⁷⁰ How abnormal is it for the World Bank to discuss investor-state arbitration with its member states? For scholars familiar with the post-McNamara World Bank, which undertakes rule of law projects and advises states on their investment climates, advocacy of an idea like ICSID does not seem unusual. In the early 1960s, however, the Bank was a small organization that lent funds for specific projects—it was a bank, not the development organization it would become. For “Black's Bank” of the 1950s and 1960s to dispense advice about dispute resolution was

⁶⁷ Mahoney 2012: 587.

⁶⁸ Mahoney 2012: 574.

⁶⁹ Collier 2011; Van Evera 1997: 31.

⁷⁰ Goertz 2006; Ragin 2008.

peculiar. Therefore, evidence of the Bank actively discussing dispute resolution with states—in the absence of an actual dispute—passes a difficult hoop test. Despite this, since I do not advance a fully deductive argument, the tests conducted in this thesis are probabilistic: they lend support to the argument, but are not definitive. To ameliorate this, I use multiple methods, which permits stronger conclusions.⁷¹

Caveats

Scholars confront many choices while forging their particular path to a topic, and each of these choices has consequences. Here I would like to highlight the intersections of my path with other roads—not taken in the present thesis, but which may provide fruitful avenues for future research.

I have chosen not to incorporate any analysis of ICSID cases, apart from providing the context of three cases against Jamaica. Cases are of course central to ICSID's evolution, but I exclude them here in order to emphasize that ICSID's evolution is more than the sum of its cases. In addition, there is already an expert legal literature on ICSID cases. That said, the present thesis suggests some possibilities for future research, for instance comparing Broches' advocacy as Secretary-General and his approach as an arbitrator (to the extent the documents necessary for such a survey can be accessed).

I have also opted not to extend my analysis past 1980. Events since 1980 are a crucial part of any comprehensive explanation of ICSID, but my intent is not to provide a comprehensive history of ICSID.⁷² Rather, it is to illustrate how a particular approach, modest multilateralism, enabled an organization to be built and become influential against the odds. I focus on the years before 1980—commonly seen as a period of inactivity—because they provide a stronger testing ground for, and better illustration of, my argument. The foundations set in this period also hold the key to understanding ICSID's later growth and development.

⁷¹ Mahoney 2012: 584.

⁷² Furthermore, Parra (2012) has already done this with great skill and unrivalled access.

Finally, I do not analyze domestic ratification processes in detail, with the exception of one case study. Although I went to great lengths to locate domestic records, I found the most interesting parts of the debate were often left unsaid. To reconstruct the missing pieces would require additional primary sources and domestic context, and including these materials in the thesis would distract from the primary process of interest—the Bank’s strategic approach to make ICSID a viable organization. Domestic debates in response to the ICSID Convention provide a good point of departure for future analysis, however. In particular, debates that ended with a decision not to ratify ICSID (such as those within the Brazilian government in 1966 on investment issues⁷³) or debates in states that were “on the fence” about ICSID for many years because they saw it “from both perspectives” (usually non-capital-exporting OECD members, such as Australia or New Zealand⁷⁴) are particularly intriguing. The analysis presented in this thesis, however, forgoes these alternate avenues in order to focus on the Bank’s strategic appeal to states. The chapters that follow trace the idea of ICSID and present a novel argument to explain how this idea became persuasive to state policymakers.

⁷³ I am grateful to Pedro Mendonça Cavalcante for alerting me to these debates.

⁷⁴ I am grateful to several archivists in the National Archives of Australia and Archives New Zealand for assisting me in finding these debates and then pursuing the declassification of these records.

Chapter One: The History of Investment Dispute Settlement

This chapter provides a targeted history of investment dispute settlement and prepares the conceptual ground for the rest of the thesis. The ideas and legal traditions brought together to form ICSID have old roots. This chapter contextualizes the emergence of these ideas and principles. It draws out six themes. The first three themes appear before 1914, and the rest characterize the period between 1914 and 1964.

First, the chapter focuses on developments before 1914 that directly influenced ICSID's framing. Capital-exporters used colonization, consular jurisdiction, and other governance strategies to bring property owned by their citizens in distant places under direct rule. The contentiousness of this legacy is one reason ICSID's framers did not include substantive standards. Insofar as the ICSID Convention removes investment disputes from local courts (it removes proceedings but relies upon national courts for enforcement) and places foreign investors under different rules than domestic investors, it carries forward the idea of separate courts and separate law for foreign investors.

Before 1914, many different methods of dispute resolution were in common use, including armed intervention, negotiation, arbitration, and local courts. Investors and their states often employed multiple methods in a single dispute. This interplay between dispute resolution methods was something the framers of the ICSID Convention recognized and sought to limit.

The key point of contention between capital-importers and capital-exporters before 1914 was diplomatic protection—specifically the legitimacy of armed intervention. In the late 19th century, capital-exporters justified their use of force by extending the legal tradition of diplomatic protection to cover investment disputes. This idea was strongly contested by capital-importing countries, particularly in Latin America. A body of legal writing and treaty practice emerged supporting competing standards and debating the legality of armed intervention to settle investment disputes. These legal exchanges culminated in the Drago-

Porter Convention of 1907, which moved international law towards dispute settlement by peaceful means. ICSID's framers extended the Drago-Porter Convention.

Second, the chapter charts developments from 1914–1964 that influenced ICSID's framing. This fifty-year period was characterized by political change that threatened, and sometimes eliminated, the structures that had protected foreign investment.

The World Wars led to large-scale changes in property ownership, as well as demands for independence—both political and economic. Nationalizations of unprecedented size occurred throughout the period. Governments in capital-exporting states increasingly turned to arbitration after World War I. Many groups worked to strengthen arbitral institutions during the interwar years. At this time, the Permanent Court of Arbitration (PCA) and Permanent Court of International Justice (PCIJ) grew in stature. ICSID's framers saw these permanent institutions as a model.

During the interwar years, small groups of academics and policymakers began rethinking foreign investment. These individuals sought to disassociate investment from its imperial connotations and frame it as a useful tool for development. These ideas were connected to a broader set of new economic ideas that prioritized planning and an increased role for government. Certain early proposals for postwar multilateral economic organizations included investment arbitration. Ultimately, the postwar architecture that emerged did not include rules to govern international investment or machinery to resolve disputes. Nevertheless, the idea for such machinery existed in the minds of many postwar planners, and this enabled the World Bank's management to present ICSID as filling a gap in the international architecture.

Decolonization brought with it high expectations, but leaders in many new states found their political independence tempered by a lack of economic independence. Inherited economic arrangements and concession contracts made nation-building goals seem unreachable. Some leaders began to take back the commanding heights of their economies through nationalization. To investors, these acts were unconscionable property seizures. In many

instances, the rhetoric of nationalization exceeded the actions taken. Many concession contracts were renegotiated with relative ease—like the Saudi Aramco 50/50 agreement of 1950—while other renegotiations became hostile, like the Abadan incident described in the prologue. These expectations and tensions were the backdrop against which ICSID was framed in the early 1960s.

1.1 Informal Empire and Investment Treaties

The protection of investment was a central problem for imperial powers. Many governance arrangements were employed to protect property overseas, and most of them placed investment disputes outside of local law.

In many instances, informal control was preferred to formal colonization. In their seminal article on informal empire, Gallagher and Robinson observe: “By informal means if possible, or by formal annexations when necessary, British paramountcy was steadily upheld.”⁷⁵ Imperial governments had at their disposal many means to protect investment and found that different means for exerting control were useful in different situations. Platt disagreed with the characterization of British action in Latin America as ‘informal empire’ because the intent was not preferential market access. Yet he agreed that the British government selected between various governance strategies:

It was in the name of equal favour and open competition that HM Government was compelled on occasion simply to apply diplomatic pressure, at others to colonize, and at others still to reach an international compromise whereby underdeveloped nations were divided into spheres of interest or influence.⁷⁶

In many instances, imperial governments found a treaty sufficient to secure commerce and investment.

It was these instances, when investment was secured through treaty and not direct control, which gave rise to international investment law. Rules and practices developed in the spheres of interest and the places under consular jurisdiction, in the ‘informal empire’ more broadly.

⁷⁵ Gallagher and Robinson 1953: 8.

⁷⁶ Platt 1968a: 137. See also Platt’s (1968b: 306) response to Gallagher and Robinson.

In areas of direct control, like colonies, investment disputes were domestic disputes under the law. Colonial authorities applied metropolitan law and enforcement was direct, whether the court sat in Cape Town or London. It was disputes within the informal empire – areas with substantial investment, but in which control was less direct – that required the development of international investment law.⁷⁷

Treaties that protect investment first appeared between European nation-states in the seventeenth century. For instance, a 1667 treaty between Great Britain and Spain prohibited the mistreatment or seizure of ships and merchandise in each other's territory.⁷⁸ Then these standards were exported outside Europe, initially alongside trading firms like the Dutch East India Company.⁷⁹ Miles argues that extending the principles embodied in these treaties beyond Europe altered their character from one of reciprocity to one of enforced compliance.⁸⁰ She notes "although initially concluded on equal terms, these agreements were often the first stepping stone to establishing a more intrusive presence within non-European nations."⁸¹ These 'unequal treaties' usually established direct consular controls, or areas of extraterritorial jurisdiction within a host state. Within these areas, foreign nationals and their property were not subject to local laws, but remained within the jurisdiction of their home state.⁸² The establishment of exclusive consular rule proved an effective way to ensure the security of foreign-owned property.⁸³ This system also engendered resentment within host states.

Areas of informal empire were often important hubs of commerce, and many received large amounts of foreign investment. Most European investment from 1870 to 1914 did not go to European colonies. The table below shows that colonial affiliation had limited influence on the size and direction of capital flows. German colonies received only 2.6% of overall German

⁷⁷ Anghie (2004: 253) argues all international legal discourse has been shaped by imposing 'universal standards' that essentially furthered European/Western interests, but this is perhaps most explicitly true in the case of international investment law.

⁷⁸ Sornarajah 2004: 180; Miles 2013: 24.

⁷⁹ Lipson 1985: 38; Miles 2013: 21.

⁸⁰ Miles 2013: 21.

⁸¹ Anghie 2004: 85–86.

⁸² Miles 2013: 26,

⁸³ Lipson 1985:14; Miles 2013: 27.

capital exports. Collectively, British colonies received only 16.9% of capital exports from the UK.

Table 3: Destination of English, French, and German Foreign Investment 1870–1913

Destination	Percent of English Investment	Percent of French Investment	Percent of German Investment
Europe	9.7%	61.6%	53.5%
USA, Canada, Australia, New Zealand	41.0%	4.4%	15.7%
Latin America	17.7%	13.3%	16.2%
Africa	9.1%	7.3%	8.5%
Asia (India, Japan, China)	11.5%	4.9%	4.3%
Rest	11.0%	9%	2%
Total	100%	100%	100%
Colonies	16.9%	8.9%	2.6%

Note: Figures adapted from Daudin, Morys, and O'Rourke 2008: 28.

The table shows that capital exports from Europe largely went to the US, Australia, Canada, Argentina, and European countries. Membership of the British Empire helped attract capital inflows, *ceteris paribus*, but mattered far less than did endowments.⁸⁴ During this era, capital flows were unidirectional. Six European countries accounted for almost 90% of global foreign investment, and the UK alone for 42%.⁸⁵ The profound asymmetry between capital-exporters and capital-importers during this period had lasting consequences on how states perceived their interest with regard to investment protection.

⁸⁴ Clemens and Williamson 2004: 304.

⁸⁵ Belgium, England, France, Germany, the Netherlands, and Switzerland. Maddison 1995: 65.

1.2 The Interplay of Dispute Resolution Mechanisms Before 1914

A range of methods was used to resolve disputes over direct investment before 1914. In the early 19th century, the British government did not, in principle, take up the cause of specific investors. Yet it always retained the choice to intervene. Armed intervention became more frequent as the UK, the US, Germany, and others pursued more mercantilist policies in the late 19th century. Throughout the 19th and early 20th centuries, disputes were often settled through a mix of political and legal means. For instance, a home state (the US) might use force or a display of force so that a host state (Mexico) would agree to set up a mixed claims commission. During this period, advance consent to arbitration or other dispute settlement mechanisms was rare. Mixed claims tribunals or other arrangements were made *after* a dispute had arisen.

In principle, the British government pursued liberal, laissez-faire policies and not mercantilist ones during the 19th century. The government sought to defend the principle of private property rights, without becoming involved in individual disputes. Force was used to open up areas to economic intercourse and ensure continued free access, but not to advance the cause of specific investors.⁸⁶ Palmerston summed up the government's position in 1848:

The British Government has considered that the losses of imprudent men who have placed mistaken confidence in the good faith of foreign Governments would prove a salutary warning to others.⁸⁷

At the time, Palmerston was resisting pressure from British bondholders to take action against Spain, which had recently defaulted. Investors in this period favored debt instruments over equity, since they faced great informational asymmetries and principal-agent problems.⁸⁸ Investment flows were directed primarily into sovereign bonds and into railway bonds when they became available. The concentrated nature of portfolio investment made it easier to protect than FDI. In 1868, bondholders in London formalized their coordination by creating the Corporation of Foreign Bondholders, which negotiated with debtor states collectively.⁸⁹ If

⁸⁶ Miles 2013: 29.

⁸⁷ Quoted in Lipson 1985: 45, and in Waibel 2011: 24.

⁸⁸ Bordo, Eichengreen, and Irwin 1999.

⁸⁹ The Corporation was active from 1869 to 1988. "It was semi-official in the sense that it had Whitehall's sanction and full support. But it was not a government agency and could press for payments without being overly concerned about the repercussions for foreign policy. The CFB initiated arbitration against Ecuador, Santo Domingo, Venezuela, Guatemala, and Honduras." Waibel 2011: 103.

a state defaulted, the Corporation could block access to the London money market. The Corporation had Whitehall's full support, but it was not a government agency. In principle, no intervention was needed from the British government.⁹⁰

The British government asserted it had the right to intervene, but chose not to in many instances. Waibel calls Palmerston's memorandum the "most famous testament to the desire of governments to retain their freedom of action in responding to sovereign defaults and to limit the exercise of their creditor rights."⁹¹ Governments had a choice whether or not to intervene on behalf of bondholders and other investors. The British government faced that choice with increasing regularity in the latter half of the 19th century. British investments in Latin American government bonds soared in the 1820s. Virtually all of these bonds went into default soon thereafter. Many countries remained in arrears for decades. British investment returned during a second boom in the 1860s, and again in later years, despite periodic debt crises. In the second half of the century, investors found that direct investment could be more profitable than bond holdings. More than 174 million pounds in direct investment flowed from Britain into Latin America between 1870 and 1880, much of it for railway construction. By 1890, Great Britain's direct investments exceeded its bond holdings in Latin America.⁹²

Competition among imperial powers in Latin America fuelled mercantilist tendencies. American direct investment in Latin America grew quickly during the latter half of the 19th century. Between 1897 and 1914, US corporations made nearly one billion dollars in direct investments in Latin America, a figure that equals America's direct investments throughout the rest of the world.⁹³ Regarding intervention, the State Department initially followed the British lead in Latin America, as Lipson observes: "In general, the State Department, like the British Foreign Office, allowed its nationals to win their own prizes and suffer their own

⁹⁰ Yet in practice the British government stood behind the CFB, and Schwarzenberger (1969: 50–54) provides details of government support, through the middle of the 20th century.

⁹¹ Waibel 2011: 23–24.

⁹² Lipson 1985: 51.

⁹³ Lipson 1985: 58.

defeats.”⁹⁴ The US changed tack, however, as more investment became direct (instead of portfolio), and as competition among capital-exporters intensified.⁹⁵

Force began to play a more prominent role in individual disputes as direct investment increased, but so did arbitration. Platt counted at least 40 examples of “coercion and the landing of [British] armed forces” in Latin America between 1820 and 1914.⁹⁶ Arbitration was also common, often in the form of a mixed claims commission. Brownlie observes:

In the century after 1840 some sixty mixed claims commissions were set up to deal with disputes arising from injury to the interests of aliens.⁹⁷

He cites settlements conventions between Mexico and the US of 1839, 1848, 1868, and 1923; the Venezuelan arbitrations of 1903, involving claims of ten states against Venezuela (discussed below); and conventions between Great Britain and the US of 1853, 1871, and 1908.⁹⁸ These commissions often dealt with many individual claims. For example, the US-Mexico Mixed Claims Commission of 1868 arbitrated more than two thousand claims between 1871 and 1876.

Arrangements for arbitration were made after a dispute arose, not in the initial contract or treaty.⁹⁹ Vandevelde notes that Friendship, Navigation, and Commerce (FCN) Treaties “typically did not include any kind of arbitration clause or method of resolving treaty-related disputes through the use of binding, third-party procedures.”¹⁰⁰ There is a fundamental problem with waiting until a dispute arises to agree dispute resolution procedures. It is difficult for both parties to agree after the dispute has arisen. In many instances during the 19th century, the capital-exporting state would compel the other state, typically by force, to engage in arbitration.

⁹⁴ Lipson 1985: 61.

⁹⁵ Miles 2013: 29. Competition was primarily between Germany, the UK, and the US in Latin America.

⁹⁶ Platt 1968c: 330.

⁹⁷ Brownlie 1979: 521.

⁹⁸ Brownlie 1979: 521.

⁹⁹ Pauwelyn (2014: 31) terms this retrospective consent, and notes that the frequency of prospective consent is a main way in which investment treaty arbitration differs from past arrangements. Prospective or advance consent is the subject of chapter five.

¹⁰⁰ Vandevelde 2010: 26 and 31.

Even when force was not used, the possibility of armed intervention was always present. Many of the first direct investments were located along seacoasts, in part so they could be protected by naval power. This advanced the earlier practice of securing loans with collateral in port cities, usually the customs house, which was the main source of local government revenue.¹⁰¹ Sometimes force was used as a signal to other capital-exporters, even if no property had yet been damaged. Oliver observes that in 1915, for instance,

Marines landed in Haiti and subdued political uprisings which threatened the expropriations of European and American properties and the loss of American lives, but this action was taken not so much to protect American investments per se as to prevent a threatened military encroachment by Europeans.¹⁰²

To Latin American states, actions like these constituted “flagrant economic imperialism.”¹⁰³

Armed intervention could be based on flimsy pretexts. For example, the Swiss-French bank of J. B. Jecker and Company lent 75 million francs to the Mexican government, of which Mexico received only 3,750,000 francs. Non-payment of 100% of the loan and its interest was a justification for armed intervention by the French government, which led to regime change.¹⁰⁴ Law, force, and politics were bound together in the settlement of disputes.

1.3 Diplomatic Protection and the Right to Use Force in an Investment Dispute

In the late nineteenth century, the international legal tradition of diplomatic protection was expanded to cover investment disputes. Brownlie observes, “Literature on protection of aliens from the point of view of investor states grew, particularly after about 1890.”¹⁰⁵ Diplomatic protection itself is a long-established international legal tradition. It asserts that an injury done to a foreigner is an injury to their state and enables the home state to take action, including military intervention, to remedy the injury.¹⁰⁶ The principles of diplomatic protection were designed to ensure the safety and security of aliens. It was the conversion of these principles

¹⁰¹ Lipson 1985: 147

¹⁰² Oliver 1975: 348.

¹⁰³ Shea 1955: 13.

¹⁰⁴ Shea 1955: 14.

¹⁰⁵ Brownlie 1979: 521.

¹⁰⁶ Sornarajah 2004: 18. See also Miles 2013: 47.

into a system of property protection that generated conflict.¹⁰⁷ Sornarajah separates the general tradition of diplomatic protection from the issues at hand in investment disputes:

There is general recognition that there is state responsibility for direct wrongs done to aliens. Yet, there has been considerable tension generated between developed and developing states as to the application of the rules of state responsibility and diplomatic protection in the area of foreign investment. The disagreement has largely been focused on the standard of treatment to be accorded to the alien.¹⁰⁸

This area of law “has always been one of acute controversy.”¹⁰⁹ Capital-exporting and capital-importing states advanced competing standards of treatment in the nineteenth century.

1.3.1 Competing Standards

Capital-exporting states asserted an international minimum standard of treatment for their investors. Their governments took the position that “national treatment did not provide sufficient protection for foreign investors and that international legal obligations were not to be determined by reference to the domestic laws of individual states.”¹¹⁰ Failure to conform to the minimum standard of treatment created a reason for taking action against the violating state. In the *Neer* case, the General Claims Commission set up by the US and Mexico expressed the law as follows:

the propriety of government acts should be put to the test of international standards...the treatment of an alien, in order to constitute an international delinquency should amount to an outrage...or to an insufficiency of government action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.¹¹¹

Capital-importing states, in contrast, asserted there were no international standards. These states contested the right to use force. For capital-importing states, particularly in Latin America, the stakes were high: many governments considered their independence to be in question. As Shea observes:

Unable to resist these abuses by force, they [Latin Americans] attempted to build up strong logical, moral, and legal defenses. Much of the literature of diplomacy and jurisprudence of Latin America in the last half of the nineteenth and the first half of the twentieth centuries has been devoted to this objective.¹¹²

¹⁰⁷ Sornarajah 2004: 146.

¹⁰⁸ Sornarajah 2004: 139.

¹⁰⁹ Brownlie 1979: 522.

¹¹⁰ Miles 2013: 49.

¹¹¹ *L.F.H. Neer and Pauline Neer v United Mexican States* (1926). Emphasis mine.

¹¹² Shea 1955: 14.

Many Latin American legal scholars developed principles to substantiate the legality of resistance to armed intervention and diplomatic protection. Among the best known is Carlos Calvo, whose five-volume work first appeared in 1868.¹¹³ Calvo set forth two cardinal principles. First, sovereign states, being free and independent, enjoy the right to freedom from interference of any sort from other states, whether by force or diplomacy. Calvo spent years as a diplomat in Paris, and emphasized that equality among nations was not a concept reserved solely for Europe:

According to strict international law, the recovery of debts and the pursuit of private claims does not justify the armed intervention of governments, and since European states invariably follow this rule in their reciprocal relations, there is no reason why they should not also impose it upon themselves in their relations with the nations of the new world.¹¹⁴

Calvo's second principle asserted that aliens are not entitled to rights and privileges not accorded to nationals, and therefore may seek redress only before the local authorities.¹¹⁵

These arguments were widely accepted by governments in Latin America at the time, but not by those in Europe and the US.

Yet the principle of national treatment was widely accepted. As Brownlie observes:

There has always been considerable support for the view that the alien can only expect equality of treatment under the local law because he submits to local conditions with benefits and burdens and because to give the alien a special status would be contrary to the principles of territorial jurisdiction and equality... The principle of national treatment had support from many jurists both in Europe and Latin America prior to 1940, from a small number of arbitral awards, and from seventeen of the states at the Hague Codification Conference in 1930.¹¹⁶

In one of these arbitral awards, *Rosa Gelbtrunk v Salvador*, the arbitrator held:

A citizen or subject of one nation who, in the pursuit of commercial enterprise, carries on trade within the territory and under the protection of the sovereignty of a nation other than his own, is to be considered as having cast in his lot with the subjects or citizens of the state in which he resides and carries on business. Whilst on the one hand he enjoys the protection of that state, so far as the police regulations and other advantages are concerned, on the other hand he becomes liable to the political vicissitudes of the country... in the same manner as the subjects or the citizens of that state.¹¹⁷

¹¹³ Calvo's *Le Droit International Théorique et Pratique* was first published in 1868 and in final form in 1896.

¹¹⁴ Shea 1955: 18.

¹¹⁵ Shea 1955: 19. See also Shan 2007.

¹¹⁶ Brownlie 1979: 523-524.

¹¹⁷ *Rosa Gelbtrunk and the "Salvador Commercial Company" v Salvador* (1902).

Similarly, Sornarajah argues that the writings of Borchard and Ralston, two leading American experts at the time, do not contain support for an external standard of protection for foreign investment agreements.¹¹⁸

The battle between capital-exporting states and capital-importing states (in this case, primarily European and Latin American) played out in treaty language. Latin American states attempted to use treaties and conventions as a means to restrict or eliminate diplomatic protection.¹¹⁹

Latin American states signed treaties that included local remedies only (termed “inserting a Calvo Clause”, under which the alien agreed not to seek the diplomatic protection of his own state), or which limited the right of a capital-exporter to use diplomatic pressure.¹²⁰ Many judges and governments denied the validity of such clauses, but they received a degree of acceptance during the 1920s.¹²¹

The battle over diplomatic pressure was waged in the realm of politics too. Politics determined the nature of diplomatic protection. Shea observes, “redress for injuries was dependent more on political than on legal considerations.”¹²² Borchard asserted that diplomatic protection created a situation in which:

All three parties to the issue, the individual, the defendant nation, and the claimant nation, are in a precarious and unhappy condition. Politics rather than law governs the outcome of the case. If the individual is a member of a strong clan (state), he may be able to obtain the aid of his nation; if not, he is in this respect helpless. Thus his relief, which should be governed by legal rule, depends on the accident of his nationality.¹²³

Brownlie captures the animosity underlying the debate over standards:

The controversy concerning the national and international standards has not remained within the bounds of logic, as the two viewpoints reflect conflicting economic and political interests...Protagonists of national treatment point to the role the law associated with the international standard has played in maintaining a privileged status for aliens, supporting alien control of large areas of the national economy, and providing a pretext for foreign armed intervention.¹²⁴

¹¹⁸ Sornarajah 2004: 145.

¹¹⁹ Shea 1955: 21.

¹²⁰ Shea 1955: 23.

¹²¹ Brownlie 1979: 546.

¹²² Shea 1955: 11.

¹²³ Borchard 1927: 303.

¹²⁴ Brownlie 1979: 526.

All of the elements identified by Brownlie—the competing standards, conflicting political and economic interests, and armed intervention—can be seen in events in Venezuela around the turn of the 20th century.

1.3.2 Venezuela, 1899–1903

Civil war broke out in Venezuela in 1899. The war “crippled that national industry and paralyzed all commercial enterprise with the exterior” and led Venezuela to default on debts of roughly 26 million pounds.¹²⁵ The size of the default was not exceptional, and it followed many previous cycles of lending and default, the result of decades of irresponsible lending and unsteady government. The incident is memorable because it prompted the elucidation of legal doctrines on the use of force in international law, and because it was a turning point for US government involvement in Latin America.

At the time, European powers, particularly the UK and Germany, had substantial economic interests and quasi-colonial outposts in and around Venezuela. The situation was one of informal empire, with tensions running high because the US stood poised to replace the European states as the dominant external power. A contentious boundary dispute between British Guyana and Venezuela had been solved through inter-state arbitration three years earlier, in 1896. The boundary dispute “had a catalytic effect on the delicate balance of power between the United States and Britain. While politically Venezuela accepted American supremacy, she turned to London for loans.”¹²⁶

In this charged political situation, Venezuela defaulted on its loans. An acrimonious correspondence ensued between Venezuela, Great Britain, and Germany.¹²⁷ In December 1902, the British government informed the Venezuelan government that Germany and Britain had agreed to act together in order to obtain a settlement of all their claims.¹²⁸ Then the UK, Germany, and Italy bombarded a number of Venezuelan ports, sank three Venezuelan

¹²⁵ Hood 1983: 177.

¹²⁶ Hood 1983: 138.

¹²⁷ Hood 1983: 186.

¹²⁸ Hood 1983: 186.

warships and took over customs houses. Faced with this European blockade, Venezuela soon relented.

A protocol was signed between the blockading powers and Venezuela in February 1903, in Washington. The protocol set up ten arbitral commissions to settle the claims, and referred part of the dispute to the PCA in The Hague.¹²⁹ The primary legal question the PCA was called upon to decide was whether “unilateral enforcement by military intervention entitled the intervening powers to preferential payment of their claims under international law.”¹³⁰ The UK, Germany, and Italy requested preferential treatment, since they had borne the cost of the armed intervention. Throughout the proceedings of the mixed claims commissions, it was never in dispute that, in principle, Venezuela would be liable to pay compensation.¹³¹

In an immediate sense, the settlement of the Venezuelan default was a triumph for the right of armed intervention. W. L. Penfield, the Solicitor of the US State Department at the time, wrote an article in July 1903, in which he argued:

The intervention of Germany and Great Britain in Venezuela was a notable event in its relation to the law of nations. It was notable ... as an impressive assertion of the right of intervention for the protection of subjects of intervening states ... and not less important and far-reaching are the consequences which will flow from the recognition of the Monroe Doctrine, and from the reference to the Hague tribunal.¹³²

Penfield was correct that the intervention in Venezuela was a notable event for international law. The ultimate influence would be in the opposite direction, however. The legal arguments made in response to the action in Venezuela, combined with geopolitical developments, would one day curtail the right of armed intervention.

1.3.3 The Drago Doctrine and the Drago-Porter Convention

In response to events in Venezuela, the Argentinian foreign minister, Luis Drago, sent a note to the Argentine Ambassador to the US on December 29, 1902, which subsequently became public and attracted widespread attention. The note argued “the public debt of an American

¹²⁹ Ralston 1904. Ten commissions were needed because Venezuela’s creditors were of ten nationalities.

¹³⁰ Waibel 2011: 30–34.

¹³¹ Noted in Miles 2013: 66–8.

¹³² W.L. Penfield, “The Anglo-German Intervention in Venezuela” in the July 1903 edition of the *North American Review*. Quoted in Hood 1983: 191. Emphasis mine.

State cannot occasion armed intervention, nor the actual occupation of the territory of American nations by a European power.”¹³³ Drago framed his argument for a US audience, intending the Drago Doctrine to be a corollary of the Monroe Doctrine.¹³⁴ Drago wrote an article explaining his logic in the inaugural issue of the *American Journal of International Law*.¹³⁵ Although Drago’s argument fit squarely within the Monroe Doctrine, the response from the US government was lukewarm. Some in the government argued that to adopt the Drago Doctrine would discourage European investors, to the detriment of Latin American countries.

Yet in 1904, US President Theodore Roosevelt took up the logic of the Drago Doctrine in his State of the Union Address. His statement came to be known as the Roosevelt Corollary to the Monroe Doctrine. The Roosevelt Corollary prohibited European intervention in the Americas to coerce payment of debts. In principle, the Corollary was the Drago Doctrine. The Corollary, however, reserved the right *for the US* to use military action in the Western Hemisphere to force payment of debts. In practice, the Corollary became associated with the increasing use of force by the US, and served as justification for US interventions in Cuba, Nicaragua, Haiti, and the Dominican Republic.¹³⁶ Wary of the Roosevelt Corollary, Latin American officials continued to pursue the idea of non-intervention in international law.

In 1907, a modified version of the Drago Doctrine was brought into international law through the Porter Convention.¹³⁷ The Convention was one of 12 agreements produced during the Second Hague Conference on International Law. The Porter Convention stated that military intervention to coerce payment of debts was prohibited, as a general principle. Military intervention was permissible if the debtor country failed to participate in arbitration. It was a compromise, but one that failed to address the concerns of Latin American states. Shea observes:

¹³³ Hershey 1907: 30.

¹³⁴ Drago even quoted Alexander Hamilton and the 11th Amendment to the US Constitution, making it clear he sought to appeal to an American audience. Hershey 1907: 28–31.

¹³⁵ Drago 1907: 692.

¹³⁶ The 1933 Good Neighbor policy of the Franklin Roosevelt Administration officially put an end to armed intervention to collect debts.

¹³⁷ At the time it was known as the Porter Convention, after General Horace Porter, the head of the US delegation. It is now referred to as the Drago-Porter Convention.

The Convention left a loophole through which a fleet of warships could sail in providing that the renunciation of the use of force was not applicable ‘when the debtor state refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any *compromis* from being agreed on, or, after the arbitration, fails to submit the award’.¹³⁸

The decision to use armed force in investment disputes was still left to the discretion of capital-exporting countries. This framing was unacceptable to Latin American countries.¹³⁹

The Porter Convention provides a suspension of diplomatic pressure, as long as arbitration is progressing. The ICSID Convention adopts the same approach—they both provide a suspension, and not a removal, of diplomatic pressure.¹⁴⁰

The Porter Convention moved international law towards dispute settlement by peaceful means and away from armed intervention. Delegates to the 1907 Hague Conference “strove mightily to substitute the courtroom and its law for the battlefield and its dead.”¹⁴¹ The delegates were ahead of their time, perhaps, and in the area of investment protection made limited progress toward removing the use of force. The Convention was limited in its scope and failed to address the immediate concerns of Latin American states, but it did set out principles that would be picked up later. Waibel expresses this with a powerful metaphor:

Debtor countries had little choice but to accept arbitration in view of the Damoclean sword of the use of force that continued to hang over their heads. The Drago-Porter Convention represented a gradual yet significant step toward outlawing the use of force...It was a trailblazer for restricting the use of force in international law. One had to wait until after World War II when Article 2 (4) of the UN Charter generalized the principle of the Drago-Porter Convention by outlawing the use of force in international law.¹⁴²

This principle—substituting peaceful dispute settlement for the use of force—would inspire a wave of institution building after World War I and World War II. One of these institutions was ICSID.

¹³⁸ Shea 1955: 15.

¹³⁹ Shea 1955. See also Vandevelde 2010: 30.

¹⁴⁰ As discussed in chapter four, the ICSID Convention leaves the possibility of diplomatic pressure open before the case is registered and after a decision has been handed down.

¹⁴¹ Van Genugten and Scharf 2007.

¹⁴² Waibel 2011: 38.

1.4 Large-Scale Nationalizations and Their Judicial Settlements During the Interwar Era

World War I and the interwar period saw property seizures that were without precedent, in both their scale and their nature. The Soviet nationalization of 1919 challenged the very idea of private property. The Mexican nationalization of 1938 asserted the state's ownership of subsoil rights. These were incidents that could not be settled with a gunboat display, even if the political will and capacity to do so had existed. These incidents required home governments to take seriously the assertions and reasoning of host governments, possibly for the first time. Some disputes, like the Mexican nationalization, were dealt with through inter-governmental negotiations. The settlement of others, like the Soviet nationalization, relied more heavily on international institutions. A body of practice began to emerge from the PCIJ in particular, as well as from the PCA. Advocates of arbitration worked for greater institutionalization.

By 1938, oil production in Mexico had been declining for years, while costs had been rising.¹⁴³ The oil companies, mostly American and British-owned, were in financial distress, while the oil workers were striking for better conditions.¹⁴⁴ When the companies showed themselves unwilling to discuss the unions' demands or comply with the orders of the Federal Labor Board, relations soured. To stop wildcat strikes and calm domestic instability, Mexican President Cardenas nationalized the oilfields.¹⁴⁵ US President Roosevelt, no friend of the oil industry, was sympathetic to Cardenas and saw the Mexican government's actions as generally responsible. After a determined publicity campaign by the oil companies, the Roosevelt administration, led by Secretary of State Cordell Hull, pressed the Mexican government for compensation.¹⁴⁶ The dispute was settled through an exchange of letters and inter-governmental negotiations. Under the settlement, the Mexican government paid compensation, possibly at above-market rates.¹⁴⁷ Yet the most important, and most visible,

¹⁴³ Maurer 2011: 594.

¹⁴⁴ Maurer 2011: 597.

¹⁴⁵ Maurer 2011: 599.

¹⁴⁶ Maurer 2011: 603. Hull was not a fan of the oil industry, but (a) wanted a reciprocal trade agreement from the Mexican government and (b) convinced Secretary of the Treasury Henry Morgenthau that the dispute was a convenient excuse to suspend the Silver Purchase Act of 1934.

¹⁴⁷ Maurer 2011: 605-7.

outcome was that the Mexican government retained the oilfields—the US government recognized that the subsoil rights were now national property.

The Soviet government repudiated its foreign debt and began to nationalize all property within its territory during World War I. The Soviet government's actions were a profound challenge to the institution of private property. More immediately, the actions had serious consequences for French and Belgian investors. Around two-thirds of all French and Belgian foreign investment was in Russia/the Union of Soviet Socialist Republics (USSR) at the time of the nationalizations.¹⁴⁸ France and Belgium were not in a position to use force to compel the USSR to pay. The Soviet government took a creative position on compensation. In 1921, the government acknowledged that it was obligated to pay compensation to foreign investors, but announced it would pay only if the allied governments paid compensation for losses attributable to foreign military intervention after the revolution. The losses attributable to the military intervention were four times the claims of foreign investors. The Soviet position was a demand for reparations, minus the investor claims.¹⁴⁹ Unsurprisingly, the claims against the Soviet government were not settled for many decades. The first important settlement did not occur until the mid-1980s.¹⁵⁰

The Soviet actions, and nationalizations by other communist governments, marked a shift in the settlement of investment disputes. The use of force was not seriously considered. Instead, these disputes were brought before permanent legal institutions, or were settled through negotiations between states. The PCIJ, set up in 1922, heard many of these cases. Some, like the Case Concerning the Factory at Chorzow, which established that an unlawful expropriation requires compensation sufficient to eliminate the effects of the wrongful act, would become cornerstones of investment law.¹⁵¹ States adapted their treaty practice to include these new institutions. Clauses specifying arrangements for arbitration in advance appeared soon after the 1899 Hague Conference created the PCA. The structure of the PCA

¹⁴⁸ Jones 2005: 27.

¹⁴⁹ Lipson 1985: 67.

¹⁵⁰ Waibel 2011: 39. Waibel also notes that when the Soviet Union collapsed, the US was still negotiating a final settlement of the 1917 repudiation.

¹⁵¹ When claims were submitted to arbitration under BITs many decades later, claimants and respondents alike relied upon PCIJ jurisprudence in the early twentieth century. Vandevelde 2010: 35.

and, later, the PCIJ, would influence the structure of ICSID, insofar as they were permanent dispute resolution machinery untethered to any particular set of rules.¹⁵²

Treaty practice in the interwar years incorporated these new permanent institutions. More FCNs began to specify that the disputes would be submitted to the PCIJ.¹⁵³ Nevertheless, many disputes were still settled through inter-state agreements to constitute mixed claims commissions. After World War I, these commissions, particularly those formed to resolve claims for war damages against Germany, sometimes permitted the claimants to submit their claims to the tribunal directly.¹⁵⁴ This was a precursor to giving individuals standing under international law, which was formalized in the ICSID Convention.

During the 1920s and 1930s, several international conferences were held to develop international law on investment protection. In 1930, the League of Nations held the First Conference for the Codification of International Law. One of the three topics selected for codification was “the responsibility of states for damage done in their territory to the person or property of foreigners.” Edwin Borchard prepared a Draft Convention in preparation for the conference, which became known as the 1929 Harvard Draft.¹⁵⁵ Delegates made little progress, with Manley Hudson, the American technical representative, observing: “A sharp divergence of views on the fundamental aspects of the subject was evident from the start, and but slight progress was made toward reconciling the divergence.”¹⁵⁶ The delegates present were legal experts, not politicians. In a contrast with the Bank’s approach to ICSID, Hudson argued that the Conference might have achieved better results if more elected politicians had been present: in his view, the Conference vindicated the adage that “experts should be on tap but not on top.”¹⁵⁷

¹⁵² Broches wrote: “The provisions on jurisdiction in the Preliminary Draft of the Convention which was discussed at the regional consultative meetings were inspired in part by the practice of the International Court of Justice.” Broches [1966] 1995: 172.

¹⁵³ Vandevelde 2010: 25.

¹⁵⁴ Vandevelde 2010: 37.

¹⁵⁵ Borchard 1929: 133–239.

¹⁵⁶ Hudson 1930: 459.

¹⁵⁷ Hudson 1930: 448.

Of these League of Nations conferences, Lipson writes, “the issue of foreign investor rights was brought up and, unlike the debates in pre-war fora [the Hague Conventions of 1899 and 1907], was fought to a stalemate.”¹⁵⁸ As capital-importing states gained voice, investment protection was increasingly contested in international fora. At the 1930 League of Nations conference, delegates from 17 of the 42 states represented believed that foreigners should not enjoy better treatment in a country than its own nationals.¹⁵⁹

Investment protection was also the subject of regional conferences and private initiatives during the interwar years. Latin American states continued to develop the national treatment standard through treaty practice. At the Seventh International Conference of American States held in Montevideo in 1933, governments adopted a Convention that provided:

Nationals and foreigners are under the same protection of the law and the national authorities, and the foreigners may not claim rights other or more extensive than those of the nationals.¹⁶⁰

This was a reiteration of the national treatment standard. At the same time, the International Chamber of Commerce (ICC) was developing a draft convention on the protection of foreigners. Work on this draft convention began in the 1920s, and the draft consistently provided for ICC arbitration of disputes. Although the convention was never adopted, it further developed the idea of arbitration.¹⁶¹ Codification efforts continued throughout the late 1930s and early 1940s, and received renewed attention in the postwar era of institution building.

In 1948, the International Law Association (ILA) published two draft statutes on investment dispute settlement that outline many of ICSID’s characteristics. Both statutes establish permanent machinery for investment disputes. One proposes investor-state arbitration, while the other outlines a Foreign Investments Court.¹⁶² Both draft statutes give investors standing against states:

¹⁵⁸ Lipson 1985: 141.

¹⁵⁹ Vandevelde 2010: 36.

¹⁶⁰ Article 9 of the “Montevideo Convention on the Rights and Duties of States,” signed December 26, 1933.

¹⁶¹ Article 14 “should contain detailed provisions for the composition and working of the International Court of Arbitration to which all disputes and differences are to be referred under Article 13. The details are, however, left to be worked out by the negotiating governments.” ICC 1949: 278. See also Vandevelde 2010: 53.

¹⁶² The Court was to have 15 members, elected for nine years each (Article X). No member of the Court may engage in any other occupation of a professional nature, or act as agent, counsel, or advocate in any case

A national of one of the Parties claiming that between him and a Party there exists a dispute...may institute proceedings against this Party before the Arbitral Tribunal.¹⁶³

Like ICSID, the arbitral tribunal consists of three arbitrators: two selected by the parties, and if the parties cannot agree, the President of the ICJ appoints the third arbitrator.¹⁶⁴ Like ICSID, deliberations continue even in the absence of one of the parties.¹⁶⁵ The idea for investor–state arbitration machinery had been proposed. The next section explores the extent to which this idea was integrated into interwar and postwar proposals for an international organization on investment.

1.5 Proposals for an International Organization on Investment

During the interwar years, new thinking about FDI emerged that would influence postwar policymaking. This new approach attempted to remove the imperialist associations from foreign investment and recast it as a tool to facilitate development. Scholars presenting such a view moved away from laissez-faire attitudes and asserted that governments had a role to play in facilitating investment for development. To facilitate useful government intervention, an international investment organization was proposed.

One group of scholars had a direct impact on US planning for the postwar era. In 1940, the Council on Foreign Relations (CFR) formed expert study groups to develop plans for the postwar era. These experts commanded influence within US academia and government, and several study group reports became templates for State Department policy.¹⁶⁶ Jacob Viner and Alvin Hansen led the Study Group on Economic and Financial Problems.¹⁶⁷ Their study group sent the State Department nearly 100 reports and 66 discussion digests, several of which dealt with international investment.

(Articles XIII and XIV). Costs shall be borne by the Parties proportionally in their percentages of contributions to the costs of the United Nations (Article XXV). ILA 1948: 269-270.

¹⁶³ Article 3. ILA 1948: 259. One important difference between the ILA draft and ICSID's eventual shape was this, in the ILA draft: "access to the tribunal presupposes the exhaustion of local remedies except where other rules of international law or an agreement between the parties provides otherwise." Article 4b. ILA 1948: 260.

¹⁶⁴ Article 4. ILA 1948: 260.

¹⁶⁵ Article 25. ILA 1948: 264.

¹⁶⁶ Shoup and Minter 2004: 119 and 122.

¹⁶⁷ Shoup and Minter 2004: 122.

In a 1942 memo on international long-term investment, Viner suggested mitigating the obstacles of international investment through multinational agencies. In Viner's proposal, these agencies should:

Police international investment by private capital, so as to provide judicial or arbitral facilities for settlements of disputes between creditor and lender, and to remove the danger of the use by creditor countries of their claims as a basis for illegitimate political or military or economic demands.¹⁶⁸

Later in the same memo, Viner elaborated on his argument for investment arbitration, and on the need for separate arbitral institutions:

There is need for exploration of the possibilities of minimizing the source of international conflict through the establishment of (A) multinational investment institutions and (B) supranational judicial or arbitral institutions for the settlement of disputes between debtors and creditors where these are of different nationalities and one or both are governments.¹⁶⁹

In 1943, the State Department sent the Treasury a proposal for an International Investment Agency, which drew heavily on Viner's proposal.¹⁷⁰

Viner, Hansen, and their colleagues took pains to distance their ideas from the imperialist character of past investment. When addressing a Senate subcommittee in 1940, Assistant Secretary of State Adolf Berle, a member of Viner and Hansen's study group, condemned past foreign investment. In his view, the purpose of foreign investment should not be profit for private firms, it should be the development of the host government. Berle argued:

The past movements of capital have been regarded as, frankly, imperialist. They usually led to difficulties of one sort and another. The countries did not like to pay; the interests built up were frequently supposed to be tyrannous. We are still liquidating many of the 19th century messes which were occasioned by the somewhat violent and not too enlightened moves of capital. As nearly as one can see it, the object would seem to be capital movements which are worked out not merely because some concessionaire wishes to make a profit but following the more careful plans of the various governments involved with a view to the development of the country.¹⁷¹

Berle was speaking to the Subcommittee in support of a proposed Inter-American Development Bank. He urged support of the proposal because,

¹⁶⁸ Viner "Problems of International Long-term Investment," April 1, 1942. Viner drew on Eugene Staley's ideas, as articulated in his book, *Raw Materials in Peace and War*. In writing this book, Staley drew on his experience as the rapporteur of a study group that included Alvin Hansen, Jacob Viner, and other CFR members, that was convened by the American Coordinating Committee for International Studies.

¹⁶⁹ Viner "Problems of International Long-term Investment," April 1, 1942.

¹⁷⁰ Young, "Draft of Proposed International Investment Agency," September 4, 1943. Ultimately, Harry Dexter White's proposal (which emerged within the Treasury) would evolve into the negotiating text at Bretton Woods.

¹⁷¹ "Statement of Adolf Berle" 1940: 20.

There must now be a means of making capital available to these [Latin American] countries on some basis which is less dangerous than the mere somewhat whimsical operations of overseas financial houses.¹⁷²

The Roosevelt administration was attempting to cultivate a new relationship with Latin American states. The language used in a quasi-governmental publication titled “Latin America in the Future World,” overseen by Alvin Hansen, provides a sense of the new terms offered to Latin American states.¹⁷³ Describing the proposed international investment corporations, the authors argued,

The aim would be not solely to protect the investor against fraud but also to promote sound expansion and to safeguard both debtor and creditor against crises in international exchange... [the system] would implement the public character of investment and minimize its former capacity for waste, injustice, and international friction.¹⁷⁴

The language of injustice and the emphasis on *public* investment were new. Arbitration was re-packaged among these new ideas as well. The proposal suggested arbitration of any disputes arising between international debtors and creditors.¹⁷⁵

These principles were enshrined in the leading postwar attempt to create a multilateral organization. The Havana Charter, agreed in 1948, reflected the new thinking on investment. The Charter’s text read:

International investment, both public and private, can be of great value in promoting economic development and reconstruction, and consequent social progress... [members have the right] to take any appropriate safeguards necessary to ensure that foreign investment is not used as a basis for interference in its internal affairs or national policies.¹⁷⁶

The Havana Charter was agreed after robust deliberations, but never came into force. The US failed to ratify the Charter. Investment protection was one of the main reasons the Charter failed to come into force. In Havana there had been “a general unwillingness to give guarantees as to its security, and, in some cases, a feeling that such capital in itself was suspect, and a likely tool of foreign exploitation.”¹⁷⁷ US businesses interpreted the few

¹⁷² “Statement of Adolf Berle” 1940: 20.

¹⁷³ Soule, Efron, and Hess 1945.

¹⁷⁴ Soule, Efron, and Hess 1945: 325–326.

¹⁷⁵ Soule, Efron and Hess 1945: 325.

¹⁷⁶ Article 12. Article 93 specifies arbitration to settle disputes. Havana Charter (1948).

¹⁷⁷ Toye 2003: 288.

provisions on investment in the Charter as weakening the status quo.¹⁷⁸ John Parke Young, the author of the State Department's draft for an International Investment Agency, recalled later:

We hoped that the GATT would become a real organization like the IMF (International Monetary Fund) and the World Bank, but...The business community disliked some of the investment provisions, especially the provision regarding compensation in local currency for properties expropriated. This weak provision was slipped in by our delegation in Geneva without Washington clearance. I was chairman of a group in Washington working on investment and other provisions and was shocked when this was done.¹⁷⁹

The main US business organizations came out against the Charter, so the Truman administration did not submit it to Congress.¹⁸⁰ The temporary arrangements for trade, the GATT, became semi-permanent and facilitated the continuation of multilateral dialogue. The provisions on investment, however, were not carried forward in any multilateral architecture. There was no multilateral governance structure for investment.

1.6 Decolonization and Its Discontents

The reality of foreign investment was slower to change than the rhetoric of multilateral planners like Viner would suggest. Political independence was not accompanied by economic independence for many of the states that emerged from colonial domination in the 1950s and 1960s. Colonial-era concession contracts remained in force, and FDI relations continued largely as before.

Leaders in many newly independent states found themselves constrained by inherited economic arrangements. As James Crawford put it, "When, after a long process, independence was achieved...the independence that was granted turned out to be less than it seemed."¹⁸¹ Leaders faced urgent challenges, often including core nation-building tasks like creating health systems, education systems, militaries, and civil services. Their ability to address these challenges was limited by existing foreign investments. Brownlie characterized the situation as one of "partial independence":

Many of the poorer states have accepted foreign investment at the expense of economic, and therefore political, independence. It is all very well to say that nationalization is possible – providing prompt and adequate compensation is paid. In

¹⁷⁸ Toye 2003: 288.

¹⁷⁹ Young Oral History 1974: 82.

¹⁸⁰ Toye and Toye 2004: 41.

¹⁸¹ Crawford 2004: xii.

reality this renders any major economic or social programme impossible, since few states can produce the capital value of a large proportion of their economies promptly. It is common for the poorer economies to be subjected to foreign ownership to a great extent, and the analogy of private law ownership clashes sharply with the desire of states to govern their own economies.¹⁸²

To many leaders, foreign investment still seemed antithetical to development. To them, FDI was not an instrument in the service of national development: it was a tool for continued control by external powers.

Continuing foreign ownership of key industries was interpreted as cover for political interference. This interpretation was vindicated in multiple cases, most often when strategic resources were involved. The case of bauxite mining in Jamaica in chapter six illustrates the manifold ways in which a capital-exporting government, the US in that instance, could be involved with foreign investment, and by extension with domestic politics. The appeal of communism was a consideration for the US government in Jamaica. The Soviet model offered a path to development through centralization and planning. The governments of capital-exporting states like the US needed to ensure their alternative narrative—development funded by lending and foreign investment—was viable and attractive. This imperative, along with other geopolitical developments, led to some renegotiations and agreements under more equal terms.¹⁸³

Concession contracts were an area of particular friction. Concession agreements usually refer to agreements conferring the sole right to exploit natural resources or license agreements for the construction and operation of transport or telephone services.¹⁸⁴ Newly independent governments often inherited concession agreements in which the taxes an extractive company paid to its “home” capital-exporting state were far greater than the revenues it paid to the host government. The 1933 Concession Agreement between the Iranian government and AIOC, the agreement underlying the Abadan dispute, exemplifies these arrangements. Under the 1933 Concession Agreement, AIOC paid no tax to the Iranian government for *30 years*.¹⁸⁵ When

¹⁸² Brownlie 1979: 537.

¹⁸³ For instance, Schwarzenberger (1969: 57) explains the actions of OECD states toward Indonesia must be viewed within the context a sustained effort to remove Indonesia from the Chinese sphere of influence.

¹⁸⁴ Brownlie 1979: 547.

¹⁸⁵ See prologue. Article 11 of the 1933 Agreement, quoted in Schwarzenberger 1969: 75. Emphasis mine.

the Agreement was renegotiated in 1954, the fee paid was “fixed at one shilling per cubic metre of crude oil delivered or refined.”¹⁸⁶ The renegotiation of these agreements sometimes led to the use of force, as with the Abadan dispute, but more often they were resolved through arbitration.

The “great oil arbitrations” were a series of postwar disputes emerging from concession contract renegotiations.¹⁸⁷ The facts of these cases had many similarities. These were the type of disputes ICSID was designed to resolve. The arbitrator’s approach in a case against Abu Dhabi provides a sense of international law at the time. The law of Abu Dhabi would have governed the contract underlying the dispute, but the arbitrator observed:

No such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran and it would be fanciful to suggest that within this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.¹⁸⁸

While that language reads as a patronizing dismissal of local institutions today, it also displays fidelity to the idea of law. In the postwar era, political and legal developments both reinforced the idea that force was illegitimate and that investment disputes should be settled through peaceful means like arbitration.

The use of force became illegal under international law with the adoption of the UN Charter in 1945. The Charter devotes five articles to the peaceful settlement of disputes.¹⁸⁹ The Charter lent additional support to attempts to institutionalize arbitration globally. One landmark success in this area was the adoption of the New York Convention in 1958. The ICC issued a Draft Convention in 1953 that aimed to create a system of arbitration not governed by national law.¹⁹⁰ The ICC presented the draft to the UN Economic and Social Council (ECOSOC). ECOSOC then adapted the treaty in response to sovereignty concerns. The title of the ECOSOC Draft Convention makes clear the difference: whilst the ICC Draft Convention

¹⁸⁶ See prologue. Article 13 of the 1954 Agreement, quoted in Schwarzenberger 1969: 77.

¹⁸⁷ Higgins 1994: 141. She cites: *Petroleum Development Ltd v Sheikh of Abu Dhabi*; *Saudi Arabia v Aramco*; *Sapphire International Petroleum Ltd v NIOC*; *BP v Libyan Arab Republic*; *Texaco v Libyan Arab Republic*; *Liamco v Libyan Arab Republic*; and *Kuwait v Aminoil*.

¹⁸⁸ *Petroleum Development Ltd v Sheikh of Abu Dhabi*.

¹⁸⁹ Articles 33–38 of the UN Charter (1945).

¹⁹⁰ Van Den Berg 1981: 7.

referred to “International Arbitral Awards” the ECOSOC Draft Convention mentioned “Foreign Arbitral Awards.”¹⁹¹

Hale emphasizes that expertise played a central role in the drafting process. He notes that the drafting committee, although made of eight government representatives, introduced its report with the following disclaimer:

In view of the technical nature of the subject matter, the members of the Committee while being aware that they had been appointed as Government representatives, considered themselves as acting essentially as technical experts with the understanding that the views expressed by them in the course of the Committee’s deliberation would not necessarily constitute the positions of their respective Governments.¹⁹²

That disclaimer would be replicated by the ICSID drafting committee, which also saw its endeavor as a technocratic one: a matter for legal expertise and not politics. Hale observes that during the drafting of the New York Convention:

The terms of the debate were...predominately legalistic in nature. At no point was the general utility of private arbitration as a policy matter, in dispute. Rather, controversy arose over how best to achieve this goal in a world of varied legal systems.¹⁹³

These debates prefigured the expert legal debates that would characterize the drafting of the ICSID Convention a decade later.

Conclusion

Looking back on the postwar era, one policymaker remarked: “Private foreign direct investment has been...the stepchild of inter-governmental economic cooperation.”¹⁹⁴ There was no headline multilateral cooperation in investment, no forward-looking agreement on rules. This has led many observers, like the policymaker quoted above, to see investment as an issue void of multilateral cooperation—yet doing so overlooks the community of practice around investment arbitration that has been growing steadily for centuries.

This chapter contextualizes the legal ideas and principles that were brought together in ICSID. Removing investment disputes from local courts carried forward a tradition of separate courts

¹⁹¹ Van Den Berg 1981: 8.

¹⁹² Hale (forthcoming): 118, quoting UN Doc E/AC.42/4:4.

¹⁹³ Hale (forthcoming): 119.

¹⁹⁴ Levy 1984: 47.

and separate law for investors which dates from the age of empire. Yet the ICSID Convention seeks to limit the use of diplomatic protection, which was a feature that characterized disputes during empire. The ICSID Convention advances the Drago-Porter Convention and all other treaties that aimed to limit, or later outlaw, the use of force. It also builds on the permanent judicial institutions formed earlier, particularly the PCA and the ICJ. The idea of multilateral investment dispute resolution machinery also brought forward an idea raised by the internationalist planners behind the Bretton Woods architecture but which was not implemented. Although these individuals sought to frame investment as a useful tool for development, the reality of decolonization in the postwar era fell short of their aims. Unwinding colonial economic arrangements proved to be a complicated, drawn-out process in many cases, and one that often provoked suspicion on both sides. These were the ideas and tensions facing the Bank's framers in the early 1960s. They form the backdrop against which ICSID was framed.

Chapter Two: Modest Multilateralism as a Conceptual Framework

This chapter elaborates the modest multilateralism approach and crafts a framework for the analysis in later chapters in five sections. First, it defines international law as a process and argues that ICSID created a framework in which law could be developed. Next, it identifies organization building as the main dependent variable, and identifies the World Bank as the primary actor in the creation of ICSID. Then, section 2.4 sets out the core argument of the thesis. It presents three major obstacles to ICSID's creation and argues the Bank overcame them by relying on ambiguity, expertise, and incrementalism. These three characteristics comprise modest multilateralism, a new approach to organization building. I draw from existing literatures on compliance with international law, epistemic communities, and norm entrepreneurship to elaborate modest multilateralism. The final section probes the cross-national variation in receptiveness to ICSID. I argue if a capital-importing state has a weak intrinsic ability to attract investment it is more susceptible to the idea of ICSID.

2.1 ICSID and Evolving International Investment Law

As mentioned in the introduction, Lowenfeld observed that there has been a wholesale change in the customary international law regarding investment since 1964. Lowenfeld chose 1964 as the base year for his comparison because the ICSID Convention was first discussed by states in that year.¹⁹⁵ The establishment of ICSID brought the idea of investor–state arbitration official recognition from states, and created the space for an evolution in customary international law.

The substantive law on international investment has grown through practice, as states have concluded investment treaties and as tribunals have decided cases. Bilateral treaties, and not multilateral conventions, have been the primary means through which investment law has been redefined. Broches identified this development in 1983, years before it was widely

¹⁹⁵ Lowenfeld was a member of the US delegation.

acknowledged. After describing the failures of the OECD Conventions, Havana Charter, and other UN efforts, Broches noted:

It is therefore of great importance that the uncertainty as to the content of customary international law is being resolved, and has been for some time, by treaty law albeit on a bilateral rather than multilateral basis. There are at present in existence more than 200 treaties ...for the reciprocal promotion and protection of foreign investments. ...Of particular interest for our subject are the provision in some sixty treaties (and the number is increasing steadily) which in addition to the customary provisions ...provide in one way or another for arbitration of investment disputes directly between investors of one Contracting State and the other Contracting State.¹⁹⁶

Broches was referring to advance consent clauses in BITs.¹⁹⁷ These clauses led to a large caseload at ICSID and other arbitral institutions. In turn, this caseload enabled law to be tested and further developed through practice. Former ICSID Deputy Secretary-General Nassib Ziade observed:

By defining the scope of these principles in actual cases, the decisions and awards rendered by ICSID tribunals are not only settling important and often large-scale disputes, but are also contributing to the formation of a body of international law on foreign investment. Arbitration has in fact become by this process the primary means of developing the rule of law in regard to international investment.¹⁹⁸

Practice drives the evolution of law. This dynamic is central to any account of international law. Practice shapes treaties through doctrines of application and interpretation, and is indispensable for the existence of customary international law. Higgins defines international law as “a continuing process of authoritative decisions.”¹⁹⁹

International law builds upwards, from basic principles to more specific substantive standards. It builds through a continuous process, in which principles are refined and adjusted to context. Lowe describes the process:

The gradual refinement of a consistent principle, tested in the crucible of a succession of concrete cases, makes possible the distillation of the detailed, carefully considered analyses spread throughout the mass of individual decisions. This is a continuing process. Legal principles are never static. They may be constantly adjusted to changes in material and social circumstances, and in this way offer the prospect of maintaining a principle suited to the exigencies of modern life.²⁰⁰

¹⁹⁶ Broches [1983] 1995: 465.

¹⁹⁷ Advance consent clauses are the subject of chapter five.

¹⁹⁸ Ziade 2011: 124. Ziade was writing in a personal capacity. Emphasis mine.

¹⁹⁹ Higgins 1968: 58–9.

²⁰⁰ Lowe 2000: 215.

Context is a critical factor in determining the law. Higgins emphasizes the role of policy considerations, and reiterates that international law operates against a backdrop of social and political forces:

Policy considerations, although they differ from ‘rules’, are an integral part of that decision making process which we call international law; the assessment of so-called extra-legal considerations is part of the legal process, just as is reference to the accumulation of past decisions and current norms.²⁰¹

Lowe and Higgins both characterize international law as a system in motion.

Precedent is the engine of legal reasoning. In common law jurisdictions, past judgments create the law. Courts and judges in civil law jurisdictions and some areas of international law rely on precedent under the more flexible practice of a *jurisprudence constante*. Bjorklund and Reinisch characterize investment treaty arbitral decisions as a *jurisprudence constante*²⁰² while others, like Berman, emphasize the “dispersed nature of the process” and the “pressing need therefore for any given tribunal to sort through the prior arbitral awards cited to it in order to decide which decisions and which *dicta* are sound and worth following and which are not.”²⁰³ Berman underplays the extent to which ICSID, as a permanent inter-state organization, encourages a consistent use of precedent.²⁰⁴

Permanent arbitral institutions, like the PCA and ICSID, facilitate the use of precedent.²⁰⁵ In 1899, the framers of the PCA accepted that precedent could not operate in a formal sense. However, they still hoped precedent would operate.²⁰⁶ Permanent arbitral institutions have an interest in consistency. ICSID publishes the legal reasoning of its cases, unlike other organizations that administer investor-state arbitrations. ICSID’s Secretary-General even wrote to a tribunal in a recent case, to confirm they would take into account the decision of another case on similar facts.

On May 15, 2007, the Secretary General of ICSID wrote to members of the Tribunal requesting them to confirm her understanding that the Tribunal, like other ICSID tribunals,

²⁰¹ Higgins 1994: 5.

²⁰² Bjorklund and Reinisch 2012: 311.

²⁰³ Berman 2009: 664. Douglas 2006: 27, takes a similar view.

²⁰⁴ Hirsch (2014: 164) discusses the Secretariat’s encouragement of a *jurisprudence constante*.

²⁰⁵ Article 48 of the ICSID Convention states that “the Centre shall not publish the award without the consent of the parties.” This article was amended in 1984. Subsequently, the Centre releases the legal reasoning of every award.

²⁰⁶ Guillame 2011: 8.

gives due consideration to published decisions, in particular, the Decision of Liability issued in ICSID case No. ARB/02/01.²⁰⁷

Sureda observes that this action “shows the institutional interest of ICSID in the development of consistent case law.”²⁰⁸

Most ICSID tribunals rely heavily on past decisions.²⁰⁹ In his citation analysis of 207 investment treaty cases, Commission finds that although the terminology varies,

tribunals now routinely discuss the role played by “ICSID’s case law,” “[c]ase-[l]aw developed by the ICSID,” “decisions of ICSID Tribunals,” “ICSID cases,” “ICSID’s decisions,” and “ICSID jurisprudence” with varying degrees of analysis and explanation.²¹⁰

From 1990–2001, ICSID tribunals on average cited between 1–3 previous ICSID awards per decision. The average jumped to between 11–13 previous awards per decision during 2004–2006.²¹¹ Guillaume, a former President of the ICJ, argues that of all types of arbitration, ICSID decisions refer to precedent the most. In his words, “they do this ...with rather excessive zeal.”²¹² Tribunals cite the reasoning of past tribunals as well as other instruments of international law. After analyzing 98 decisions by ICSID tribunals between 1998–2006, Fauchald found customary international law was used in 34 decisions, references to the Vienna Convention on the Law of Treaties in 35 decisions, references to the statute of the ICJ in six cases, and general principles of law in eight decisions.²¹³

The tools of legal analysis are well suited to studying the growth and evolution of international investment law. Many eminent arbitrators and academics, including Schwebel, Gaillard, Kaufman-Kohler, Paulsson, Schreuer, and Alvarez, have written about the use of precedent in investment treaty arbitration.²¹⁴ Their contributions join a growing literature that examines arbitrators as a community, using sociological methods, to explain the tendency

²⁰⁷ *Sempra Energy International v The Argentine Republic* (ICSID) Award: 18.

²⁰⁸ Sureda 2009: 837, footnote 38. See also Hirsch 2014.

²⁰⁹ McLachlan, Shore, and Weiniger 2007; Brown and Miles 2011.

²¹⁰ Commission 2007: 144, quoting *Enron v Argentina* (Decision on Jurisdiction); *El Paso v Argentina*; *SGS v Philippines*; *CMS v Argentina*; *Enron v Argentina* (Ancillary Claim); and *Tokio Mokeles*, respectively.

²¹¹ Commission 2007: 151.

²¹² Guillaume 2011: 7. Kaufman-Kohler (2006: 365–366) accepts that investment arbitration uses precedent, but suggests sports arbitration and domain name arbitration use precedent more.

²¹³ Fouchald 2008: 309–330. See also Commission 2007: 151–153.

²¹⁴ Schwebel 2004; Gaillard 2004; Kaufman-Kohler 2006; Paulsson 2006; Schreuer and Weiniger 2008; Alvarez 2009.

toward consistency.²¹⁵ These pieces, in turn, are part of the large legal literature on the development of international investment law: scholarly commentaries²¹⁶ and dedicated journals²¹⁷ attest to the profusion of scholarship. The question that I ask in this thesis, however, is not one that legal analysis is well suited to answer. It is a question that IR theory provides better tools to answer: how was ICSID created?

2.2 Organization Building as Dependent Variable

While legal scholarship usually focuses on how the law is built, my focus is on how the organization was built. I seek to explain the creation and development of ICSID as an organization. This task falls into a tradition of interdisciplinary scholarship that spotlights how international law and international politics constrain and enable each other.²¹⁸ Slaughter, Tulumello, and Wood argue that IR theory opens up new lines of inquiry and encourages penetrating questions about the form and effectiveness of international legal organizations.²¹⁹

ICSID's institutional form embodied the idea of investor-state arbitration. Ratifying the ICSID Convention has only one meaning: it recognizes the principle that investors have standing to make claims against states.²²⁰ Broches, the chief architect of ICSID, made clear the meaning of ratification in unequivocal terms:

While...adherence to the Convention imposes no obligation on a Contracting State to submit any specific dispute to conciliation or arbitration without its consent, it does constitute acceptance in principle of this international procedural capacity of the individual.²²¹

Although there are other avenues through which investor-state arbitrations can be organized, and investor-state arbitrations took place before ICSID was created, ratifying the Convention

²¹⁵ Dezalay and Garth 1996 pioneered this approach, which has subsequently been applied to commercial arbitrators (Ginsburg 2003; Karton 2014; Hale forthcoming) and specifically to investor-state arbitrators (Schill 2011; Hirsch 2014; Puig 2014(b); Waibel and Wu forthcoming).

²¹⁶ The primary example is Schreuer 2001; 2009. Bjorklund and Reinisch (2012: 312) observe that “scholarly commentaries, such as the ICSID Commentary, offer useful techniques for a gradual codification effort...an effective indirect codification may take place through heavily relied upon scholarly works.”

²¹⁷ Notably the ICSID Review, as well as the Journal of International Economic Law, Journal of International Dispute Settlement, and Journal of World Investment and Trade.

²¹⁸ Abbott 1993: 1–2.

²¹⁹ Slaughter, Tulumello, and Wood 1998: 376–377.

²²⁰ Parra 2012: 37. While ratification only has one meaning, it is clear from the Report of the Executive Directors (which accompanies the Convention) that the framers expected access to ICSID would work both ways: states would instigate proceedings against investors, just as investors would instigate proceedings against states. I thank Lauge Poulsen for this suggestion.

²²¹ Broches [1966] 1995: 166. Emphasis mine.

is the most visible way for a state to accept the idea. Therefore, ICSID ratification is the dependent variable for the quantitative work in this thesis, and an important outcome in the qualitative work.

Why this dependent variable matters for studies of bilateral investment treaties

ICSID access is at the core of contemporary quantitative studies of investment treaties. This section discusses dependent variables in the literature on BITs, and why ratification of ICSID—the measurable manifestation of organization building—is an incisive dependent variable.

Many early studies on BITs probe their impact on investment inflows.²²² These studies produced contradictory results. Some, including Hallward-Dreimeier, Tobin and Rose-Ackerman, and Yackee found that BITs have no effect on investment flows.²²³ Others, including Neumayer and Spess, Salacuse and Sullivan, and Bütte and Milner found that BITs correlate with greater aggregate FDI flows.²²⁴ The contradictory results of these studies can be explained by their different samples, years, and econometric methods. For instance, some look at flows from one home country, others 18, 20, or 28 home countries.²²⁵ In the most thorough study, Aisbett finds that the correlation between BITs and investment flows, although initially strong, results from their endogeneity and is not robust to controlling for selection.²²⁶

Studies seeking to connect investment treaties to investment flows rely on three mechanisms: signaling²²⁷, institutional substitutes²²⁸, and credible commitment.²²⁹ Signaling theory identifies ways an actor can indicate the quality of its product (or in this case, indicate the quality of its promise to investors) in a context of asymmetric information. Signals vary in

²²² UNCTAD 1998; Hallward-Dreimeier 2003; Neumayer and Spess 2005; Rose-Ackerman and Tobin 2005; Salacuse and Sullivan 2005; Bütte and Milner 2008; Kerner 2009.

²²³ Hallward-Dreimeier 2003; Rose-Ackerman and Tobin 2005; Yackee 2007;

²²⁴ Neumayer and Spess 2005; Salacuse and Sullivan 2005; Bütte and Milner 2004; 2008.

²²⁵ Rose Ackerman and Tobin 2005; Salacuse and Sullivan 2005 look at one home country; Yackee 2007 at 18; Hallward-Dreimeier 2003 at 20; Egger and Merlo 2007 at 28. These examples illustrate the variation among the studies, but are not a comprehensive description of it.

²²⁶ Aisbett 2009.

²²⁷ Salacuse and Sullivan 2005; Kerner 2009.

²²⁸ Ginsberg 2005; Busse, Königer, Nunnenkamp 2010.

²²⁹ Elkins, Guzman, and Simmons 2006; Bubb and Rose-Ackerman 2007; Bütte and Milner 2008; Allee and Peinhardt 2010; 2014; Simmons 2014.

their strength. In his study of BITs, Sasse sets out two fundamental conditions that must be met for a BIT to be a reliable signal:

As with any economic signal, the signaling function of a BIT presupposes the existence of asymmetric information. In addition, different types of players need to have costs associated with the signal.²³⁰

BITs do not necessarily meet either of these conditions. First, BITs are signed between governments, who may be equally uncertain about the long-run future. It is difficult for any government to predict long-run political developments adverse to investment. In reality, both treaty partners have imperfect information. Secondly, the costs of signing a BIT may be minimal. This is even truer about ratifying the ICSID Convention. Finally, a reliable signal is directly related to the quality it represents, but BITs and ICSID ratification are unrelated to domestic institutions or the domestic legal environment for foreign investment. They are not reliable signals.

Interpreting BITs as a substitute for weak domestic institutions is an extension of credible commitments logic, not a separate mechanism. Ginsburg observes: “the presence of international alternatives can help a country to overcome defects in the domestic institutional environment.”²³¹ ICSID can help a country overcome defects by removing disputes from local institutions—it creates an institutional path entirely outside domestic courts. It is separate from the World Bank’s later efforts to promote domestic institutions or domestic rule of law.²³² Studies using domestic institutional quality as the dependent variable have found that external perceptions of institutional quality stay the same or even decline in the years following a BIT.²³³ ICSID does not strengthen domestic institutions. Lowe captures the appeal of BITs when he observes: “A reputation takes many years to build: a BIT can be signed with the stroke of a pen.”²³⁴

Credible commitment theory is the dominant explanation for BITs. The core idea is that BITs raise the *ex post* costs of non-compliance for a state. This helps states make credible promises

²³⁰ Sasse 2011: 116.

²³¹ Ginsburg 2005: 21.

²³² Carothers (2006) does not mention ICSID in any of his writing on the World Bank’s Rule of Law work.

²³³ Ginsburg (2005: 26) found 3 out of 8 good governance indicators (which rely on surveys of international business and other external observers of the economy) declined in the two years following a BIT.

²³⁴ Lowe 2007: 52.

to investors. Credibility, in turn, helps states to overcome the obsolescing bargain, or hold-up problem, in order to attract investment.²³⁵ In this account, states compete for credibility in order to attract more investment. Guzman argued competition between potential host states explained why developing countries accepted standards in BITs while rejecting those standards at the UN.²³⁶ Guzman's logic was elaborated and tested empirically in Elkins, Guzman, and Simmons.²³⁷

More than any other piece of the international investment architecture, ICSID makes promises credible. Simmons emphasizes ICSID in her recent work extending the logic of Elkins, Guzman, and Simmons.²³⁸ The dispute clauses in investment treaties—and specifically if these clauses provide access to ICSID—are the focus of a series of recent studies by Allee and Peinhardt. These studies are discussed below in section 2.5. They use dispute resolution clauses, and ICSID clauses specifically, as their dependent variable.²³⁹

Büthe and Milner also emphasize the centrality of strong enforcement mechanisms for credible commitment. Büthe and Milner analyze FDI flows into 125 developing countries from 1971 to 2007, and show that more FDI is induced by trade agreements that include stronger mechanisms for credible commitment.²⁴⁰ Their use of enforcement mechanisms in *trade* agreements to explain *investment* flows testifies to the decentralized nature of investment dispute resolution. The ICSID Convention's enforcement provisions made it unique in the 1960s and 1970s, but in recent decades BIT provisions providing functionally equivalent enforcement without ICSID have become common.²⁴¹ It is not consent to ICSID specifically that matters, it is the presence of a clause providing direct access to investor-state

²³⁵ The obsolescing bargain refers to the state's shifting incentives. Vernon 1971. The state has an incentive to promise the investor strong protection initially, and then their incentive to protect diminishes, as their incentive to seize the property increases. This is a simplified model of the relationship between investors and states and is unlikely to characterize many contemporary investment relationships. The majority of contemporary foreign direct investment is relatively liquid. In their insightful study of FDI stocks, Kerner and Lawrence (2014: 108) point out that only 24% of assets of US corporations' foreign assets are in "plant, property, and equipment."

²³⁶ Guzman's (1998) influential article relied on prisoner's dilemma to explain why developing countries sign stringent BITs while rejecting multilateral investment rules. Bubb and Rose-Ackerman (2007: 300) further develop and formalize the model.

²³⁷ Elkins, Guzman, Simmons 2006.

²³⁸ Simmons 2014: 17.

²³⁹ Allee and Peinhardt 2010; 2011; 2014.

²⁴⁰ Büthe and Milner 2014.

²⁴¹ See Appendix One, for an illustration of how the US-Poland BIT gets around Poland's non-membership of ICSID, yet provides very similar enforcement, through the New York Convention.

arbitration generally. ICSID and the ICSID Additional Facility are two of many functionally equivalent options for investor-state arbitration.

Why, then, is ICSID ratification a useful dependent variable? By virtue of being a public interstate body, ICSID is fundamentally different from any other arbitration option. It has a different relationship to states: they are its members, as well as its clients. ICSID's position within the World Bank provided its staff with privileged access to state policymakers. Studying the trajectory of ICSID provides insight into the evolution of the idea of investor-state arbitration. The simplicity of ICSID ratification as a dependent variable makes it more powerful. It cuts right to the core question: what characteristics are associated with ratification? With BITs, the picture is clouded by the bilateral relationship and many other factors. With ICSID, many of the potentially confounding variables fall away. There was no bilateral relationship to consider, nor any bilateral bargaining.

ICSID ratification has high construct validity: it measures a state's acceptance of the idea of investor-state arbitration. It is more straightforward than other dependent variables. For instance, Elkins, Guzman, and Simmons use "the number of years a dyad goes without a treaty, marked by the year of the treaty's signing, rather than the year in which it enters into force."²⁴² This requires them to have four types of independent variables: "(1) independent factors associated with the 'home' country; (2) independent factors associated with the 'host' country; (3) factors associated with the relationship between host and home countries; (4) spatial lags of the dependent variable."²⁴³ ICSID ratification, in contrast, requires only one type of independent variable: characteristics of the ratifying state.

States did not accept the idea of investor-state arbitration quickly or uniformly. Yet there has been a remarkable convergence on investor-state arbitration since ICSID's creation. In 1964, most capital-importing states were opposed to the idea of investor-state arbitration. Fifty years later, investor-state arbitration is nearly universally accepted. This change enabled the remarkable development of international investment law.

²⁴² Elkins, Guzman, Simmons 2006: 828.

²⁴³ Elkins, Guzman, Simmons 2006: 829.

2.3 Identifying Actors and Interests

One way IR enriches the study of law is by incorporating in its analysis actors' preferences. Here I start from the premise that when it comes to foreign investment, actors have preferences that are relatively static and can be identified.²⁴⁴ The study of FDI comes with strong conventional assumptions about actor preferences, supported by economic theory and historical evidence.

Capital-Exporters and Capital-Importers

I make a simplifying assumption that states define their interests towards ICSID along one dimension: policymakers see their state as either capital-exporting or capital-importing. The external validity of this assumption is assessed in the following paragraphs. If this study were about investment flows in general, it would be difficult to justify categorizing states into capital-exporting and capital-importing. This study, however, uses the assumption to classify how states perceived their interest with regard to the ICSID Convention in the 1960s and 1970s only. For this narrower application, the assumption is valid—with a few caveats.

States can be simultaneously capital-exporters and capital-importers. A recent example illustrates this duality. As an importer of capital from Europe, South Africa began terminating its BITs in 2013. As an exporter of capital to Southern Africa, South Africa chose not to terminate its BIT with Zimbabwe or its Southern African Development Community (SADC) obligations. Today, many states are both recipients and senders of capital. In the 1960s, when ICSID was drawn up, the division between exporters and importers of capital was simpler than it is today. Most governments identified their states as either importing or exporting. Moreover, policymaker comments about the ICSID Convention usually show if the government identified as an importer or exporter with regard to ICSID. For instance, when the US ratified the ICSID Convention, relevant officials told the legislature they could not

²⁴⁴ Abbott (2008: 16) argues preference identification is a first step toward theoretical explanation in the IR/international law tradition.

imagine the US government as a respondent. The government saw the US interest exclusively as a capital-exporter.²⁴⁵

States considered to be capital-exporters are not necessarily *net* capital-exporters. For much of its history, the US has been the world's largest importer of capital.²⁴⁶ The majority of FDI globally—in the 1960s and today—is intra-OECD investment. However, ICSID was not intended to apply to investment disputes between OECD states.²⁴⁷ It was not until the 1990s that investors in one OECD state could file a claim at ICSID against another OECD state.

The term capital-exporting state is not equivalent to developed state. Australia, for instance, was considered a developed state, but was not a capital-exporter in the 1960s and 1970s. A handful of states were considered developed but not capital-exporters. The term capital-exporting state is also not equivalent to OECD state. Peripheral OECD states like Greece, Spain, and Portugal were not capital-exporters during the period in question.²⁴⁸ Only a few OECD members, whose primary historical experience involving investment protection was as exporters of capital—the UK, France, Germany, the Netherlands, the US, and to a lesser extent smaller European states—perceived their reason for ratifying ICSID as the protection of their citizens' capital overseas.

Historical memory shapes how governments define their interests with regard to ICSID. States' balance of payments positions fluctuate, and international events can shift a state from being primarily a capital-importer (in balance of payments terms) to being a capital-exporter quickly.²⁴⁹ The decision to ratify ICSID, however, is ultimately a political one. Politically

²⁴⁵ The US was a large importer of capital, but foreign investors in the US were not expected to use ICSID. See chapter 4.5.

²⁴⁶ Since WWI, the United States has also been one of the top exporters of investment. When it was the “greatest debtor nation in history” during the 19th century, discriminatory legislation and virulent anti-foreign investment sentiment was common. Wilkins 1989: 144; 61–62; 82–85.

²⁴⁷ See chapter four. The understanding that ICSID would not be used between OECD member states was prevalent, but policymakers often left this unstated because it was a politically sensitive issue. Georges Delaume (2004: 52), the World Bank Legal Department employee who drafted the ICSID Convention into French recalled: “Politically, the Europeans were not for [ICSID] - except as potential users taking advantage of the institution to protect their investors against developing countries. So it was all biased.”

²⁴⁸ Given the poor quality of data on capital exports, a case is made in chapter seven for using OECD membership as a proxy for capital-exporting status.

²⁴⁹ The famous example of this is the US after World War I. The US moved from being the world's largest debtor nation to its largest creditor nation. Wilkins 1989.

resonant memories can be more powerful than economic facts. For instance, Brazilian investors have long exported capital to unstable states within their region, and a case could be made for providing ICSID access to those investors. Yet within the Brazilian Senate, ICSID ratification is seen predominately from the position of a capital-importing state.²⁵⁰

With these caveats noted, I proceed using the assumption that states defined their interests as capital-exporting or capital-importing with regard to ICSID. In this thesis, the term “capital-exporters” refers to a small group of states (under a dozen states in the 1960s), who perceived their interest in ICSID as the protection of their citizens’ capital overseas. It is this group of capital-exporting states that Oscar Schacter had in mind when he observed: “As a historical fact, the great body of customary international law was made by remarkably few states.”²⁵¹ The term “capital-importers” refers to all other member states of the World Bank.

The Interests of Capital-Exporters, Capital-Importers, and Other Actors

It is logical to expect the governments of both capital-exporting and capital-importing states to have demanded the creation of ICSID in the early 1960s.²⁵² For capital-importing states, ICSID offered the hope of removing interference by powerful states. In theory, the existence of ICSID would obviate the need for espousal or diplomatic protection. This reasoning was expected to appeal to postcolonial states, or states with long experience of coercive investment protection.

For capital-exporting states, ICSID seemed to offer a way out of problematic investment disputes in the early 1960s. Disputes complicate bilateral relationships and draw diplomatic resources away from other issues. In theory, the existence of ICSID would eliminate, or at least diminish, the likelihood of investment disputes becoming full-scale diplomatic incidents. It is logical to expect governments exiting colonial encounters to demand an organization to ease their obligation to protect investment overseas.

²⁵⁰ Lemos and Campello 2011.

²⁵¹ Schacter 1996: 536.

²⁵² IR scholarship on international organizations (IOs) is permeated by a supply-demand metaphor, which is used to separate analytically the demand for international organizations from their actual existence. In one of its earliest formulations, Keohane (1982: 333) termed this “the demand side of the problem of international regimes: why should governments desire to institute international regimes in the first place, and how much will they be willing to contribute to maintain them?”

Despite these reasons for governments to demand the creation of ICSID, there is little evidence of actual demand from states. The absence of demand is best illuminated by comparison with other organizations, as chapter three illustrates. The nearest comparators for ICSID are the two other arms of the World Bank created in the same decade: the International Finance Corporation (IFC) and the International Development Association (IDA). These were both products of demand from the US government. The proposals for these institutions were written within the US government and pushed through the Bank, over opposition from other parties. In the case of ICSID, the US government did nothing—it did not propose the organization, nor did it take a stand on its creation—until the proposal was nearly guaranteed to succeed. Other governments, notably the Dutch and German governments, were more supportive of ICSID’s creation, but these governments were not instrumental to its creation. They were supportive, but they did not lead.

Investors also have strong reasons to demand the creation of ICSID. ICSID provides a permanent pathway through which investors can seek compensation for expropriation. In a postcolonial context, or any context in which home governments seem likely to refuse to become involved in investment disputes (or are too weak to espouse the investor’s case successfully), it is logical to expect investors to demand the creation of machinery that does not require action from their home government.

Investors also gain from access to ICSID in advance of a case actually being filed. Having access to ICSID shifts the bargaining positions in a dispute in favor of the investor. Traditionally, the state could refuse to settle the dispute, and refuse compensation. However, if an investor can threaten an investor-state arbitration case, the state is less likely to refuse settlement. This is part of ICSID’s deterrence effect, which is discussed in chapter five.

Investor demand is likely to appear in two ways. The first and likeliest way is investor lobbying directed at home governments.²⁵³ Domestic lobbying channels are well-developed pathways. The second way is investor requests for ICSID access directed directly at host governments, which might occur in contract negotiations.²⁵⁴ Investors have good reason to demand ICSID's creation in both ways. Did they?

The absence of demand for ICSID from investors is startling. In the period considered in this thesis, from 1965 to 1980, there was virtually no demand from investors. The vast majority of investors did not know about ICSID. The few investors or industry groups that did know about ICSID were supportive, but not overwhelmingly so. Its creation was not their first priority in discussions with home or host governments. There is no evidence of investors exhibiting leadership to create or sustain the institution. The table below summarizes states and investors as two possible proponents of ICSID. It identifies ways for their support to manifest, and their reason for supporting ICSID.

Table 4. Possible Proponents of ICSID

Proponent	Likeliest Manifestation of Support	Reason
State	1. Government of a capital-exporting state no longer wishes to get involved in investment disputes (Example: a declining colonial power) 2. Government of a capital-importing state wishes to no longer be 'bullied' in investment disputes (Example: a former colony)	To remove home state interference in investment disputes
Investor	3. Domestic lobbying for ratification by home government 4. Requesting ICSID membership of host country, perhaps during contract negotiations	To better protect investment, which in turn will foster increased investment

If neither states nor investors were the primary proponent of ICSID, who was? The Legal Department of the World Bank. The Bank identified a gap in the international architecture,

²⁵³ Milner powerfully articulates the relationship between firm lobbying and other actions taken in domestic political arenas, and how these actions translate into trade and investment policy and agreements. Milner 1997, chapter 2; Mansfield and Milner 2012, chapters 2 and 3.

²⁵⁴ Wells and Ahmed (2007: 72, 134–5, 259) provide examples of ICSID in contract discussions.

developed a proposal for investor-state dispute settlement machinery, presented it to state representatives, oversaw its institutionalization, and then nurtured the institution through decades of underuse. At first glance, the Legal Department of the Bank seems to have had little reason to develop the idea of investor-state arbitration. However, investment disputes disrupted the Bank's business. The capital-exporting countries with representatives on the World Bank Executive Board would not approve loans to states that expropriated property. Yet the Bank was in the business of lending to capital-importing countries, and needed to foster relationships of trust with these states, as they were its main clients and revenue source. There was no international machinery to settle these disputes and the Bank expected more of them in the 1960s. Something had to be done.

It is not a matter of debate that the World Bank was the primary proponent of ICSID. While giving a series of lectures in The Hague, Broches observed: "The Convention came about as the result of an initiative taken by the World Bank."²⁵⁵ Therefore, I take the Bank's leadership as given.²⁵⁶ My aim is to develop a sharper understanding of the Bank's strategy, and why the Bank pursued this strategy.

What about states and investors? Investors and states were interested in investment protection, but their interest was in substantive rules, not dispute resolution machinery. States concentrated their international efforts at the OECD and at the UN, and negotiated bilateral treaties to protect property. States and investors took little interest in ICSID. Demand for ICSID was cultivated by the Bank over decades. The next section looks at the Bank's approach.

2.4 Modest Multilateralism: an Approach to Organization Building

There were formidable obstacles to creating a multilateral organization on investment, as demonstrated by the failures of the Havana Charter and the OECD Conventions. The World Bank was well aware of these obstacles, and knew ICSID would have to circumvent them to

²⁵⁵ Broches [1972] 1995: 192. Emphasis mine.

²⁵⁶ Given, in the sense that I do not set up contending hypotheses about who led ICSID's creation. The Bank's leadership will be demonstrated with empirical material in later chapters.

be successful. This section sets out three major obstacles and how the Bank overcame them, by relying on ambiguity, expertise, and incrementalism. Collectively, these three characteristics comprise an approach to organization building that I term modest multilateralism. The sections that follow elaborate this approach and articulate how it creates the conditions for evolution. From existing literatures on compliance with international law, epistemic communities, and norm entrepreneurship, I identify analytical building blocks, which I then combine into a cohesive approach to organization building. This approach is the core argument of the thesis. It explains ICSID's success, and may also elucidate how other IOs are created and come to be effective.

2.4.1 Ambiguity

International investment in the 1960s was characterized not by a lack of law, but by different interpretations of customary international law. Capital-exporting and capital-importing states put forward different and often irreconcilable views on the substance of international investment law. ICSID's framers observed this disagreement in play. They believed that if the ICSID Convention took a stance on substance, it would fail due to disagreements between states. Ambiguity provided a way to circumvent these disagreements.

I define ambiguity as the conscious avoidance of controversy. It is akin to knowing a pan on a stove is hot and therefore avoiding it. Its defining feature is intent. Ambiguity is more than vagueness. For ambiguity to be present, two conditions must be met. First, actors openly acknowledge that an issue is controversial. Second, actors intentionally avoid the issue, or find a way of handling the issue that avoids its main irritants. To adjudicate intention is difficult: it requires a thorough understanding of context and primary evidence to delineate between an accidental lack of clarity and conscious, strategic avoidance. On the basis of the evidence presented in the following chapters, I argue the actions of ICSID's founders meet the two conditions above.

ICSID took ambiguity to its logical limit. The Convention contains no substance. During its drafting, all debates over substance were sidelined. The proposal to create ICSID was

designed to advance the rule of law—but said nothing about which rule of law. Broches wrote:

The proposals are modest in the sense of being limited to procedure and because of their optional nature. But I have no doubt that their adoption would constitute a significant step forward toward the establishment of the Rule of Law in international investment.²⁵⁷

Which, or whose rule of law would the proposal help establish? The proposal and its framers were careful not to specify. By focusing on procedure, the proposal for ICSID sidestepped these differences.²⁵⁸

Ambiguous provisions are common in international agreements. Many types of officials, including central bankers and peace process negotiators, often engage in constructive ambiguity. Using non-specific language that suits all parties often allows an agreement to come into force. With this framework in force, details can be worked out later.

How Ambiguity Creates the Conditions for Evolution

A framework agreement creates the conditions for a community of practice to emerge.

Brunnée and Toope emphasize that participation is what defines international law. Substantive agreement is not necessary for law to exist, what is needed is minimal: a procedural framework within which individuals can participate. Brunnée and Toope argue:

Law is possible even without deep substantive agreement among participants....by adhering to requirements of legality, law-makers can create conditions in which reasoned communication and decision-making can take place, nurturing either deep disagreement or fidelity to law, even in the face of disagreement with the values or policies that it enshrines.²⁵⁹

The ICSID Convention provides a framework, within which a community of practice can grow. The framework is likely to guide the activities of the community of practice. Brunnée and Toope illustrate this argument vividly: “Having a tool to perform an activity...changes the nature of that activity.”²⁶⁰ The ICSID Convention is a “tool” that is state-sanctioned and rooted in public international law. As such, it enabled the practice of investor-state arbitration

²⁵⁷ Broches [1963] 1995: 163.

²⁵⁸ ICSID’s ability to avoid these divides was considered one of its virtues within the Bank. Broches and others at the Bank supported ICSID over investment insurance proposals because they sought to avoid the distributional questions that divided capital-importing and capital-exporting states, and believed that ICSID could avoid these differences, unlike insurance. See chapter three.

²⁵⁹ Brunnée and Toope 2010: 68.

²⁶⁰ Brunnée and Toope 2010: 62–3.

to grow and gain acceptance. Shared meanings and reference points grow within procedural frameworks.

Ambiguity empowers those who inherit a treaty, by providing more latitude for interpretation.²⁶¹ In this way, ambiguity is complemented by incrementalism, discussed in section 2.3.3 below. As Chayes and Chayes argue:

This kind of evolving treaty is one response to the need for adaptation and flexibility in a regulatory regime. It permits a treaty embodying general principles to come into force and a cooperative regime to get under way where the consensus necessary for a more detailed agreement is lacking.²⁶²

Most agreements contain arrangements for interpretation of treaty provisions. These provisions make a treaty formally adaptive. Chayes and Chayes note the “canonical sequence” of interpretive methods set out in Article 33 of the UN Charter (negotiation, inquiry, mediation, conciliation, arbitration, and judicial settlement) are part of the toolkit for managing a regime.²⁶³ Formal interpretations using these methods are relatively rare.²⁶⁴ In practice, the bulk of interpretation takes place informally, within the secretariats of most IOs, as they carry out their administrative or technical functions. Secretariats can have greater influence than is often realized. For instance, the ICSID Secretariat created the Additional Facility and embarked on the Investment Laws of the World Project by requesting slight budget increases. The Secretariat did not amend the Convention or ask for formal approval of the ideas. Ambiguity is examined again in the conclusion of chapter three.

2.4.2 Expertise

ICSID would have failed if it had become a political stage, or if its drafting had become a space for politicking. ICSID’s framers needed to find a way to shield their proposal from the high politics of investment protection. Expertise provided one way. The proposal for ICSID,

²⁶¹ This statement appears in many critiques of the BIT regime—the lack of specificity in BITs (particularly older European BITs) provides arbitrators with what some perceive as undue discretion.

²⁶² Chayes and Chayes 1995: 226.

²⁶³ Chayes and Chayes 1995: 201.

²⁶⁴ Since the IMF and the World Bank reserve interpretive authority to their Executive Directors (Article XXIX of the IMF Articles and Article IX of the IBRD Articles) formal interpretations virtually never occur. Note: the ICSID Convention does not follow this practice. It bestows interpretive power on the ICJ, like most treaties. See Article 64 of the ICSID Convention.

like many proposals for small international organizations, sought to transfer policy “from politics to expertise.”²⁶⁵

I define expertise as fidelity to a shared method. Usually a shared method is the result of a particular type of education or training, which predisposes individuals to adopt certain ideas. Goldstein illustrates that many policymakers find liberal trade ideas persuasive because they were taught classical economics.²⁶⁶ The shared training of economists²⁶⁷ and climate scientists²⁶⁸ accelerates their influence on domestic and international policy. Unlike economists or climate scientists, the lawyers involved in ICSID’s creation did not form an epistemic community. Members of an epistemic community share normative beliefs that provide a value-based rationale for their actions.²⁶⁹ Lawyers do not necessarily share normative beliefs, but they share a language, as Collier and Lowe explain:

For all these people international law is kind of lingua franca—a language in which relations between them, and the States and corporations that they represent, can be conducted. Indeed, lawyers commonly find that their view of the world has much more in common with that of lawyers from other countries than it has with the views of politicians in their own countries.²⁷⁰

It was exactly this group of people—international legal experts—that the World Bank wanted at the consultative conference. Even if they represented states with opposed interests, the individuals shared a method.

Shared expertise makes a group of individuals more likely to frame problems in a similar way, and consider the same universe of potential solutions. An individual taught the logic of litigation at school is more likely to find the idea of investor-state arbitration persuasive. There was also a normative appeal to investor-state arbitration: every expert involved in ICSID’s drafting had lived through the World War II and the signing of the UN Charter. The idea of arbitration “fit” this context and this audience well.

²⁶⁵ Haas 1992: 8.

²⁶⁶ Goldstein 1989.

²⁶⁷ Nelson 1987 provides an excellent early study.

²⁶⁸ Raustiala 2001.

²⁶⁹ Haas 1992: 3; 18. See also Haas 1989; Adler and Haas 1992.

²⁷⁰ Collier and Lowe 1999: 3. This quote anticipates Slaughter’s (2004) conceptualization of governments as disaggregated actors that form networks of experts at the international level.

The work of experts rests on political foundations. Technical ideas, like ICSID, are effective only when they resonate with the political needs of the moment.²⁷¹ As Woods argues: “Ideas prevail not because they are the ‘best’ ideas in a technical or professional sense but because they meet the social, organization, and political needs of key actors.”²⁷² ICSID met the needs of key actors through its appeal to peaceful dispute resolution, and its absence of controversial standards.

Expertise was prioritized over representativeness during the ICSID Convention’s drafting process. The immediate reason for this was that individuals with expertise in procedural law could better understand the content of the treaty. Additionally, however, individuals with legal training were more likely to be sympathetic to the idea. Chwioroth describes the importance of professional training for generating sympathetic interlocutors for the IMF: “due to the similar professional training, neoliberal economists and external financial representatives often share common policy orientations and speak the same language (both professionally and linguistically).”²⁷³ Woods observes, “To succeed the IMF and World Bank must find willing and able interlocutors in borrowing governments.”²⁷⁴ The same was true for ICSID ratification: the Bank needed to find individuals who could speak the language of arbitration, and were willing and able advocates for the idea of ICSID.

How Expertise Created the Conditions for Evolution

Relying on expertise during the creation of an organization has effects that last long past the drafting stage. Some sympathetic interlocutors become persistent advocates for the organization in their home country. A community of practice may emerge out of the participants in the drafting. There are also several larger benefits, or ways in which relying on expertise initially continues to shield an organization from politicking and eases the organization’s transition into becoming a provider of technical assistance.

²⁷¹ Ikenberry 1992: 293. See also Ikenberry 1993.

²⁷² Woods 2006: 69.

²⁷³ Chwioroth 2007.

²⁷⁴ Woods 2006: 65.

If an organization is associated with expertise, states (particularly states with less capacity) are less likely to view the organization as an agent that they direct and control as its principal. They are more likely to perceive the organization as a teacher they listen to and follow.²⁷⁵ In ICSID's case, the strong leadership of the World Bank, combined with the reality that states do not pay the administrative costs of the ICSID Secretariat, meant that state policymakers did not prioritize exercising control or directing ICSID. Expertise also supported ICSID's creation in the form of deference to the Bank's superior technical resources and credibility. In the framing of ICSID, the type of power exercised by the Bank was not the power to compel, but the power to persuade. Barnett and Finnemore emphasize that international organizations derive normative power from their expertise, and are "eager to spread the benefits of their expertise and often act as conveyor belts for the transmission of norms and models of 'good' political behavior."²⁷⁶ The idea of best practice exerts a powerful pull on states. Arguably, this normative pull becomes even more powerful over time.²⁷⁷ In the case of the international investment regime, Jandhyala, Henisz, and Mansfield argue the pattern of BIT diffusion demonstrates that during the 1990s, these treaties became *the* global standard.²⁷⁸

The use of expertise in the drafting process sets the stage for technical assistance once a treaty is in force. Some treaties make the provision of technical assistance explicit.²⁷⁹ Chayes and Chayes observe that for many international organizations, "the provision of technical assistance may be the main programmatic activity."²⁸⁰ They note that the International Atomic Energy Agency spends half of its budget on providing technical assistance to developing states. The World Intellectual Property Organization (WIPO) also spends a large share of its budget on technical assistance and training.²⁸¹ Technical assistance can be a powerful tool to reinforce particular conceptions of issues, and to strengthen communities of practice. It may also create or raise the profile of sympathetic interlocutors in governments. ICSID's provision

²⁷⁵ Finnemore 1993.

²⁷⁶ Barnett and Finnemore 1999: 712–714.

²⁷⁷ Finnemore and Sikkink 1998.

²⁷⁸ Jandhyala, Henisz, Mansfield 2011.

²⁷⁹ For example, Article 10 of the Montreal Protocol. The United Nations Framework Convention on Climate Change (UNFCCC) and Convention on Biological Diversity contain similar articles to finance capacity building and compliance.

²⁸⁰ Chayes and Chayes 1995: 197.

²⁸¹ Deere Birkbeck (forthcoming).

of technical assistance was less formally organized, but as chapter five illustrates, it still decisively shaped state actions.

2.4.3 Incrementalism

The Bank stepped outside its usual business by creating ICSID, and arguably exceeded its mandate. Furthermore, it entered an issue that divided its member states. The Bank's management were concerned the endeavor could end in ill will. Proceeding incrementally protected the Bank from making missteps, by enabling the Bank's management to check their actions with their shareholder and client governments at regular intervals.

I define incrementalism as political change by small steps.²⁸² Incrementalism is not timid leadership: policymakers may consciously use incremental decision-making in pursuit of a long-term objective. Lindblom observed that in reality, "shifts of policy within a party take place largely through a series of relatively small changes."²⁸³ Incrementalism may provide a more sophisticated, and ultimately more successful path to a long-term goal.²⁸⁴

When policymakers proceed in incremental steps, they are better able to anticipate adverse reactions and remain within their political constraints. Lindblom articulated reasons why policymakers choose to make policy in small steps:

Policy is not made once and for all; it is made and re-made endlessly. ...A wise policymaker consequently expects that his policies will achieve only part of what he hopes and at the same time will produce unanticipated consequences he would have preferred to avoid. If he proceeds through a succession of incremental changes, he avoids serious lasting mistakes in several ways.²⁸⁵

The past steps provide information about the probable consequences of further similar steps, so a policymaker is able to test their predications as they move forward.²⁸⁶ Incrementalism takes into account that policymakers usually make decisions under conditions of

²⁸² Lindblom 1979: 517.

²⁸³ Lindblom 1959: 85.

²⁸⁴ Lindblom 1959: 86.

²⁸⁵ Lindblom 1959: 86.

²⁸⁶ Lindblom 1959: 86.

uncertainty.²⁸⁷ Taking small steps and waiting for feedback before continuing is one way of lessening this uncertainty.

Incrementalism appears in many international legal regimes, and is often studied in the constitutionalization literature.²⁸⁸ The framework-protocol format, an explicitly incremental treaty structure, is common in the area of environmental law. An initial treaty is drafted in general terms, often establishing a framework or skeleton for future cooperation. All parties anticipate that as consensus grows, protocols will fill in the substance. The Vienna Convention on the Protection of the Ozone Layer exemplifies the framework idea: it was subsequently ‘filled in’ with substance by the Montreal Protocol.²⁸⁹ Similar framework-protocol approaches were adopted for the UNFCCC, and the Convention of Biological Diversity. Incrementalism appeared in two guises during the creation and development of ICSID. First, the process by which the Convention was proposed and brought into force involved many rounds of consultation. Second, after the Convention was in force, the Secretariat took many small steps to spread the idea of investor-state arbitration.

How Incrementalism Creates the Condition for Evolution

Frameworks create a space for future negotiations, which can tackle fine-grained or more difficult issues, within the general structure of cooperation. The individuals working within this framework begin to form a community of practice. Chayes and Chayes observe that framework-protocol structures are useful in promoting compliance because the treaty becomes an open, evolving regime.

If a treaty regime is to endure and continue to serve its basic purpose over time, it must be adaptable to inevitable changes in technology, shifts in substantive problems, and economic, social, and political developments.²⁹⁰

Chayes and Chayes focus on the process whereby substantive obligations are fit to a particular context. In the case of ICSID, the process is different. ICSID is a framework agreement, in that it provides a structure for future cooperative endeavors. Unlike substantive treaties, however, obligations under ICSID do not evolve through more rounds of negotiation. In the

²⁸⁷ Shapiro and Stone Sweet 2002: 92.

²⁸⁸ Thompson 2011 surveys constitutionalization in the sphere of international investment and corporate activity.

²⁸⁹ Benedick 1998.

²⁹⁰ Chayes and Chayes 1995: 225.

case of ICSID, expectations and obligations evolve through repeated arbitral practice and through the accretion of precedent.²⁹¹

The existence of a permanent legal forum in any issue area is associated with an increased use of precedent in that issue area. This represents Brunnée and Toope's metaphor that "having a tool to perform an activity...changes the nature of that activity" in action.²⁹² The use of precedent has grown with the proliferation of international courts in recent decades. Guillaume argues the growth in such courts *enabled* the growth in precedent:

The situation [of precedent] today is quite different [from the mid-1960s] because of the proliferation of international courts and the increasing institutionalization of arbitration. Globally, the International Court of Justice has found new life. Then came the International Tribunal for the Law of the Sea, international criminal courts, the Appellate Body of the World Trade Organization and many administrative tribunals. ... The traditional forms of arbitration prospered, but new forms have emerged, with the Iran-US Claims Tribunal, the Court of Arbitration for Sport, and ICSID.²⁹³

By providing permanent homes for particular bodies of law, these different judicial institutions have spread the use of precedent in their issue areas. Communities of practice develop around these institutions and propel the development of substance. The gradual development and 'filling in' of substantive standards is an incremental process. In the remaining chapters, I use incrementalism to explain the building of ICSID as an organization, not the building of law. Yet incrementalism can be used to describe both the building of organizations and the building of law. In ICSID's case, in some ways these processes intertwine.²⁹⁴

2.4.4 Multilateralism as Process, not Substance

The three characteristics of modest multilateralism create the conditions for a continuing process. Modest multilateralism is explicitly evolutionary. It is distinguished from traditional multilateralism because its primary aim is to create a process, not an outcome or a deal.

²⁹¹ Pauwelyn 2014: 29 captures this well (quoted in the conclusion of chapter five.)

²⁹² Brunnée and Toope 2010: 62–3. See also 2.4.1 above.

²⁹³ Guillaume 2011: 7.

²⁹⁴ Shapiro and Stone Sweet 2002.

Other forms of multilateralism are premised on a deal: substance is at the heart of most definitions of multilateralism. When defining international organizations, Alvarez notes: “like other international agreements, the constituent instruments of international organizations usually contain substantive obligations.”²⁹⁵ Similarly, Ruggie argues it is the qualitative aspect of multilateralism that makes it distinct: many arrangements coordinate national policies, but multilateralism is unique because it does so on the basis of certain principles.²⁹⁶ These principles are general and apply equally to all members. Ruggie implies that the principles are substantive.

Modest multilateralism, in contrast, is a process that fills the void when states cannot agree on substantive principles. In this way, the modest multilateralism approach relates closely to studies of informal international lawmaking; both seek to understand processes that are not recognized as traditional inter-state lawmaking, yet that create or shape international public policy or law.²⁹⁷ Pollack and Shafter identify many reasons why states use informal law, or mix informal and formal arrangements.²⁹⁸ Informal agreements are one way states elide disagreements; modest multilateralism is another. The difference is that modest multilateralism is not driven by states. The approach is propelled by a dedicated IO, and in most cases, the IO is likely small and narrowly-focused.

The work of small technical IOs may be underappreciated in many areas of global economic governance, but nowhere is it less appreciated than international investment law. Even Schill’s insightful study of the multilateralization of international investment law does not mention ICSID as an agent.²⁹⁹ Schill observes that arbitration is vital for turning bilateral investment treaties into a multilateral regime. He argues:

Multilateral treaty-making, however, is not the only perspective on multilateralism. On the contrary, already at present, we can observe the emergence of multilateral structures underlying the practice of bilateral IIA-making and one-off dispute settlement by arbitration. This process can be captured by the concept of multilateralization, i.e. the paradoxical phenomenon that IIL [international investment law] is developing towards a multilateral system with rather uniform rules and principles relating to investment protection on the basis

²⁹⁵ Alvarez 2006: 65.

²⁹⁶ Ruggie 1993: 6.

²⁹⁷ Pauwelyn, Wessel, and Wouters 2012.

²⁹⁸ Pollack and Shafter 2012.

²⁹⁹ Schill 2009a.

of bilateral treaties. Unlike genuinely bilateral treaties, IIA do not stand isolated in governing the relations between two states; they rather develop multiple overlaps and structural interconnections that create a relatively uniform and treaty-overarching legal framework for international investment relations based on uniform substantive and procedural principles with little room for insular deviation.³⁰⁰

What Schill describes is the process of legal development set out in section 2.1—how the development of a community of practice and the use of precedent create a web of reinforcing interpretations and a more-or-less consistent legal framework. This argument does not take account of the special role the ICSID Secretariat played in facilitating the growth of this legal framework. Schill attributes the convergence among BITs to their common historic pedigree in the OECD, and secondly in UNCTAD and the European Union—not ICSID.³⁰¹

Equally, the decision to ratify ICSID—to join a formal, visible, permanent IO dedicated to adjudicating investment disputes—is overlooked in many accounts of the international investment regime. Modest multilateralism is largely complementary with accounts of the international investment regime as a complex adaptive system.³⁰² Yet if there is a moment when state policymakers were asked to reflect and think carefully about the system as a whole, then it is the moment at which they decided to ratify (or not to ratify) ICSID.³⁰³

Bilateral treaties and individual contracts may not prompt policymakers to reflect on the system, particularly if they expect to gain additional investment out of the deal. When ratifying ICSID, however, there was no new investment on the table to cloud their vision.³⁰⁴ So why forego sovereignty in this circumstance? Chaos theory does not seem to provide an answer to this question directly. Modest multilateralism suggests that policymakers ratified ICSID not only because it seemed inconsequential, but also because experts supported it as best practice. Is the notion of best practice truly strong enough to warrant sacrificing sovereignty in this way?

³⁰⁰ Schill 2014: 114.

³⁰¹ Schill 2014: 117–118.

³⁰² Pauwelyn 2014.

³⁰³ Although a case can be made that the full legal implications of ratifying ICSID could not be seen in 1964-5, chapter four presents considerable evidence of prescience on the part of those attending the consultative conferences and drafting committee. These policymakers could not anticipate *AAPL v Sri Lanka* exactly, but many had serious concerns about the lack of limits on ICSID's jurisdiction—serious enough to prevent their states from ratifying. The hazards of ratification have existed from the beginning; over time they have just become more salient.

³⁰⁴ In a very few, exceptional instances, material gains were tied to ICSID ratification for states—yet after many years of searching for evidence on this point, I have found less than 10 instances in which this seems to have been the case.

It is a confronting question for IR scholars accustomed to weaving explanations from the stiffer cloth of power and interests. Yet in ICSID's case, power-based and interest-based accounts are not so much wrong as they are incomplete. When it came to setting investment rules, there were clearly powerful actors and less powerful actors. There were also actors with strong interests in high levels of investment protection. Yet these were not the actors responsible for ICSID's creation or its enduring influence.

What is perhaps most novel about the modest multilateralism approach is the attention it pays to political context—in particular, to the ways this context constrains key actors. The grand tradition of multilateralism tends to be imbued with a sense that anything is possible—that powerful actors in a situation of crisis will come together, prioritize the communal interest above their individual interests, and forge a grand bargain. This characterization is not accurate. In his analysis of the Bretton Woods conference—which took place among the Allies, before World War II had ended—Ikenberry argued:

The underlying structures of interests set the broad parameters around which an agreement could be built, but were not imperatives that inevitably produced the agreement. At a very deep level incentives for agreement existed, but serious blockages stood in the way.³⁰⁵

A similar statement could be made for investment: at a deep level incentives for agreement existed, but serious blockages stood in the way. Modest multilateralism is about how small, strategic actors get around those blockages. These small, strategic actors know they are hemmed in on either side by powerful parties, and know that a softly-softly approach is their only chance. Coercion and horse-trading are not at their disposal. Yet they can still have lasting influence, through their expertise and other means.

The influence of modest multilateralism, however, unfolds over time. ICISD's creation and development, for instance, were gradual. Gradual organization building goes against the grain of most IR literature on institutional design. Although Koremenos, Lipson, and Snidal are sensitive to the ways in which cooperation problems and institutions change over time, there is a tendency in the institutional design literature to focus primarily on the original bargain, or on

³⁰⁵ Ikenberry 1993: 63.

the current configuration of institutional characteristics.³⁰⁶ In the case of ICSID, politics—an intractable, fundamental disagreement between exporters and importers of capital—prevented a suitable bargain. ICSID’s framers did not aim for the most efficient institutional arrangements; their political constraints necessitated an evolutionary approach.

2.5 The Politics of Ratification

Can a robust understanding of the strategy used to build ICSID also explain the variation in state reactions? Around 40 states ratified the ICSID Convention quickly, others waited decades, and 40 World Bank member states remain outside ICSID. Chapter seven uses this cross-national variation as an opportunity to test the conclusions reached in the chapters which precede it, using different tools. The Bank’s strategy for developing ICSID has been, at core, about promoting an external idea of best practice. What determines the extent to which policymakers accepted this idea? The three sections below draw from existing literatures to identify states that should be less susceptible to the idea of ICSID. The first argues states that lack intrinsic attractiveness to FDI should be more susceptible; the second argues states that lack institutional credibility should be more successful; the third argues that coercion make certain states more susceptible to the idea of ICSID.

Intrinsic Attractiveness to FDI

I expect states with long-standing intrinsic advantages to be less susceptible to new ideas about foreign investment disseminated by the World Bank. These states have stronger pre-existing ideas about foreign investment and less need of external advice about how to attract it. I select two types of states with a well-established ability to attract investment—natural resource exporters and states with large domestic markets—and test if they are less likely to ratify ICSID in chapter seven. Determinants of investment, the factors that shape a firm’s decision to invest in a given location, are complex. I focus on these two factors to illustrate that traditional determinants of FDI decisively shape the contours of the international

³⁰⁶ Koremenos, Lipson, and Snidal 2001: 767 on “evolutionary forces.”

investment regime, not to provide a comprehensive explanation of policymaker receptiveness.³⁰⁷

The oil and gas industry has long been at the forefront of developing instruments to protect foreign property. The history of investor-state arbitration is longest in this sector, as the previous chapter and prologue suggested. The upfront investment and the long time horizon of oil operations exemplify the obsolescing bargaining problem.³⁰⁸ A recent paper evaluated if international investment agreements have an impact on prices in the petroleum sector. Using transaction-level data on the sale of petroleum reserves in 45 countries, Jandhyala and Weiner found that firms pay significantly higher amounts for assets protected by agreements than similar unprotected assets.³⁰⁹ However, the effect of the investment agreement depended on several conditioning variables.³¹⁰ My argument is more straightforward: due to their intrinsic attractiveness to investors, natural-resource exporting states are systematically less likely to join ICSID.

I argue larger capital-importing states are also less likely to join ICSID. States with large domestic markets are inherently more desirable to investors. These states tend to be long-established gateways for foreign investment into their region, and have deeper capital markets and more advanced standard setting than other states in their region. These traits may insulate them from competitive pressures to a certain extent. Like natural resource exporting states, states with large domestic markets have less need for added credibility, and therefore are less willing to commit themselves by ratifying ICSID. For instance, Australian policymakers, and those from other states that were large importers of FDI in 1965, often did not believe ICSID was necessary, as chapter four illustrates. Policymakers in these states could afford to be ambivalent. Chapter seven compares Bolivia and Brazil in the 1990s, before turning to event history models. Both types of evidence suggest size matters, but neither establishes a singular reason why. Size may affect multiple factors that influence the decision to join ICSID,

³⁰⁷ The receptiveness of state policymakers to the idea of investor–state arbitration is determined by many complex and possibly idiosyncratic domestic factors. My interest is not in a comprehensive explanation of these factors. It is narrower: is receptiveness inversely related to a state’s intrinsic ability to attract investment?

³⁰⁸ Vernon 1971.

³⁰⁹ Jandhyala and Weiner 2012.

³¹⁰ These conditioning variables included the firm’s financial resources and state ownership. Jandhyala and Weiner 2012: 21.

including: a state's attractiveness to and relationship with investors, its institutional quality, and its relationship with the World Bank. Identifying the precise way in which size matters is left for future research. The argument here is uncomplicated: market size, like natural resource deposits, affects the likelihood that a capital-importing state will join ICSID. The size of the domestic market shapes how states interact with the international investment regime.

Institutional Credibility

Ratifying ICSID, like ratifying BITs, is often viewed as a way states can bolster their credibility. States commit to the ICSID Convention in order to bolster their credibility, which in turn helps them gain competitive advantage in attracting investment. Credible commitments work by raising the costs of reneging: "the acceptance of treaty obligations raises expectations about behavior that, once made, are reputationally costly for governments to violate."³¹¹ In most investment treaties, access to investor-state arbitration ensures that treaty violations might also be *materially* costly. It is the dispute resolution provisions in BITs that make the promised standards credible. For scholars focusing on institutional credibility, states competing for investment actually compete to provide credible property rights.³¹² In this logic, the most "ironclad" dispute resolution provisions provide the most credible property rights protection.

Allee and Peinhardt argue that treaties with a pre-consent to ICSID are the most credible type of BIT.³¹³ After coding nearly 1500 treaties, they identify systematic variation in legal delegation—specifically, if BITs have an ICSID advance consent clause or not. Allee and Peinhardt elaborate the logic of hands-tying, a credibility-based explanation:

The inclusion of investor-friendly elements is a deliberate, self-interested manouever that is intended to mollify investor concerns about states with particularly severe credibility problems. As such, according to this hands-tying explanation, variation in BIT design stems from differences from one host state to another. Those with the largest credibility problems, perhaps stemming from weak domestic political institutions, weak rule of law, or a government's poor reputation, are most likely to include stronger provisions in their BITs. By contrast, host states without such credibility problems have far less need to tie their hands,

³¹¹ Simmons 2000: 819.

³¹² Simmons, Elkins, Guzman 2006: 812.

³¹³ "The most notable difference among treaties is whether they include dispute settlement via ICSID. ...ICSID is the most important institution for the settlement of these types of investment disputes." Allee and Peinhardt 2010: 2.

since their higher quality institutions or solid reputations alleviate any worries investors might have.³¹⁴

In this approach, states with the most severe credibility problems are likeliest to tie their hands by ratifying ICSID. States ratify these agreements to compensate for, or gloss over, weak institutions.

Coercion

Allee and Peinhardt conclude that investment-sending states generally prefer ICSID clauses and typically obtain them when they have significantly greater bargaining power.³¹⁵ Scholars find that OECD states generally get what they want in international negotiations, particularly in asymmetric bilateral negotiations.³¹⁶ In the international investment regime, OECD states want access to ICSID. Bilateral negotiations on investment treaties provide an opportunity for them to encourage (or require) their treaty partners to join ICSID. Therefore, to explain the results of an asymmetric negotiation, “the emphasis is firmly on the home state of the BIT pairing: its desire to include stronger enforcement provisions in BITs and its ability to incorporate them successfully.”³¹⁷

Allee and Peinhardt find considerable empirical support for their hypothesis that the power of the home state determines the shape of dispute resolution clauses in investment treaties. They argue:

The explanation for treaty design resides squarely within the preferences and power of ‘home’ states and not the varying conditions in the heterogeneous ‘host’ states almost all of whom end up having their hands tied for them.³¹⁸

If states wanted ICSID clauses, they would want their negotiating partner to be a member of ICSID. It follows that major capital-exporting states would use their superior bargaining power to pressure the other state into joining ICSID. The coercion account expects ICSID ratification to be the result of pressure during BIT negotiations. BIT negotiations are the likeliest moment for coercion by capital-exporting states to occur. Chapter seven compares

³¹⁴ Allee and Peinhardt 2014: 59.

³¹⁵ Allee and Peinhardt 2010.

³¹⁶ Gruber 2000; Stone 2011. Jones 2013 provides an alternate view.

³¹⁷ Allee and Peinhardt 2014: 62.

³¹⁸ Allee and Peinhardt 2014: 49.

ICSID ratification dates to BIT negotiations with major capital-exporters, before testing the coercion hypothesis with event history models.

Alternately, capital-exporting states could have used their leverage at the World Bank to make ICSID membership a condition of receiving loans. Pressure from the World Bank is not part of the modest multilateralism approach. Modest multilateralism is propelled by the power to persuade, not the power to compel. Archival and interview evidence is uniform that ICSID membership has never been a condition of receiving a loan from IDA or IBRD. Yet, there is still a possibility that lending and ratification may overlap in practice, or be associated. State policymakers seeking to persuade Bank officials to lend might have pre-emptively joined ICSID. Therefore, chapter seven investigates the possibility of an association between ICSID ratification and World Bank loans.

Domestic Reformers

Some scholars and policymakers, often from capital-importing states, emphasize that international economic agreements may strengthen the position of domestic reformers. Echandi argues that ratification is often driven by domestic goals. He identifies three such goals: to lock in domestic reforms, to promote transparency and the rule of law, and to foster greater coordination among and more coherent policy implementation by various agencies of national governments.³¹⁹ In this account, international investment law generates pro-reform pressure, or provides domestic reformers with leverage.³²⁰ ICSID ratification is an unlikely objective for domestic reformers. It was designed to bypass domestic institutions, not strengthen them. Although the chapters that follow are alert to the possibility of domestic reformers pushing ratification, supportive evidence is scarce.

³¹⁹ Echandi 2011: 12–16.

³²⁰ Similar pro-reform pressure has been generated by World Trade Organization (WTO) accession and other economic agreements. See Vu Thanh 2014.

Chapter Three: The Creation of ICSID within the World Bank, 1951–1964

This chapter sets out the context in which the World Bank created ICSID. Using process tracing, it identifies the institutional constraints and drivers that shaped the outline of ICSID. There were many obstacles to ICSID's creation. Multiple previous attempts had failed: the ICC draft, the ILC articles, and the Havana Charter mentioned in chapter one had led nowhere. Investment protection was divisive. Even within the OECD, strong disagreements between capital-importing and capital-exporting states were derailing attempts to create rules on investment in the early 1960s.

The World Bank was a particularly improbable institution to create machinery related to investment protection. During the 1960s, the Bank was a small lending institution, not the large development organization it would later become. At the time, the Bank operated by taking conservative steps within the political constraints set by its largest shareholder, the US government.

Despite these adverse circumstances, ICSID was created. Why, and how? Answering these questions requires first reconstructing the context in which ICSID was created, and then tracing the individual steps taken by its framers. A scholarly account of this process also requires identifying multiple points of view and placing them in relation to one another. These tasks in turn require access to a large number of original documents. Ideally, the personal papers of the key individuals would be available, and could be contrasted with their public statements and other official records. While I did not find many personal papers, I was able to access a rich variety of original documents and oral histories, which provide multiple perspectives and insider perspectives that have not been available until recently.

To foreshadow the findings of the chapter, in the early 1960s the Bank took several tactical steps to make the proposal for ICSID feasible. The chapter argues the most important part of the Bank's strategy at this stage was its use of ambiguity. The Bank consciously sidestepped

controversial issues in order to foster agreement between states that disagreed on investment protection issues. The Bank also relied on expertise in order to keep high politics out of the drafting process. Finally, the Bank's strategy was incremental: the idea of ICSID was introduced to small groups, and refined, and then introduced to larger groups, and refined again.

The chapter proceeds in three sections: the first section identifies characteristics and institutional constraints of the 1950s Bank that shaped the emergence of ICSID; the second considers the Bank's first forays into dispute resolution; and the third analyzes the Bank's strategy to create ICSID.

3.1 The World Bank: an Unlikely Home for Investment Protection Issues

Investor protection divided the World Bank's member states. Typically during these years, the World Bank was hesitant to wade into controversial issues. Yet the Bank decided to create ICSID. In order to understand the institutional drivers of ICSID's creation, it is necessary to flesh out the place of private investment in the Articles of Agreement of the International Bank for Reconstruction and Development (IBRD, now the World Bank). The Articles create a Bank whose relationship with private investors is fundamental to its success. Three characteristics of the Articles contextualize the emergence of ICSID within the Bank: the Bank has to borrow in order to lend; encouraging private investment is a core purpose of the Bank; and the Articles have always been interpreted expansively.

3.1.1 The Bank Must Borrow in Order to Lend

The Bank was structured in such a way that it had to fundraise from private capital markets. The Bank's paid-in capital was relatively small: in 1948, its ability to lend was dwarfed by the US Export-Import Bank and the Marshall Plan. In addition, the early Bank faced widespread skepticism and had no reputation or institutional credibility. In the 1950s, the Bank's first order of business was to prove its creditworthiness. Its creditworthiness was judged not by member governments, but by the bond markets, which meant by investment banks in New York (and later in Europe and elsewhere). The Bank did not earn a triple-A credit rating until

1959, after 13 years of operation.³²¹ During these years, and for some time afterward, the Bank's management did not take its eyes off that triple-A credit rating. All decisions were influenced by it.

The Bank's need to demonstrate to bond markets that it was a disciplined lender influenced the Bank's early policies on default and expropriation. The Bank concluded that:

A settlement of government defaulted debt was essential...and made it a condition for receipt of a Bank loan that a reasonable attempt be made to negotiate such a settlement.³²²

The Bank established a parallel policy for expropriation:

The Bank is charged, under its Articles of Agreement, to encourage international investment. It has, therefore, a direct interest in the creation and maintenance of satisfactory relations between member countries and their external creditors. Accordingly, the normal practice is to inform governments who are involved in such disputes that the Bank or IDA will not assist them unless and until they make appropriate efforts to reach a fair and equitable settlement.³²³

The Bank did not lend if a state had outstanding claims against it. Expropriation without adequate compensation arguably prevented the Bank loans that otherwise would have been made to Algeria (after 1964), Indonesia (throughout the Sukarno regime), Iraq (mid-1960s), the United Arab Republic (most of the 1960s), and the Democratic Republic of the Congo (1961–1969).³²⁴

The Bank's stance on defaulted debt loomed over its relations with Latin American states. Even if the defaulted debts long predated the existence of the Bank, there was no lending until the debts were settled. This policy led the Bank to become involved in settlements between states and bondholders. In an extreme example, Luis Machado, a Latin American Executive Director of the Bank, mediated the settlement of a Guatemalan debt from 1829. The Bank arranged for the Guatemalan government to pay investors—mostly speculators, since the original bondholders were long dead—for loans issued 137 years earlier.³²⁵ This policy did not endear the Bank to its borrowers, but it did impress the Bank's primary audience: bond markets, particularly in the US and Germany. Since the Bank had to borrow to lend, its early

³²¹ Kapur, Lewis, and Webb 1997: 1169.

³²² Mason and Asher 1973: 337.

³²³ Mason and Asher 1973: 338, quoting the IBRD Policies and Operations Manual of June 1969.

³²⁴ Mason and Asher 1973: 338.

³²⁵ Mason and Asher 1973: 337.

policies needed to please its lenders—bond markets—even if that meant displeasing its borrowers.

3.1.2 The Bank is Charged with Encouraging Private Investment

Unlike lending, encouraging private investment is prominent in the IBRD's Articles of Agreement.³²⁶ The encouragement of private investment was taken up eagerly, but the Bank's staff soon found that they lacked "adequate tools" to do much.³²⁷ Therefore, during the early years, Bank staff created tools with which they could encourage private investment. The most notable was the IFC.³²⁸

The Bank's experience with the IFC in the 1950s influenced the creation of ICSID. When the IFC was proposed at the Bank's Annual Meeting in 1952, the majority of attending bankers and businessmen opposed the proposal, observing "the problem for private investment in developing countries was not the lack of capital but the absence of an appropriate investment climate."³²⁹ Despite this, the IFC was created to lend public money to the private sector, which was expected to encourage private enterprise and foreign (private) investment. After an unsatisfying first decade, the IFC began concerning itself with "investment conditions rather than with individual investments."³³⁰ By the early 1960s, the IFC and the Bank began to focus on the "climate" for foreign private investment.³³¹

The investment climate was approached from the perspective of foreign investors. The Bank's staff recognized the importance of mobilizing domestic savings for growth, but believed development required foreign investment. It was assumed that foreign investment was unquestionably pro-development, and that poor countries needed a "big push" of foreign capital:

The perception at the time was that private foreign investment was not significantly recovering after the war and that developing countries were thus being deprived of

³²⁶ Article I (ii) of the IBRD Articles of Agreement.

³²⁷ Haralz 1997: 815. This enthusiasm, like the Bank's unflinching posture on debt default, was likely reinforced by the prior careers of many staff (notably the American senior management) in the private sector.

³²⁸ Mason and Asher 1973: 335.

³²⁹ Haralz 1997: 810.

³³⁰ A 1961 letter to IFC President Garner, quoted in Haralz 1997: 821.

³³¹ Mason and Asher 1973: 336. This said, the IFC did continue to make individual equity investments.

much needed capital, and, even more important, of the technical and managerial knowledge that ordinarily went with direct foreign investment.³³²

The Bank's staff was searching for ways to funnel private capital to poor countries.

Despite the centrality of private investment in the Articles, the Bank was not set up to solicit ideas from companies about FDI. Nor did the early management, even those with backgrounds in the private sector, have much experience with foreign *direct* investment. The private sector backgrounds of the management were concentrated in investment banks or other firms that were one step removed from direct investment. They had managed balance sheets, not factories. The staff was also very small at this time, which prevented sustained engagement on the ground. As Kapur, Lewis, and Webb observe:

Despite the World Bank's ideological leaning in the 1950s, it did little active fraternizing with foreign private profit-seeking firms trying to trade with or invest in developing countries, other than in mining – and the protocol was that the Bank was to relate to indigenous developing country firms only through their governments.³³³

Despite the emphasis on encouraging foreign investment, the Bank was an inter-state organization. The management reported to Executive Directors, who spoke for states, and the Bank's clients were states.

The Bank's early efforts to encourage private investment—including by setting up the IFC—resulted in two realizations that shaped the creation of ICSID. First, improving the investment climate of borrowing states was a priority. Second, new organizations could be created in-house. The IFC's creation provided a precedent that guided the creation of ICSID. Many of the individuals who shaped the IFC would reprise their roles to create ICSID.

3.1.3 The Articles of Agreement Are Interpreted Expansively

The IBRD Articles of Agreement were not constraining for the early Bank. Commenting on the Articles during the creation of IDA, President Eugene Black said, “We can do what we want.” Black may have stretched the truth a little, but not much. Many of the men shaping the World Bank's role in the 1950s considered the men at Bretton Woods their peers. These men

³³² Haralz 1997: 815. The observation was made about the founding of the IFC, but is equally valid for the creation of ICSID.

³³³ Kapur, Lewis, and Webb 1997: 1171.

saw the Articles as broad principles that had been cobbled together in a hurry, amid the uncertainty of World War II. Broches, who attended Bretton Woods as part of the Dutch delegation, said: “The Articles weren’t very artistically drawn, even though there were a number of lawyers around. It would have been handled quite differently if there had been more time.”³³⁴ The primary focus of most delegates to Bretton Woods had been the creation of the IMF: the World Bank (then the IBRD) was an afterthought. Additionally, a fair share of deliberation about the World Bank focused on the reconstruction of Europe—a business the Bank quickly left after the Marshall Plan was announced. As the Bank repositioned itself, the staff grew comfortable with activities that went beyond what was explicitly set out in the Articles.

Broches and others adopted a three-pronged test to see if the Bank could get involved in an activity. As he put it:

It has been the view of successive General Counsel – including myself – that, to put it in extreme terms, everything that’s not prohibited is permitted [1], as long as it serves the purpose of the institution [2], and as long as it is not inconsistent with anything else in the Articles [3].³³⁵

Of interest here is how this test applied to the creation of new institutions, like ICSID. As

Broches saw it:

What the Directors were doing was to add something to the existing instruments for promoting economic development. In the case of IFC, it was to give emphasis to the private sector. In the case of IDA it was to give emphasis to those countries whose absorptive capacity was greater than their credit-worthiness. In the case of ICSID, to get slightly ahead of the story, it was to create a set of instruments which might help attract foreign investment to the countries that needed it, thereby once again assisting the task of the Bank.³³⁶

Broches applied this three-pronged test to justify the Bank’s involvement in the Abadan dispute, discussed in the prologue. When the Bank was asked to mediate, he was asked to provide legal counsel about whether the Bank could legitimately proceed. Broches did not personally support the mediation (he later called the “scheme” a “hare-brained plan”) but still argued in his memo to the Executive Directors that it was something the Bank could do.³³⁷

Overall, throughout its first decades the World Bank’s management sought ways to leverage the Bank’s resources to encourage private investment. The management was open to creating

³³⁴ Broches Oral History May 1984: 4.

³³⁵ Broches Oral History May 1984: 4.

³³⁶ Broches Oral History May 1984: 2.

³³⁷ Broches Oral History April 1984: 28–29.

new types of organizations and had a sufficient mandate to do so.

3.2 The Bank Searches for a Middle Way through Investment Disputes, 1950–1960

The Bank became involved in investment dispute mediation in the 1950s. The previous section illustrated the Bank's emphasis on promoting private investment: mediations were viewed as a way to restore investor confidence and restart investment flows. This experience gave the Bank's management insights that prompted the creation of ICSID. No existing organization was prepared to arbitrate in disputes between investors and states. The Bank's President stepped hesitantly into this void and mediated several disputes. The Bank's management understood that existing proposals in other international organizations for machinery to resolve disputes were too ambitious. These proposals were tied up with substantive standards of investment protection, which were contentious. This experience and insight led the Bank to propose ICSID as a middle way. On the one hand, ICSID would provide machinery to get the dispute settlement job done. On the other, ICSID was a sufficiently modest proposal that it might be politically feasible.

3.2.1 Lack of Machinery

The Bank's involvement in the Abadan dispute, discussed in the prologue, was not a success, and the Bank's management did not view it as an endeavor worth repeating. However, the Abadan dispute made the Bank's management aware of the lack of machinery for resolving disputes between investors and states. Nationalizations were a global and growing trend, as a prominent American lawyer emphasized in a 1963 speech:

When Americans currently talk or write about foreign nationalization problems, they are primarily concerned with the Cuban situation where, for all practical purposes, only American interests are involved. This was not the case with other foreign nationalizations of the recent past, such as the Iranian oil expropriation in 1952, the Egyptian nationalization of the Suez Canal in 1956, and the Indonesian expropriation of Dutch property in 1958. Other expropriations of American interests occurred in some Latin American countries and are in the making in Asia and Africa.³³⁸

Given the Bank's remit to encourage private investment and its policy of refusing to lend to states with outstanding expropriation claims against them, these nationalizations concerned

³³⁸ Domke 1963: 281.

the Bank's management. The Bank's management may have anticipated being asked to mediate future nationalizations, making the absence of appropriate machinery palpable. This absence was mentioned repeatedly by senior management after Abadan. In an oral history interview in 1961, the Bank's most senior Vice President, William Iliff, explained the Bank's position:

The Bank has really been quite concerned about the question of the lack of machinery for resolving disputes between governments and private interests, and we have been called in on several [instances] – for example, Suez for one. Just at the moment we have another one on our plate, where the Colombian government has officially approached us....Now, we get into this thing I think as much for this reason as any other, that there isn't any appropriate machinery today, either in the field of conciliation or in the field of arbitration that can settle these disputes.³³⁹

In the absence of dedicated international machinery, the Bank³⁴⁰ got involved in several mediations in the 1950s. “Black's Bank” was remarkably good at dispute resolution and successfully forged several settlements. The largest was between India and Pakistan over the Indus River system. This was an inter-state dispute, unlike the others, which were disputes between a state and foreign investors. The Indus mediation is important as regards the creation of ICSID because it was a large, visible success: it established the Bank as a mediator. Hundreds of millions of people were affected by the dispute, and the issue was technically complex and politically charged. The Bank had considerable leverage in this mediation because both India and Pakistan were borrowers, and the Bank provided funds for the post-settlement engineering works. The mediation took almost a decade but ended in public success with the Indus Water Treaty in 1960.³⁴¹ Additionally, and not a trivial point, this mediation (unlike Abadan) was closely managed by President Black and Vice President Iliff, both skillful diplomats with personalities conducive to effective mediation.

The Indus settlement was important, but it did not directly inspire the creation of ICSID. The inspiration for ICSID came from two smaller mediations managed by Black: the Suez Canal

³³⁹ Iliff Oral History 1961: 43–45. Emphasis mine.

³⁴⁰ In some of these mediations, President Black agreed to act “in his personal capacity.” This changed very little about the conduct of the mediation. As Iliff succinctly put it: “the President was acting in his personal capacity... if you go in for that sort of fiction.” Iliff Oral History 1961: 64.

³⁴¹ Graves 1973: 610. One indicator of the good will created during this negotiation is that India's chief negotiator, Biswanath Sen, would become a friend of the Bank, and an important proponent of ICSID in later decades. Chapter six discusses Sen's later advocacy of ICSID.

Company and City of Tokyo compensation cases.³⁴² These cases involved states, as one party, and investors seeking compensation, as the other party. In the Suez Canal Company case, President Black arranged for the Egyptian government to compensate the company after the expropriation of equipment.³⁴³ This settlement “helped Egypt to international financial respectability” and “opened the way for the Bank to lend the Suez Canal authority \$56.6 million.”³⁴⁴ Black’s efforts were similarly successful in settling a long-running dispute between French bondholders and the City of Tokyo.³⁴⁵ These successes were attributable to (a) Black himself, whose personal involvement lent gravitas to the negotiations, and (b) the Bank’s involvement being interpreted as a promise that settlement would pave the way to financial respectability and better access to capital for the defaulting party.

Given the Bank’s—and Black’s personal—success in these mediations, it is not surprising that he proposed the idea of institutionalizing dispute resolution at the Bank. Addressing the Board of Governors during the 1961 Annual Meeting, he said:

As most of you know, the Bank as an institution, and the President of the Bank in his personal capacity, have on several occasions been approached by member governments to assist in the settlement of financial disputes involving private parties. We have indeed, succeeded in facilitating settlements in some issues of this kind, but the Bank is not really equipped to handle this sort of business in the course of its regular routine.

At the same time, our experience has confirmed my belief that a very useful contribution could be made by some sort of special forum for the conciliation or arbitration of these disputes. The results of an inquiry made by the Secretary-General of the United Nations show that this belief is widely shared. The fact that governments and private interests have turned to the Bank to provide this assistance indicates the lack of any other specific machinery for conciliation and arbitration which is regarded as adequate by investors and governments alike. I therefore intend to explore with other institutions, and with member governments, whether something might not be done to promote the establishment of machinery of this kind.³⁴⁶

I quote Black’s address to the Bank’s Board of Governors at length because two traits that define the creation of ICSID are evident here. The first is that Black’s framing is humble. There is nothing prescriptive, nor is there any mention of substantive investment protection. The second trait is that his tone is deferential. He places the Bank in a studious posture,

³⁴² Years later, Broches was asked if the Abadan dispute was “a forerunner that rang the bells and started you thinking about ICSID.” He replied, “No, no. The forerunners for that were rather Black’s conciliation role in connection with the City of Tokyo bonds, and the Bank’s mediation between the Suez Canal Company and Egypt.” Broches Oral History April 1984: 30.

³⁴³ Iliff Oral History 1961: 30–45.

³⁴⁴ Mason and Asher 1973: 642.

³⁴⁵ Waibel (2011: 83–84) summarizes the dispute.

³⁴⁶ “Address by Eugene Black to the Annual Meeting of the Board of Governors.” September 19, 1961.

emphasizing it would survey the problem in cooperation with other organizations. He only hints at the possibility that after much consideration, the Bank might act. Black's hesitant approach may have been disingenuous. Broches had set out detailed plans for ICSID four months earlier in an internal memo, and the organization that eventually came into being is nearly identical to the one laid out in the memo.³⁴⁷ In any case, these two traits were characteristic of Black, who cultivated good relations with the Bank's Board. Black's successor George Woods adopted a similarly sensitive approach in the case of ICSID, unlike his approach in other issues. This sensitivity is what sets the Bank's approach to investment protection apart from the approaches being pursued concurrently by other organizations, as the next section details.

In conclusion, the World Bank's experience mediating investment disputes during the 1950s was largely successful. Repeated requests for mediation by the Bank's President made it clear that there was demand for machinery to resolve disputes between investors and states. Additionally, President Black's success at mediating disputes over compensation, and that of other top officials, led to a widespread realization that the Bank could be useful in settling such disputes. This realization was complemented by a belief that settling such disputes improved the investment climate of the states involved.

3.2.2 The Bank's Involvement in Concurrent Proposals for Investment Protection

In the late 1950s, the World Bank's management was deferential to other organs of the UN, which had a larger number of staff and wider mandates. In April 1959, President Black travelled to Mexico City to address ECOSOC. In the area of investment protection, ECOSOC was the preeminent international organization until the creation of UNCTAD in 1964.³⁴⁸ ECOSOC, the UN General Assembly, and (after 1964) UNCTAD all demonstrated a sustained interest in investment protection. In 1957, the International Chamber of Commerce proposed that ECOSOC, together with the IBRD and IFC, call a conference to draw up an agreement. During the conference, held under UN auspices, Hermann Abs, chair of the

³⁴⁷ Broches 1961, SecM 61-192. August 28, 1961.

³⁴⁸ For example, in 1956, ECOSOC urged: "governments of capital-exporting and capital-importing countries alike to continue their efforts to develop international confidence conducive to private investment, in conformity with the principles of the Charter of the United Nations." Resolution 619 (XXII).

German Society to Advance the Protection of Foreign Investments, released a draft multilateral code titled “International Convention for the Mutual Protection of Private Property Rights in Foreign Countries.”³⁴⁹ Although the draft generated enthusiasm among many business groups in capital-exporting states, it faced instant opposition from capital-importing states, voiced at the 1957 conference by the Governor of the Central Bank of the Philippines.³⁵⁰ This division between capital-exporting states and capital-importing states created a stalemate within the UN system.

The other international organization that had a concrete proposal for dispute settlement architecture was the OECD. Under the auspices of the OECD, a committee led by Abs and Hartley Shawcross,³⁵¹ produced a Draft Convention on the Protection of Investment in 1962. The treaty contains an annex outlining machinery for resolving disputes between investors and host states.³⁵² The Bank’s management was aware of the OECD’s proposal: institutionally, the Bank had been cooperating particularly closely with the OECD since the Development Assistance Committee (DAC) was established in 1960.³⁵³

The World Bank had a close relationship with Hermann Abs, who was also the Chairman of Deutsche Bank. Abs’ special relationship with the Bank began in 1959, when he launched a daring operation in support of the Bank’s first European bond issue. In that year, the Bundesbank adopted a restrictive monetary policy, which caused bonds to fall below their issue price. If the World Bank bonds had been allowed to fall beneath their issue price it would have damaged the Bank’s standing. Abs decided that Deutsche Bank—alone among the German banks involved—would buy all the bonds necessary to keep the market price above the issue price. Deutsche Bank eventually bought over 66 percent of the bond issue, sustaining large losses in the process but earning Abs tremendous goodwill with the Bank’s

³⁴⁹ Miller (1959: 372–4) notes that Article X of the draft proposed the establishment of an international court for handling disputes, under a charter separately negotiated. The Article also envisioned an international arbitration committee to “decide questions concerning the adequacy, amount and form of compensation due following any expropriation of a foreign investment.”

³⁵⁰ See the quotations from Miguel Cuaderno, in “Investment Code for the World Urged: German Banker Proposes International Convention to Protect Capital.” *The New York Times*, October 16, 1957. Ministers from Ghana, Ceylon, Indonesia, Cuba, and other capital-importing states also voiced opposition.

³⁵¹ Shawcross was the lead British prosecutor at the Nuremburg trials, a former Attorney General, and had become one of the UK’s first life peers in 1959.

³⁵² For detailed analysis of the draft’s dispute resolution provisions, see Schwarzenberger 1969: 123–134.

³⁵³ Mason and Asher 1973: 7. See also Kapur, Lewis, and Webb 1997: 1172.

management.³⁵⁴ When Hermann Abs spoke, the Bank listened—particularly since the Bank still viewed bond markets as its primary audience.

The Bank’s senior management recognized that the OECD Draft Convention was unlikely to succeed. The US opposed the Convention, as did Turkey and other investment-importing OECD states like Spain and Portugal. The Bank’s Washington location may have helped its management to see that the proposed substantive standards would fail. The Bank certainly acted as though the OECD proposal had failed long before it actually did. Broches told the World Bank Executive Directors in 1962 that: “If [the OECD Convention was] adopted and adhered to by a substantial number of capital-exporting and capital-importing countries” then ICSID was unnecessary.³⁵⁵ Yet Broches developed the proposal for ICSID while the OECD Draft Convention was still under consideration. The Bank’s management did not wait for the OECD proposal to fail.

The OECD was also working on proposals for investment insurance, another idea supported by the German banking community.³⁵⁶ Broches and two other senior members of the Bank staff were assigned to study the issue in the early 1960s. Investment insurance was not a new idea—in 1948 the Bank produced a “Proposed Plan for Guaranteeing Foreign Private Investments against Transfer Risks and Certain Other Risks.”³⁵⁷ Although the idea had supporters at the Bank, the overall reaction was adverse. In their memoranda, Broches and his two co-authors concluded that investment insurance was “a rather unpromising proposal for the Bank to become actively associated with” for many reasons.³⁵⁸

Broches’ reasons for rejecting investment insurance make clear situations he thought ICSID could avoid. First, the memos emphasize that the Bank might find its relationship with borrowing countries unduly complicated by insurance. The Bank’s management was concerned about “a possibility, naturally appealing to investors who wanted to engage the

³⁵⁴ Kopper 1997: 456.

³⁵⁵ “Memorandum of Meeting” SecM 62–68 (April 10, 1962), Point 3.

³⁵⁶ One reason investors from the Federal Republic of Germany were interested in multilateral initiatives is because Germany’s diplomatic presence was curtailed after World War II, and its outward investors were more reliant on international institutions than American, British, or French investors.

³⁵⁷ Mason and Asher 1973: 343.

³⁵⁸ Mason and Asher 1973: 344.

Bank's interest, that it might find itself using its lending power as a bargaining weapon when embroiled in pressing for the settlement of claims."³⁵⁹ Broches sought to avoid this situation. The memos were clear: the Bank's loans should not be used as leverage in the settlement of insurance claims.³⁶⁰

The second reason is that investment insurance proposals were beset by disagreements about who would bear the costs of insurance. Although the extent of disagreement between capital-importing and capital-exporting states did not become public until years later, senior Bank staff like Broches saw this disagreement first-hand during meetings. Executive Directors from investment-exporting countries argued the countries in which investments were made should contribute to the administrative costs of an insurance scheme, as was the case in OECD proposals. Executive Directors from investment-importing states, in contrast, were unwilling to share either losses or administrative expenses.³⁶¹ Executive Directors expressed both positions in clear cost-benefit terms. The strong rhetoric of the General Assembly resolutions—and equally strong rhetoric of OECD proposals—was absent. Discussion among the Executive Directors focused on the “who pays” question, which was the kernel of the disagreement. Listening to these discussions made Broches and the Bank's management sensitive to both positions. They recognized there were two (or more) reasonable ways to answer the question: who should bear the cost of settling investment disputes?

The Bank's management attempted to avoid the “who pays” question when framing the ICSID Convention.³⁶² Many Bank staff members were personally in favor of the OECD proposals for substantive standards, but the Bank avoided taking an official position. Similarly, many staff members saw value in investment insurance, which seemed to be in line with the Bank's mandate to encourage private investment, but the Bank's management demurred. These

³⁵⁹ Mason and Asher 1973: 344.

³⁶⁰ See also Boskey and Sella 1965.

³⁶¹ Mason and Asher 1973: 345. Interestingly, the first UNCTAD also encouraged the Bank to pursue further study of investment guarantees in 1964 (Mason and Asher 1973: 570).

³⁶² Although the Bank was largely successful at removing the question of “who pays” from the creation of ICSID, the question did not disappear in practice. Today, ICSID cases can lead to large settlements borne entirely by capital-importing states, while the Multilateral Investment Guarantee Agency (MIGA), the investment insurance agency eventually created by the Bank, distributes costs widely, including among capital-exporting states.

actions demonstrate the management's prudence and reliance on ambiguity: when an issue of acute controversy emerged, the Bank plotted a course around it, not through it.

By the early 1960s, the Bank's management had been involved with investment disputes for over a decade. These officials appreciated the real disagreements between capital-exporting and capital-importing states. The Bank's management thought it unwise to get involved in investment protection, yet more investment disputes were expected and these disputes were believed to harm investment climates. The Bank's President was still receiving requests for mediation, and something would have to be done about this gap in the international architecture—the expectation of future investment disputes impelled action.

3.3 The Bank's Strategy for Creating Dispute Resolution Machinery

The previous two sections demonstrated the Bank's commitment to promoting private investment and sensitivity to the tensions of investment disputes. In this context, the Bank's management backed a prudent, minimalist proposal for dispute resolution machinery. The Bank's management designed a strategy to shepherd the proposal into force. The strategy was premised on ambiguity: controversial issues were taken off the table, so they would not derail the proposal. Secondly, the strategy employed expertise to prevent the proposal from being subject to politicking. States were asked to send individuals with legal expertise to regional conferences and then to a global drafting committee. Yet these discussions were not formal deliberations, and in all stages the power to amend the ICSID Convention remained in the hands of the Bank. This section traces the Bank's strategy in creating ICSID. The focus is on the Bank's strategy; the next chapter analyzes states' responses.

3.3.1 Initial Proposal

The idea for ICSID was proposed in an August 1961 memorandum to the Bank's Executive Directors, written by Broches and his team in the Legal Department. The memo argued the lack of investment dispute machinery was an important gap in the existing institutional architecture and articulated how the proposed machinery could help encourage private investment, thus justifying the Bank's involvement. I argue that the proposal's novelty is its

reliance on the idea of consent³⁶³ and its use of ambiguity. The memo avoided controversial issues or made clear the proposed machinery could work with multiple interpretations of a given controversial issue.

The memo relies on state consent to assuage the concerns of capital-importing states. The proposal reassures capital-importing states that their sovereignty will remain intact. Joining the proposed Centre would not automatically allow cases to be brought against a state. For a case to be registered, the government would have to consent again, either to the dispute itself or in advance. As the proposal put it, “the jurisdiction of such a tribunal would be based on consent ...the tribunal would have no compulsory jurisdiction, and access to it would be voluntary.”³⁶⁴ This emphasis on consent, and sensitivity to sovereignty concerns, is what distinguished the Bank’s proposal from the OECD Draft.

The proposal deliberately played to capital-importing states. It acknowledged the legitimacy of opposition to arbitration. It also suggested the proposed machinery was consistent with a requirement to exhaust local remedies. This is a form of ambiguity. Investor-state arbitration works against the spirit of requirements to exhaust local remedies. Arguing they can be used together obfuscates the tension between investor-state arbitration and local remedies. The proposal, however, argued the proposed machinery would not change existing rules:

Nor need the establishment of such machinery interfere with the customary principle of international law pursuant to which claims cannot be brought before an international tribunal until local remedies (whether administrative or judicial) have been exhausted. This rule would be left intact, although it would, of course, be open to any government to agree that the procedure before the international arbitral tribunal would be in lieu of whatever local procedures or remedies may be available.³⁶⁵

That excerpt also demonstrates the deferential language of the proposal. The choice to use arbitration belongs to governments. The proposal, like all international treaties, builds from the idea that a government’s sovereignty includes the ability to create limits on that sovereignty. The proposal requires two types of consent from a state before the machinery can be invoked. This double-consent formulation was meant to reassure capital-importing states.

³⁶³ The jurisdiction of the ICJ relies on consent, as do other courts and IOs. The novelty is the proposal’s double-consent requirement, which is intended to assuage the fears of capital-importing states.

³⁶⁴ Broches 1961, SecM 61–192, Point 4.

³⁶⁵ Broches 1961, SecM 61–192, Point 4.

Executive Directors from some capital-exporting states pushed for the proposed Centre to have a binding character (which would have meant removing the double-consent requirement). In response, Broches reiterated the importance of consent:

Signature of or later adherence to the suggested international agreement would in no way obligate any government, either legally or morally, to agree to submit any particular dispute or type of dispute to conciliation or arbitration under the auspices of the Center. The position in this respect would remain as it is today and would not be changed in any way by the suggested agreement.³⁶⁶

Broches was attempting to give capital-importing states every assurance that their sovereignty would not be diminished. It is difficult to assess how much of Broches' emphasis on consent was genuine, and how much was strategic. The limited available evidence suggests that his support for consent was largely strategic. Shortly after ICSID was created, he advocated that states give advance consent in BITs, and his 1952 memo on Abadan noted the utility of advance consent.³⁶⁷ Yet he knew that ICSID depended on capital-importing states. Without acceptance by capital-importing states, the new organization would not be legitimate or practically useful.

Most Executive Directors, representing both capital-importing and capital-exporting states, received the proposal well. In particular they applauded its "modesty."³⁶⁸ The proposal's key virtue was put bluntly by the US Executive Director: "Since the Bank's proposal did not attempt to establish some such substantive rules of law, his Government did not look at it with the same reservations as they had for a multilateral investment code."³⁶⁹ There was still a divide between capital-importing and capital-exporting states. The comments from the Executive Directors for India and for Germany, quoted in the following paragraphs, illustrate the seriousness of this divide.

³⁶⁶ Broches 1962, SecM 62–17, Point 20. Note: ICSID's name is "the Centre for Settlement of Investment Disputes"—the British spelling of Centre is correct. The Chair of the Drafting Committee was British and adopted British spellings. (ICSID History 1970: 691.) Yet, the World Bank's secretarial pool was American, or accustomed to American spellings, so many archival records refer to it as "the Center."

³⁶⁷ Chapter five discusses his advocacy of advance consent clauses at length.

³⁶⁸ The term appears repeatedly in "Memorandum" SecM 62–68.

³⁶⁹ "Memorandum" SecM 62–68, Point 17.

The Executive Director for India, Krishna Moorthi, questioned the link between ICSID and additional investment. Moorthi reported that:

His government asked for more time...they were considering many important aspects of the proposal; for instance, whether such a Center was by itself necessarily expedient and proper for the encouragement of foreign private enterprise coming into developing areas.³⁷⁰

This comment displays a skepticism that was also expressed by many other newly independent former colonies and by Latin American states. Moorthi hinted at the cost-benefit analysis for capital-importing states: would joining ICSID actually increase investment flows? No work had been done at the Bank to investigate this question, nor is there any record of any such work being proposed; ICSID was a creation of the Legal Department, and was not linked to the more statistically minded parts of the Bank.³⁷¹

The Executive Director for Germany, Helmut Koinzer, outlined the possibility of using the proposed Centre to enforce investment treaties. Germany's new investment treaties provided investment protection but did not offer any type of dispute resolution other than inter-state arbitration.³⁷² Koinzer said,

Questions of jurisdiction, procedure, and applicable law might be dealt with in bilateral agreements between interested countries...Germany had conducted a number of so-called promotion treaties with different countries, and...the Bank's proposal might be a valuable supplement.³⁷³

The link between ICSID and BITs was present from the start: Koinzer's remark was made in 1962, years before the ICSID Convention was even drafted.³⁷⁴

The Bank's management did not believe the Executive Directors had been able to give them a strong enough mandate to continue work on the proposal for ICSID. Creating ICSID posed legal questions, but the Executive Directors, and the people in government they consulted, were not lawyers. As Broches put it:

³⁷⁰ "Memorandum" SecM 62-68, Point 11.

³⁷¹ Bank management likely also realized that such an exercise was very difficult. Over 50 years later, the academic literature does not have an answer to this question.

³⁷² For instance, Germany's 1962 investment treaty with Cameroon. Article 10 provides for *ad hoc* inter-state arbitration or adjudication at the ICJ.

³⁷³ "Memorandum" SecM 62-68, Point 6.

³⁷⁴ While Broches, Koinzer, and possibly some other European representatives clearly already saw that bilateral treaties or multilateral treaties could provide the second consent to ICSID, the idea was not well known. For instance, an article published in a top American law journal in 1968 does not mention treaty consent in its list of methods by which consent to ICSID can be granted. "Comments: New Approach" 1968: 266.

Executive Directors report to Ministries of Finance, and while the purpose of the exercise was developmental, the technique was not only legal, but procedural. It was particularly difficult for people who are not lawyers, or who are lawyers but not interested in procedural matters.³⁷⁵

In a practical sense, the Bank's management needed more feedback, particularly from legal experts with an interest in procedural matters. In a political sense, the Bank's management needed to find a way to familiarize governments with the proposal, as familiarity was likely to build support and lessen skepticism about it. Familiarizing governments with the proposal would also give the Bank an opportunity to get a sense of the likelihood that they would ratify the proposed Convention.

3.3.2 Consultative Roadshow

The Bank's solution to get more feedback and to familiarize governments with their proposal was to convene a series of consultative conferences. Between December 1963 and May 1964, the Bank's Legal Department, with help from the UN, convened four conferences in different regions of the world. As Broches explained:

We hit on the idea of taking the show on the road to get comments from member countries, because we didn't get them through the Directors... I have to take credit for the idea of having four regional consultative meetings in the four capitals of the UN: Geneva, Santiago, Bangkok, and Addis Ababa. The Bank paid for up to two experts for one week – travel and subsistence... [these] representatives of countries were not really representing these countries, they were experts-designate.³⁷⁶

These experts-designate came from a mix of backgrounds: some were private lawyers, while others were professors or even cabinet members. A few notable public international lawyers attended, as did a handful of Bretton Woods attendees.³⁷⁷ A typical representative was a legal counsel from a finance ministry or a central bank.³⁷⁸ The defining trait these experts-designate shared was legal training. The Bank asked member states to send experts to evaluate a procedural legal text. States duly sent lawyers expert in procedure, not the individuals

³⁷⁵ Broches Oral History May 1984: 37.

³⁷⁶ Broches Oral History May 1984: 38.

³⁷⁷ For instance, this is how attendance at the Santiago conference was summarized for the Bank's board: "Most of the delegates were lawyers, some of them of great distinction, like Mr [Guillermo] Sevilla Sacasa of Nicaragua [Ambassador to the US 1943-1979, second in succession to the President] and Mr Alfonso Espinoza of Venezuela [former Finance Minister, former President of the Central Bank, lawyer and economist by training] both veterans of Bretton Woods. Mr Roberto Ramirez, President of the Central Bank of Honduras and an old friend of the Bank, represented his country." ICSID 1970 Vol II: 365.

³⁷⁸ For example, Australia sent: "Principal Legal Officer, Attorney General's Department." Israel sent: "Legal Adviser, Ministry of Finance" and "Senior Economist, Bank of Israel." Malaysia sent: "Principal Assistant Secretary, The Treasury" and "Senior Federal Counsel, Attorney's General Office." Pakistan sent: "Joint Secretary, Ministry of Law." ICSID 1970 Vol II: 459.

responsible for foreign investment policymaking. This group of lawyers was exactly the group the Bank wanted, as they could provide expert feedback and a semblance of representativeness, but in a cordial setting where participants saw themselves as moving the discussion on investment protection “above” politics and into the realm of law.

These conferences were purely consultative. It was the Bank’s decision whether or not to incorporate any feedback. As Broches remembered:

There was no voting at these meetings. In addition to comments, suggestions were advanced, and some compromises were reached but all in the framework of consultations.³⁷⁹

The experts-designate were not representing their governments. No expert-designate spoke on behalf of their government. Some experts-designate were not even employed by the governments that sent them. They were expressing quasi-personal views in a closed, consultative forum. They were not angling for domestic political audiences. The Bank attempted to insulate the conferences from politics.

The experts-designate provided Broches and his team at the Bank with valuable information: they provided the Bank with the likelihood that their country would join such an institution, if one were created. This was one of the most important functions of these experts. The way Broches spoke about it years later demonstrates the centrality of this function:

The consultative meetings gave an enormous amount of useful information. After these four meetings, I wrote a report to the Board – and I didn’t do all these things alone, I had two or three people working with me – in which I said that on the basis of these reports of the consultative meetings, I was satisfied that it would be possible to work out something that would command wide support.³⁸⁰

The Bank used the consultative conferences to check that both capital-importing and capital-exporting states were receptive to the idea of arbitration machinery.

The Bank structured the conferences to diffuse any disagreements that might impede the proposal. The Bank’s management avoided having a global deliberative conference, despite

³⁷⁹ Broches Oral History May 1984: 37.

³⁸⁰ Broches Oral History May 1984: 37–38.

repeated suggestions that such a conference be held.³⁸¹ The consultative conferences were an opportunity for every member state to share their views, yet the regional structure kept resistance to the Convention fragmented. It enabled the Bank to present responses to the Convention along regional lines. Latin America was characterized as intransigent in its opposition, while the other capital-importing regions were presented as receptive.³⁸² This misrepresents the actual responses from both Latin American and other capital-importing states, as the next chapter details.

The Bank went to great lengths to avoid opposition uniting. The Bank chose not to circulate summary records from the earlier consultative conferences to later consultative conferences.³⁸³ When asked during the later conferences about how states in other regions had responded, Broches gave vague or selective indications.³⁸⁴ The Bank was concerned that different strands of resistance would unite and the Convention would not be agreed.³⁸⁵ This concern was warranted: strong disagreement along similar lines was expressed in every conference. State representatives' responses are discussed in the next chapter, but, as an example, the initial statements of Brazil, India, Thailand, and South Africa are similar and may have been sufficiently close that they would have jointly led opposition to the Convention.³⁸⁶

The consultative conferences also spread the idea of ICSID. The Bank explained the idea to legal experts, who could then spread it in each of their countries. This was particularly important in newly independent capital-importing countries with capacity-constrained

³⁸¹ One delegate "felt... that an instrument of such significance ought to be discussed in a wider forum than that offered by a regional meeting." ICSID 1970: 543.

³⁸² For instance, Szasz 1970: 256.

³⁸³ Although never stated explicitly, it is clear in the records that the delegates, even at the final consultative conference, had not been sent any summaries or comments from previous consultative conferences. This can be clearly inferred from a comment Broches makes as chair. ICSID 1970: 547.

³⁸⁴ For example, when asked a question in the Bangkok consultative conference, Broches answered with the reply: "In Africa, no delegate had dissented from the view that it would be advantageous to remove disputes from the intergovernmental sphere. On the contrary, they had expressed a preference for the approach embodied in the Convention." ICSID 1970: 541.

³⁸⁵ As chair, Broches says the Bank did not circulate summaries in order to conserve resources. Yet, ensuring representativeness was taken so seriously during the drafting of ICSID that the Bank (a) paid for over 100 experts to attend the regional consultative conferences, and then (b) paid for over 100 experts to fly to Washington from national capitals for the drafting committee, which required over three weeks of per diems for each expert. Given the considerable funds invested in the creation of ICSID, it is extremely unlikely that the reason for not circulating summaries was a financial or resource constraint. There was a conscious decision not to provide summaries.

³⁸⁶ Chapter four explores the responses of these state representatives.

ministries. Many states asked the Bank to teach or disseminate information about investment disputes. For instance, the representative from China (Taiwan) said:

Referring to the proposal of the delegate from Lebanon that the Bank provide expert legal guidance in the drafting of investment agreements or arbitration agreements, he wondered whether the Bank would also consider sponsoring seminars or training courses at which legal experts could be trained in those subjects.³⁸⁷

The records from the consultative conference show representatives becoming acquainted with the idea of ICSID, and in some cases taking up its logic. The consultative conferences were considered a success, and provided enough encouragement that the Bank decided to take the proposal for ICSID to a vote at its 1964 Annual Meeting.

3.3.3 The 1964 Annual Meeting and Drafting Committee

The Bank's tactical maneuvering did not stop after the consultative conferences; it intensified. Before taking the idea to a vote at the Bank's 1964 Annual Meeting in Tokyo, the Bank's management invited each member state to send a representative to Washington for a drafting committee. This was an unprecedented step for the Bank.

President Woods—not known for profligacy or consensus-building—decided the Bank would fund a three-week long Drafting Committee, with 102 states represented. Before going to Tokyo, President Woods sent a note to the Executive Directors explaining why the Bank would pay for every member country to send a representative for three weeks of drafting: it was the only way to ensure adequate representation. In the note, he wrote:

I have considered whether it would be possible to limit in some way the size of the Committee, bearing in mind problems of organization of the work of a group which could in theory number 102 persons, as well as the expense this might impose on the Bank. However, there appears to be no practicable formula which would guarantee a balanced composition of a committee with limited membership, since very few of the Executive Directors representing more than one country represent homogeneous groups. I have therefore concluded that we should give every member the right to send a representative to serve on the Committee.³⁸⁸

To compare, the Drafting Committee had the same duration as the entire 1944 Bretton Woods conference, and more than double the number of states represented in 1944. Unlike the Bretton Woods conference, however, the ICSID Drafting Committee was not a deliberative

³⁸⁷ ICSID 1970: 544.

³⁸⁸ "Note from the President to the Executive Directors Concerning the Legal Committee" R 64–105, Point 2.

body. When the Bank invited states to send “representatives” or experts-designate to Washington in 1964, they were inviting them to take part in the technical task of drafting. Drafting is not deliberation. State representatives were there to help the Bank formulate the text; their remit did not include voicing opposition or significantly altering the Convention.³⁸⁹

The operating procedures of the drafting committee take ambiguity to its zenith. When experts-designate agreed an issue was controversial, it was removed from the discussion. During the drafting committee, as during the consultative conferences, the formal power to change the document remained with the Chair. If representatives felt the issue was not particularly essential, they would resolve it then and there with a show of hands. If the issue was felt to be important, it was reported to the Executive Directors. Broches, who chaired the committee, later termed it a “voting/non-voting system” and noted that it “was pretty innovative” and “worked pretty well.”³⁹⁰ The system got things done. Yet at the same time, this removed the most important issues from discussion. It relied on ambiguity to circumvent disagreement. The Bank chose this structure to prevent disagreements from derailing the proposal.

There are three reasons why the Bank’s management took the extraordinary step of funding a drafting committee. All three reasons stem from the idea that the success of the Convention depended on signature by capital-importing states. The first reason is that the Bank recognized the need for a new and more inclusive procedure. If the IFC and IDA procedure were followed, the idea would be discussed primarily by rich states, but ICSID’s success depended on its acceptance by small and poor states. Second, since ICSID was a legal body it needed to build procedural legitimacy. Third, and most importantly, the Drafting Committee provided a chance for the Bank to disseminate information. Each of these three reasons is discussed in turn below.

³⁸⁹ Again, as during the consultative conferences, the Bank asked member states to send lawyers expert in procedure—not officials who dealt with foreign investment policymaking.

³⁹⁰ Broches Oral History May 1984: 38–39.

The drafting of the IFC Articles and IDA Articles provide a benchmark for what the Bank had done before; comparing ICSID's drafting against this benchmark shows the extent to which ICSID's creation was a *sui generis* process. The Bank's management realized the process used for the IFC and IDA Articles was inappropriate, and would harm ICSID's chances of success. The Articles for the IFC and IDA were drafted internally by the Bank, discussed by the Executive Directors, and then submitted to states for ratification. There was no formal consultation. These Articles emerged fully formed from within the Bank and then states could join or not join. Broches remembered the drafting of the IFC Articles:

There was no diplomatic conference, and the treaty was drafted and opened for signature and acceptance not by the plenary organ of the Bank, the Board of Governors, but by an executive organ, the Executive Directors, then seventeen in number.³⁹¹

The distinction between the Executive Directors and the Board of Governors is important. On the Board of Governors, each member state has one seat and one vote. Thus, as the Bank's membership grew rapidly in the late 1950s, the number of seats on the Board of Governors grew from 58 in 1959, to 102 in 1964. In contrast, the Executive Director seats did not change to reflect this growth. Executive Directorships are allocated using a formula that relies primarily on shares of Bank capital owned.³⁹² The largest shareholders each appoint a director. Smaller shareholders must share an Executive Director: sometimes one Director represents 21 states.³⁹³ The largest shareholders also tend to be powerful capital-exporting states. The Bank's smallest shareholders tend to be the poorest and smallest states; their representation on the Executive Directors is least direct, and their awareness of what happens during Executive Director meetings tends to be weakest.

It was not unseemly that the main voices in the debate during the crafting of the IFC and IDA Articles were capital-exporting states.³⁹⁴ In essence, the IFC and IDA Articles were agreements among rich countries about what arrangements they would use to channel capital

³⁹¹ Broches [1959] 1995: 29.

³⁹² Each member receives votes consisting of share votes (one vote for each share of the Bank's capital stock held by the member) plus basic votes (calculated so that the sum of all basic votes is equal to 5.55% of the sum of basic votes and share votes for all members. World Bank 2014.

³⁹³ In 2012, two Executive Directors—representing 21 countries each—represented Africa. World Bank, Corporate Secretariat 2014.

³⁹⁴ It should be noted that the proposal for IDA emerged from the Board of Governors. Yet IDA was very much an American proposal—put forward by the US Treasury Secretary at the Annual Meeting in 1958—and key discussions did not extend beyond the Bank's main shareholders.

to poor countries.³⁹⁵ These were funding mechanisms. ICSID, in contrast, was a legal mechanism. The main voices in its drafting could not be Executive Directors from capital-exporting states. These Directors represented exactly the wrong constituency. The proposal's success rested upon the perceptions of capital-importing states.

ICSID needed a strong foundation of procedural legitimacy. This is the second reason why the Bank's management funded a drafting committee. After all, setting out robust procedure is the core purpose of the ICSID Convention. The Bank's earlier mediations of investment disputes had no formal procedure: they were *ad hoc*, personality-driven affairs. ICSID was the Bank's first foray into creating legal mechanisms, and the first time it asked member states to send experts in procedural law. The Bank, in line with the deference that characterized its approach to ICSID, wanted to ensure the Convention had excellent procedural credentials. There were two additional influences reinforcing this drive toward good procedure: the legacy of Bretton Woods, and the example set by the UN.

ICSID's Articles were a chance for Broches and his team to leave a stronger framework for ICSID than the one left after Bretton Woods. The formal authority for interpreting the World Bank's Articles rests with the Board of Governors, but in practice interpretation rests with the Legal Department, of which Broches was the head. As section 2.4.1 noted, in any IO, a great deal of interpretation takes place informally, within the organization. Typically, lawyers use preparatory papers or records from drafting conferences to substantiate interpretations. Yet no official papers existed from Bretton Woods.³⁹⁶ Those working in the Bank's Legal Department bemoaned the lack of *travaux préparatoires* from Bretton Woods. As Broches put it:

The technical organization of the [1944 Bretton Woods] conference was very poor. There were no proper records of the proceedings. There were documents but there were no minutes, which might have explained why a particular provision was adopted or changed. The Fund did have some minutes about some meetings which may still exist. Some draft minutes are said to have been destroyed because there were such

³⁹⁵ In the case of the IFC it was funding for private enterprises, in the case of IDA it was concessionary loans or grants.

³⁹⁶ In recent years, papers from the US delegation have been published by a think tank and been used by researchers as *travaux préparatoires*. These papers, however are not a formal institutional record, have never been stored at the Bank, and were never used in a formal capacity by Broches or others.

gaps they were regarded as more harmful than helpful. On the Bank there's nothing except documents.³⁹⁷

The lack of minutes was inconvenient for the legal departments of the IMF and the World Bank, but not a serious problem, since the authority to interpret the Articles is held within those institutions. For ICSID, however, the power to interpret the Convention would rest with tribunals. The individuals on these tribunals would come from diverse backgrounds and would operate outside the Bank's institutional culture and without Board oversight. The proposed Convention did not constrain their interpretive powers. The framers of ICSID therefore believed it was imperative to leave these tribunals with thorough *travaux préparatoires*. After the Convention was agreed, the Bank spent two years formulating precise regulations and rules of procedure for ICSID. In 1965/66, the Bank hired Paul Szasz, on his way to becoming one of the world's foremost experts on procedure in public international law, to work exclusively on the regulations and rules of procedure.³⁹⁸ The Convention is sent to states in a packet: the Convention itself (28 pages), the accompanying Report of the Executive Directors (16 pages), and the Regulations and Rules of Procedure (69 pages). Each of these documents sets out what ICSID is and what it is not. Collectively, they reflect the intent of Broches and others to leave a stronger framework than the World Bank's Articles.

The effort put into ICSID's drafting also reflected the influence of the UN. The UN raised expectations about how global arrangements should be formalized. Capital-importing states had a voice in UN organs by 1964, and expected the same from the World Bank. ECOSOC was in its ascendancy at this time. Four new regional commissions had been established, and construction had just finished on new buildings in each of the regional headquarters: Addis Ababa, Santiago, Bangkok, and Geneva. These buildings hosted the ICSID consultative conferences. In March to June 1964, the first UNCTAD was held.³⁹⁹ These UN fora were

³⁹⁷ Broches Oral History April 1984: 2.

³⁹⁸ Szasz subsequently joined the office of Legal Counsel at the United Nations. He was later instrumental in drafting the constitutions of Bosnia, Namibia, and the International Fund for Agricultural Development, in addition to many other notable contributions to international law. See Szasz Oral History 1988; Brown Weiss 2002.

³⁹⁹ UNCTAD 1964.

spaces in which capital-importing states had a voice, and they used that voice to articulate shared interests and shape global debates.⁴⁰⁰

The same forces buffeted the Bank and the UN. President Woods went out of his way to make “a supportive speech” to the first meeting of the UNCTAD.⁴⁰¹ In his address, he said the Bank intended to participate “actively and affirmatively” in UNCTAD’s deliberations. It had embarked on a “program of critical self-analysis,” the first consequence of which was a decision to expand the scope of its financing.⁴⁰² He announced that the Bank was beginning agriculture loans, and loans for education were to be expected.⁴⁰³ Woods’ overture was warmly received. After this address, Raul Prebisch described Woods as the Bank’s Pope John XXIII, who had proved an unexpected revolutionary: stressing human rights and appealing to richer nations to help the poor.⁴⁰⁴ It was not mere window-dressing either: the Bank saw UNCTAD as a forum for its borrowers and listened to it—at least on a few issues.⁴⁰⁵ The Bank was aligning its focus more with its borrowers’ priorities and less with the bond markets. For ICSID to have any legitimacy, Woods and other top management knew the representativeness of ICSID’s drafting committee needed to match—at least outwardly—the representativeness of the UNCTAD proceedings.

The third reason why the Bank’s management took the extraordinary step of forming a drafting committee was because it would provide a chance for state representatives—particularly representatives from poor, postcolonial states—to learn about the logic of ICSID. It was a way to help countries focus on the legal framework for foreign investment in their countries, advance peaceful arbitration as a means of dispute resolution, and build legal capacity in member states. Educating officials about ICSID also reinforced positive perceptions of it. A close reading of the Bank’s internal documents show this reason was important, even though it was rarely stated explicitly.

⁴⁰⁰ As an American diplomat put it, “I had still made the basic mistake of thinking that the controversy at ECOSOC was going to be essentially between ourselves and the Soviet Union. That clearly would not be the case. Our basic problem would be to cope with the demands of the under-developed countries, who were really starting to throw their weight around in the General Assembly and in ECOSOC.” Wyman Oral History 1989.

⁴⁰¹ Kapur, Lewis, Webb 1997: 16.

⁴⁰² Woods 1964(a).

⁴⁰³ Mason and Asher 1973: 570.

⁴⁰⁴ Noted in Kapur, Lewis, Webb 1998: 176–177.

⁴⁰⁵ Oliver 1995: 108.

Despite the best efforts of the Bank, opposition to ICSID was strong enough to threaten the proposal during the Bank's 1964 Annual Meeting in Tokyo. After the consultative conferences, the Bank's management believed there would be enough support for the proposal to succeed, even though some countries would resist. The Bank planned the next steps for ICSID before putting it to a vote in Tokyo. The invitations to the drafting committee had been prepared. The Bank would invite all member states to participate, "including those who have had reservations or who, for whatever reason, do not now envisage joining any convention which may emerge."⁴⁰⁶ The drafting committee was an additional opportunity for education.

Member states did not know invitations to the drafting committee had already been prepared, and President Woods' address to the Board of Governors continued the outwardly deferential approach first begun by his predecessor, Black. President Woods introduced the proposal for ICSID as one of many initiatives to facilitate foreign investment:

It is, therefore, in the interest of the developing world to avail itself of the advantages offered by foreign investment... Another approach, which we have actively sponsored, is the establishment of international machinery which would be available to deal on a voluntary basis with investment disputes between governments and nationals of other states. This is proposed in the draft Convention on the Settlement of Investment Disputes on which the Executive Directors have submitted a report to you. If you agree, the Executive Directors, assisted by a committee of legal experts designated by interested governments, propose to work out a final text for submission to governments ... in 1965. This proposal, in my view, holds great promise. I recommend it and urge your unanimous approval of it.⁴⁰⁷

The proposal did not get unanimous approval. The Chilean Governor, Felix Ruiz, also Vice President of the Banco Central de Chile, acted as a spokesman for a group of states, primarily Latin American, which opposed the proposal. If there had been global deliberations or more information sharing, would more states have joined the Chilean statement? Possibly, as will be explored in the next chapter. As it happened though, resistance was fragmented along regional lines—and then written off as the product of Latin America's particular history with investment protection. The Board of Governors approved the Bank's proposal to hold a drafting committee and produce a completed Convention.⁴⁰⁸

⁴⁰⁶ George Woods' opening speech to the Drafting Convention. ICSID 1970: 673.

⁴⁰⁷ Woods 1964(b): 11.

⁴⁰⁸ Broches would open the drafting committee by closing off the possibility of deliberations: "The present meeting was no longer concerned with the question of the desirability of creating machinery for facilitating the

Conclusion

This chapter sets out the context in which the World Bank created ICSID and analyzes the Bank's strategy in doing so. The first section highlights the Bank's search for ways to encourage private international investment. The Bank's Articles of Agreement creates a bank that must borrow to lend. The Bank had relatively little paid-in capital and was not envisioned primarily as a lending agency. One of its principle objectives was to promote and encourage private investment into countries where capital was needed. This proved more difficult than expected, and the Bank learned from its early experience (particularly setting up the IFC) that a focus on the investment climate was warranted. The Bank also learned from its creation of the IFC that it had a sufficiently wide mandate to set up new organizations.

The second section details the Bank's involvement mediating investment disputes in the 1950s. Although the Bank's first foray, in the Abadan dispute, was unsuccessful, later efforts would reward the Bank with visible successes. These mediations brought the need for international machinery dedicated to resolving disputes between investors and states to the attention of senior management. The Bank was well informed regarding initiatives on investment protection underway in other international organizations. The Bank's management judged these initiatives unlikely to succeed. The disagreement between capital-importing and capital-exporting states seemed intractable.

It was in this context, with the Bank seeking to promote private investment while understanding the sensitivity of investment protection, that the Bank's management crafted a strategy to create ICSID. The strategy relied heavily on ambiguity. Chapter two argued the defining characteristic of ambiguity is intention. Plenty of vague treaty language exists in international agreements. Ambiguity is conscious avoidance of controversy. Did ICSID's framers go out of their way to avoid harm to their proposal? To adjudicate intention is difficult, and impossible without a thorough understanding of context and access to primary

settlement of investment disputes since that question had already been decided in the affirmative." ICSID 1970: 674.

records. This chapter, however, presented enough context and detail to enable a firm conclusion to be drawn: ICSID's framers consciously maneuvered their idea through a difficult and divided context, avoiding disagreement and controversy at every turn. The Bank's President trumpeted the modesty of the proposal, because of its absence of substance and emphasis on consent. The US Executive Director said his country could support the proposal because of its absence of substance—because of its ambiguity.

Contemporary observers recognized the Bank's skillful use of ambiguity. In 1969, Schwarzenberger wrote:

The crucial question is the extent to which the draftsmen of the Convention considered it prudent to commit the governments of capital-importing states, without unduly rousing their susceptibilities as sovereign and equal members of the United Nations. They have come as near as it possible to the point of squaring this particular circle. With remarkable ingenuity, they have couched the minimum of legal commitments in a form which leaves everything on the level of optional undertakings, but attains as much as, in the present political climate, is likely to be attained for the protection of foreign investments through conciliation and arbitration.⁴⁰⁹

Schwarzenberger was impressed with the Bank's success and attributed it to the tactical use of ambiguity.⁴¹⁰

The process by which the proposal was introduced to member states safeguarded its ambiguity. The Bank invited states to send experts-designate, not formal representatives, and structured their participation in a consultative and regional framework. At no point did the drafting process include global deliberation. This strategy worked: where other organizations had failed, the Bank succeeded.

The creation of ICSID was almost entirely Bank-led, and had a profoundly inter-state and legal character. Investors were largely absent. The Bank created ICSID for investors, and to encourage private sector investment, but the Bank did this using their default operating procedures and channels—all of which were inter-state. The key individuals involved were not businessmen: they were lawyers accustomed to drafting loan agreements and other

⁴⁰⁹ Schwarzenberger 1969: 142.

⁴¹⁰ He did not call it ambiguity, but astutely noted an intentional lack of specificity on several points. Schwarzenberger (1969: 142) observed that “none of the operative terms were defined” in the Convention, and that “actually, all of them are sufficiently controversial to call for definitions in an interpretive section.”

documents for approval by member governments. The Bank's focus was to get the ICSID Convention approved by its member states. ICSID's form and content were designed to assuage the concerns of policymakers in capital-importing states. Would it be enough? The next chapter takes up the question of to what extent the Bank's dissemination was successful.

Chapter Four: ICSID's Emergence as an Optional Mechanism, 1964–1966

The previous chapter sets out the context in which the World Bank proposed ICSID, and analyzes the Bank's strategy for disseminating the idea. The proposal for ICSID took the idea of ambiguity to its limit: it contained no substantive standards, and the consultation and drafting procedure was designed to take the most contentious issues off the agenda.

ICSID's success at the drafting stage seemed improbable, in spite of the World Bank's tactical use of ambiguity. The two prior interstate attempts to create rules on investment—the Havana Charter of 1948 and the OECD Convention of 1962—failed in the drafting and initial ratification stages. We would expect a similar result during ICSID's drafting stage for several reasons. First, since there were no substantive rules, there was not a strong positive case to be made for the benefits of ratification: there was no evidence to support the claim that additional investment would flow to states that ratified. Second, given the history of investment protection, the drafting could have become a political battleground. Large capital-importing states might work together to veto any proposal for investment dispute resolution machinery. How did the Bank address these obstacles?

Expertise played a fundamental role in the Bank's strategy. To foreshadow the chapter's conclusions, expertise shielded the proposal from politicking and began to build a community of practice. Expertise is present when individuals share a method, as discussed in chapter two. The Bank invited legal experts to speak behind closed doors in a consultative forum, in a quasi-personal capacity. These arrangements were precautions to prevent politicking. Many of the experts-designate were high-ranking friends of the Bank: Executive Directors, General Counsels from national central banks, and jurists of international reputation. These experts were the Bank's sympathetic interlocutors. They were also the beginnings of a community of practice.

If the Bank's strategy for dissemination was successful, we expect governments to adopt the Bank's language and reasoning, and then act in accordance with this new reasoning. To what extent was the Bank's initial dissemination successful? To anticipate the chapter's findings, the answer is mixed. A sizeable minority of state experts-designate⁴¹¹ did adopt the Bank's framing, and their states did join quickly after the Convention opened for ratification. The majority of experts from investment-importing states, however, were skeptical and raised serious objections to the Convention. Several experts questioned the premise that ratifying ICSID could have an impact on inward investment flows.

The first three sections of the chapter examine issues that were prominent during the consultative roadshow. The fourth turns to state behavior, and describes the initial pattern of ratifications. When the ICSID Convention opened for ratification, the initial uptake by states was sufficient to bring the organization into existence in 1966. ICSID's initial membership was geographically and economically diverse, but far from universal. Many important states remained outside the organization in 1970. The fifth section investigates the domestic political process behind ratification in the US in depth.

4.1 Success Depends on Ratification by Investment-Importing States

State representatives at all four consultative conferences acknowledged that the Convention's success depended on acceptance by investment-importing states. This sentiment was expressed most strongly at the Geneva conference by investment-exporting states. The Geneva conference was attended by European states and South Africa. It was the only conference to be split nearly evenly between investment-exporting and investment-importing states. This mixed attendance makes it the best conference for identifying the positions of investment-exporting states, how these positions fit with the Bank's position, and how they fit with the positions of investment-importing states.

⁴¹¹ The official term for these individuals is expert-designate, but in this chapter I refer to them as experts or representatives. As discussed in Section 3.3.2, these individuals were not formally expressing the views of the states they represented, but were considered state representatives in a broad sense.

Most representatives at the Geneva consultative conference welcomed the idea of ICSID, but questioned if investment-importing states would support it. Typically, representatives opened their remarks by giving their “full support” to the Convention or stating that they “warmly welcomed the initiative.”⁴¹² Their primary question was: could the Bank successfully convince investment-importing states to ratify the Convention? The expert from France put it plainly:

The quality of procedures adopted would depend on the number of ratifications that the proposed convention would ultimately secure. A convention of that type was important only in so far as it attracted ratifications from a sufficient number of countries, capital-importing and capital-exporting alike.⁴¹³

The expert sent by Germany, Dr Koinzer, was equally straightforward. At the Geneva conference, “he stressed the willingness of the developing countries to participate in the scheme was a decisive factor in its success.”⁴¹⁴ Koinzer’s use of the term “developing state” instead of “investment-importing” indicates the type of state Koinzer and others imagined using ICSID against.

To Koinzer, ICSID was a tool that would support the new German investment treaties. By 1964, Germany had already signed several such treaties, most with newly independent states like Cameroon, Central African Republic, Pakistan, and Togo.⁴¹⁵ Koinzer had linked ICSID to BITs when Broches first proposed the idea to the Bank’s Executive Directors in 1962.⁴¹⁶ The key audience for the ICSID Convention was policymakers in states where property rights were least secure—typically the weakest, and often the newest, states. These were the states that needed to agree to the idea of ICSID. Representatives from many investment-exporting states shared this view.⁴¹⁷

⁴¹² The representatives from Finland and the UK, respectively. ICSID 1970: 377 and 376.

⁴¹³ ICSID 1970: 373.

⁴¹⁴ ICSID 1970: 374.

⁴¹⁵ The early German efforts to sign investment treaties may stem in part from the reality that the Federal Republic of Germany had a minimal overseas presence in the mid-1960s. Whereas British or French investors might have relied on the lingering effects of their country’s colonial past to help with disputes, investors from West Germany did not have this option. Additionally, as Dolzer and Kim (2013: 293) point out, German investors had a salient recent memory of expropriation: “the German government was still informed by the confiscation of German private property abroad which had taken place after 1945.”

⁴¹⁶ Koinzer was the World Bank Executive Director for Germany, as mentioned in Section 3.3.1 of the previous chapter.

⁴¹⁷ Although a few private documents exist to substantiate this understanding, it was not stated publicly: it would have damaged ICSID’s chance of success if it had become public knowledge.

States that were “developed” capital-importers provide a different perspective. Ireland, Spain, Portugal, Greece, and South Africa were some of the investment-importing states represented at the Geneva conference. With the exception of South Africa, these states were OECD members.⁴¹⁸ Yet they were investment-importers and this put them in a position opposite to that of the investment-exporting states: Germany had even signed a BIT with Greece in 1961.⁴¹⁹ The difference comes through in their comments. The representative from Yugoslavia said, “Paramount importance should be given to the views of the capital-importing countries as the creation of the Center should primarily be in their interest.”⁴²⁰ To the Yugoslav expert, the shape of the Convention was important because it could change his government’s negotiating position with foreign investors. States that were investment-importers, no matter their geographic location, perceived themselves as potential respondents to ICSID cases. During the consultative conferences, however, the concerns of these peripheral OECD states or developed investment-importers were sidelined. These states were not the focus of the effort.

The focus was states where property rights were considered least secure. These were mainly former colonies. Yet this focus remained unstated, because of the political and intellectual milieu in 1964. Concurrently with the consultative conferences, Raul Prebisch was leading preparations for the first UNCTAD.⁴²¹ Investment-importing states were increasingly exercising voice in international economic affairs. In this context, a new organization’s legitimacy was inversely related to the amount of leadership shown by former colonial powers in creating it. This position was expressed in a private memo to the US Secretary of State. In the memo, an adviser briefed the Secretary on US support for ICSID:

The United States has at all times indicated its support for the Convention, but has deliberately not led the way, since the thought has been that this Convention, unlike the OECD Convention, should not have the appearance of being prepared by the capital exporting countries for signature by the capital importing countries.⁴²²

⁴¹⁸ They were OECD members, but also still World Bank clients. These states could be considered “developing states” depending on how one distinguishes developing from developed states.

⁴¹⁹ Germany–Greece BIT, 1961.

⁴²⁰ ICSID 1970: 379.

⁴²¹ Prebisch was travelling extensively to different capitals—both developed and developing—to strengthen the solidarity of developing countries and to support his intentions regarding the forthcoming conference. (Toye and Toye 2004: 192, and, more generally, 191–194 and 204–205.) Prebisch’s proposals earned favorable publicity around the world. Toye and Toye 2004: 200.

⁴²² Meeker. Undated [likely March 1965]. Emphasis mine.

This type of language was reserved for internal discussions. US representatives avoided saying anything like this publicly.

In public, and in particular at the consultative conference they attended in Santiago, the US representatives were circumspect. The Western Hemisphere consultative conference was dominated by Latin American states opposed to the idea of ICSID. The head of the US delegation was then-General Counsel of the Treasury, Gaspard D'Angelot Belin, an elegant and progressive Kennedy-appointee.⁴²³ In the opening session, the Argentine representative strongly asserted his country's opposition to the Convention, and noted that Argentina refused "to curtail its jurisdiction and felt that to detract from national sovereignty was not an acceptable method for improving the investment climate."⁴²⁴ Speaking immediately after that sentence, Belin gently offered US support to the Convention, conditional on its acceptance by investment-importing states. He said:

If a sufficient number of countries proved interested in working out some arrangements on the basis of the draft, then the United States would support it. He stressed the voluntary nature of the arrangements proposed in the draft, which should appeal to many countries.⁴²⁵

The US delegation remained quiet while representatives from other states pummeled the idea. Meanwhile, Broches, chairing the conference on behalf of the World Bank, actively defended the Convention. He engaged in longer interventions and fairly combative exchanges with representatives to correct what he perceived as misrepresentations of the Convention in Santiago.⁴²⁶

Broches and the World Bank led the creation of ICSID, not the US or other capital-exporting states. Investment-exporting states largely adopted the Bank's framing and cooperated with the Bank's dissemination strategy, but they took a backseat to the Bank. Broches overruled or ignored the wishes of investment-exporting states when he believed they were wrong. The Dutch representative requested the Bank share how the experts at the earlier African

⁴²³ Belin was accompanied by the Acting Assistant General Counsel of the Treasury, and the Assistant Legal Adviser for Economic Affairs at the State Department, Andreas Lowenfeld, who would go on to become a seminal figure in investment arbitration.

⁴²⁴ ICSID 1970: 308.

⁴²⁵ ICSID 1970: 308. Emphasis mine.

⁴²⁶ ICSID 1970: 307–310.

consultative conference responded to the idea of the Convention.⁴²⁷ In the words of the Dutch expert:

It would appear necessary for the Meeting to have some further information of the reactions of those attending the Regional Consultative Meeting in Africa regarding whether it would be wise to institute procedures under for the settlement of investment disputes under the auspices of the Bank. ...It was extremely important to know the views of the African experts regarding the desirability of a link between the proposed Center and the Bank.⁴²⁸

As mentioned in the previous chapter, the World Bank chose not to share any minutes from the earlier regional consultative conferences with the later ones, despite requests to do so. This decision was taken to prevent opposition to the Convention from uniting. The Dutch representative ultimately chose to drop the request and to support Broches' strategy. Investment-exporting states did not stand in the way of the Bank's plan.

4.2 The Promised Benefit: An Improved Investment Climate

The Convention was presented to investment-importing states as a tool that would improve their investment climate. Broches opened each consultative conference with a speech introducing the ICSID Convention. The speech conveyed the proposal made to investment-importing states. Broches displayed sensitivity to the concerns of investment-importing states and framed the ICSID Convention as a policy tool that could help them achieve their aims.

Broches framed investment protection as a contemporary development problem, which the World Bank could assist states in solving. He acknowledged the contentious history of investment protection, before focusing on development. He began:

In the past, international investment might justifiably have been of interest chiefly to the capital-exporting nations and their citizens. Today it was universally recognized as a factor of crucial importance in the economic development of the less developed parts of the world and had become one of the major features of the partnership between the richer and poorer nations.⁴²⁹

At the time most mainstream economists believed the relationship between investment flows and development was straightforward. The problem was inadequate flows of private capital.

⁴²⁷ During the consultative conferences, the Netherlands was one of the most influential states. The Dutch Foreign Ministry took a sustained interest in the ICSID Convention. There are many reasons for the strength of Dutch support for ICSID, including the large-scale expropriation of Dutch property in Indonesia that had taken place only a few years earlier, in 1958. Domke 1963.

⁴²⁸ ICSID 1970: 375.

⁴²⁹ ICSID 1970: 302.

Lack of trust in local institutions prevented capital from flowing where it could be most productive. In Broches' words:

Unfortunately, private capital was not moving in sufficient volume to areas in need of capital, one of the most serious impediments to its flow being the fear of investors that their investment would be exposed to political risks such as outright expropriation without adequate compensation, government interference and non-observance by the host government of contractual undertakings on the basis of which the investment had been made.⁴³⁰

The language suggests to policymakers in investment-importing states that if they remove the impediments, a flood of inward investment would result. This was how Broches offered the World Bank's assistance:

The Bank had therefore been led to wonder whether, in view of its reputation for integrity and its position of impartiality, it could not help in removing that obstacle to international private investment.⁴³¹

The lack of appropriate dispute resolution machinery was an impediment to the flow of investment: ICSID would remove this obstacle, which would improve the investment climate. This argument would not necessarily have been persuasive to all types of experts, but many in Broches' audience were predisposed by their legal training to view arbitration as a solution.

The ability of ICSID ratification to improve the investment climate was a primary justification of the World Bank's involvement. Broches tied the creation of ICSID to broader World Bank efforts to improve investment climates and facilitate more investment. The following passage from Broches' opening speech to the consultative conferences conveys how Broches packaged ICSID within the broader efforts of the Bank.

The World Bank's initiative in promoting an international agreement in a field which might not be regarded as falling directly within its sphere of activity was not unusual in view of the nature of the Bank, which was not merely a financing mechanism but, above all, a development institution...much of its energy and resources were devoted to technical assistance and advice directed toward the promotion of conditions conducive to rapid economic growth, and the creation of a favorable investment climate in the broadest sense of the term.⁴³²

In this passage, the creation of ICSID is classified under "technical assistance and advice directed toward the promotion of conditions conducive to economic growth." This framing

⁴³⁰ ICSID 1970: 302.

⁴³¹ ICSID 1970: 302.

⁴³² ICSID 1970: 301–302. Emphasis mine.

requires a chain of reasoning: ratifying ICSID will encourage foreign investment, and foreign investment is conducive to economic growth.

A sizeable minority of investment-importing countries adopted the World Bank's framing and announced their full support for the Convention. The representative from Nepal spoke Broches' words back to him almost verbatim: "[The proposed] machinery would promote the flow of private capital to the developing countries by allaying investors' fears of expropriation or of the dishonoring of the terms of an agreement by the host state."⁴³³ The Nepalese representative's language is direct evidence that the World Bank's dissemination was successful.⁴³⁴ The delegate from the Philippines was equally unambiguous: "His delegation was in full accord with the underlying principles of the Convention, and his government, as a capital-importing country, welcomed the proposals believing that they would improve and encourage the flow of capital into the country."⁴³⁵

Representatives from other states were careful to note that ICSID would only address a fragment of a country's investment climate. The representative from Pakistan was quoted:

Recalling some of the factors which might be said to contribute to the formation of a country's investment climate, said that the Convention represented a genuine attempt to develop an international institution which, if successful, would dispel much of the apprehension of foreign investors regarding the security of their investments.⁴³⁶

Similarly, the representative from Malaysia "said that the principles underlying the Convention were acceptable to his government which was doing everything possible to promote foreign investment in the country."⁴³⁷ These representatives seemed unsure how much actual impact the proposed organization would have in practice, but still accepted the premise that ICSID could lead to increased investment. This view presumes that investors would pay attention to the ICSID Convention.

⁴³³ ICSID 1970: 469. The representative from Vietnam makes a similar comment on page 547.

⁴³⁴ As this language would lead us to expect, Nepal joined ICSID very shortly after the Convention opened for ratification.

⁴³⁵ ICSID 1970: 547.

⁴³⁶ ICSID 1970: 546. Emphasis mine.

⁴³⁷ ICSID 1970: 549.

Not all investment-importing states accepted the premise that the ICSID Convention could improve their investment climate. The Jordanian representative questioned the idea that investment was impeded by a lack of machinery for the settlement of disputes:

[He] believed that foreign investment should be encouraged and protected by the host state, yet there was no compelling reason for establishing institutional facilities for the settlement of disputes concerning them.... In his opinion, the main concern of an investor was the political stability of the country in which he sought to invest rather than any lack of adequate machinery for the settlement of disputes.⁴³⁸

Similarly, the representative from Thailand questioned if ICSID could improve the investment climate. The Thai representative “expressed doubt whether the establishment of facilities for voluntary conciliation and arbitration of investment disputes would do much to improve the investment climate.”⁴³⁹ This question struck right at the core of the proposition made to investment-importing states: if joining ICSID could not facilitate investment flows, then why ratify?

Some investment-importing states struggled to find a convincing answer. For instance, the Australian representative, having identified Australia as a primarily investment-importing state, puzzled over the Convention’s purpose. He observed that Australia’s domestic legal system was fully satisfactory for foreign investors. In his remarks, he pointed out “that in practice the remedies provided in Australia by the local courts had to date proved satisfactory to foreign investors and that the current inflow of foreign capital was at a relatively high level.”⁴⁴⁰ Many investment-importing states, however, did not have the benefit of extensive experience with high volumes of foreign investment. These states were reliant on the World Bank for information about investors, and in particular for a sense of how important ICSID was to investors. These differences between states are examined statistically in chapter seven.

The World Bank did not provide any empirical evidence that joining ICSID could facilitate investment. Some delegates assumed the Bank had done econometric impact assessments.⁴⁴¹ It

⁴³⁸ ICSID 1970: 549. Emphasis mine.

⁴³⁹ ICSID 1970: 466.

⁴⁴⁰ ICSID 1970: 473. This quote illustrates that the crux of the issue is trust in local courts. Australia’s courts were trusted by its investors.

⁴⁴¹ See the representative from Ecuador’s comment (ICSID 1970: 310). The official record does not show Bank officials correcting this misperception when it was voiced in the African or the Latin American consultative conference.

had not: no econometric work had been commissioned. ICSID was a creation of lawyers, not economists. Surveys were not commissioned either.⁴⁴² The comments of the Jordanian and Thai representatives quoted above suggest that if foreign investors were surveyed, their primary concern would not be a lack of dispute resolution machinery. No work was done to assess what actually deterred foreign investment, and no work was done to assess what impact ratifying ICSID might have on impediments to investment. If the audience had consisted primarily of FDI firm managers or economists, the lack of empirical evidence might have created difficulties. The assembled legal experts, however, were asked to believe the premise that ICSID could increase investment flows without empirical evidence. What stood behind that claim was not evidence, but the institutional credibility of the World Bank.

Other states thought ICSID was unacceptable, even though they sought instruments to encourage inward investment. This is the way most Latin American opposition was voiced during the consultative conferences. Representatives emphasized that foreign investment was welcome, but ICSID was unacceptable. In his welcome to the Santiago conference, the Deputy Secretary of the UN Economic Commission for Latin America (ECLA),⁴⁴³ noted:

Foreign private investments could contribute much to the economic development of the Latin American countries... On the other hand, the investment of private capital made necessary a juridical system guaranteeing the legitimate interest of the investor. Hence the importance of finding a formula that could effectively guarantee such interests, while respecting the sovereignty of each country in accordance with the principles of international law and the constitutional rules of the country.⁴⁴⁴

Within this diplomatically worded statement is a clear message that ICSID was not a formula that respected the sovereignty of each country. The opposition was principled, unyielding, and expertly expressed. The opposition emerged from a different interpretation of customary international law, not from a lack of enthusiasm for foreign investment.⁴⁴⁵

⁴⁴² Broches and two other World Bank officials had done some surveys for work on investment insurance in the late 1950s, but no surveys were conducted as part of the formal work on ICSID.

⁴⁴³ It would later become ECLAC, when the Caribbean was added to the title. Raul Prebisch was Executive Secretary of ECLA from 1948 to 1962, immediately prior to his work on UNCTAD.

⁴⁴⁴ ICSID 1970: 301. This comment is echoed by state representatives; for instance, the Peruvian representative on page 311.

⁴⁴⁵ Customary international law on this point was far from settled, as discussed in the next section. Formally, these different interpretations were equally authoritative. See the *Sabbatino* ruling of 1964, discussed in the next section.

Latin American opposition was mischaracterized as the result of insufficient desire to attract foreign investment. Toward the end of the Santiago consultative conference, frustrated by the unyielding opposition, Broches framed the decision to join ICSID as a trade-off. He reminded Latin American representatives that their states already traded rights—in the form of concession contracts and investment incentives—for additional investment. ICSID was another right they could trade for more investment. In his words:

He did not expect that delegates would uncritically accept the Bank's views on the suitability of the proposed Convention but he did suggest that in considering the proposed Convention delegates should bear in mind the fundamental question whether their countries wished to attract private investment – and he thought most of them did – and, if so, what price they were prepared to pay by way of special concessions and incentives for investors. Most such incentives involved conferring rights on foreign investors, and for that reason he found it difficult to appreciate criticism of the proposals based on the sole argument that they gave investors 'additional rights'.⁴⁴⁶

Broches may have found this criticism difficult to appreciate, but there were certainly countries outside Latin America who agreed with it. India was one such state.

The Indian representative was unequivocal: the ICSID Convention was not worth the sacrifices it entailed. At the Asian consultative conference, months before the Latin American conference, the Indian representative anticipated Broches' question. India was willing to give investors additional rights, but not willing to ratify the ICSID Convention. As he framed it,

His country wished to attract private capital and to maintain a favorable investment climate, and for that purpose it was prepared to give the foreign investor the necessary safeguards including additional rights. His criticism, however, had been addressed to the fact that the proposals in their present form gave investors additional rights of unspecified scope.⁴⁴⁷

The separation of procedure from substantive standard is at the heart of the Indian representative's comments. He noted that states had no way of knowing what they were enabling by ratifying ICSID, since substance would be negotiated separately. The risks outweighed the possibility that ICSID might lead to additional investment. The diversity of views explored in previous paragraphs shows the premise—that joining ICSID would improve the investment climate and facilitate greater flows—was unconvincing to many state representatives. Yet, this was not the primary response to the Convention. The experts in

⁴⁴⁶ ICSID 1970: 476. Emphasis mine.

⁴⁴⁷ ICSID 1970: 476. Emphasis mine.

attendance were lawyers by training, not economists or firm managers. Their primary concern was law. The overwhelming majority of the discussion focused on implications for international law. The next section turns to concerns about the risks of ICSID and consequences for international law discussed during the consultative conferences.

4.3 The Possible Costs: Implications for International Law

This section evaluates the success of the Bank's attempt to frame ICSID as an extension of existing practice. In 1964, the protection of foreign investment was one of the most controversial legal issues in the world. Customary international law on expropriation was in disarray. In 1964, the United States Supreme Court noted:

There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens...The disagreement as to relevant international law standards reflects an even more basic divergence between the national interests of capital importing and capital exporting nations.⁴⁴⁸

The battle lines had been drawn. Investment-exporting states lined up in favor of strong protection and mandatory international standards, while investment-importing states lined up on the opposing side. Yet ICSID was created in the space between these two opposing sides. How? The Bank relied on ambiguity. Broches asserted that the proposal was compatible with any legal system and with any substantive standards. Yet many in his expert audience were skeptical, and concerned the Convention would have serious implications for international law.

4.3.1 The Bank's Argument: ICSID Merely Institutionalizes Existing Practice

Broches argued the proposed Convention was not a departure from international law, despite granting investors standing against states. He set out this argument during his opening speech in each consultative conference. Although ratification equaled formal state recognition that

⁴⁴⁸ *Banco Nacional de Cuba v. Sabbatino* (US Supreme Court): 428–430. The US Supreme Court refused to get involved with the expropriations of American investors in Cuba.

investors could bring a case directly against a host state,⁴⁴⁹ he argued this recognition was in the interest of investment-importing states. It protected them from espousal. In his words:

As a corollary of the principle allowing an investor direct and effective access to a foreign state without the intervention of his national state, the Convention introduced an important innovation, namely, that the investor's national state would no longer be able to espouse the claim of its national.⁴⁵⁰

Broches' speech celebrated the Convention's ability to remove investment disputes from the realm of power, and place them in the realm of law. In Broches' words:

The Convention would offer a means of settling directly, on the legal plane, investment disputes between the state and foreign investor, and would insulate such disputes from the realm of politics and diplomacy.⁴⁵¹

This idealism fit well with the aims of developing states in other international fora, such as UNCTAD. Broches may have overstated the case, however, as ICSID provides a suspension of diplomatic pressure only.⁴⁵² States can and do use diplomatic pressure before a case has been registered and after a tribunal hands down a decision.⁴⁵³ In this sense, the ICSID Convention was another incremental step limiting the use of diplomatic protection, like the Drago-Porter Convention.

Did this framing convince state representatives? Did they adopt it? As the next paragraphs illustrate, the picture is mixed—some states adopted the Bank's framing, while others remained unconvinced and troubled by particular aspects. The paragraphs below draw out four themes that were of particular concern for many states.

4.3.2 Concern One: Equality of Status Between Individual Investors and States

Many state representatives found the idea of equal standing between investors and states to be unsettling: the idea was criticized in all four consultative conferences. In Geneva, the representative from South Africa phrased his concern diplomatically when he “wondered

⁴⁴⁹ In Broches' words “recognition of the principle that a non-state party, an investor, might have direct access in his own name and without requiring the espousal of his cause by his national government, to a state party before an international forum.” ICSID 1970: 303.

⁴⁵⁰ ICSID 1970: 303.

⁴⁵¹ ICSID 1970: 303.

⁴⁵² I thank Martins Paparinskis for bringing this to my attention.

⁴⁵³ Recent work on investment protection suggests diplomatic protection never ceased to be the primary method of adjudicating disputes between investors and states—particularly techniques like exchanges of letters or Ambassadorial discussions. Gertz forthcoming.

whether it was in fact a sound principle to elevate the individual to the status of a subject of international law”⁴⁵⁴ The Brazilian representative was less delicate, and pointedly defined arbitration as an exclusively inter-state institution during the Santiago conference.⁴⁵⁵ At the Asian conference, the representative from India described how the Convention departed from existing practice, and how this departure would unduly privilege foreign investors.

[He] shared the doubts expressed by the delegates of Thailand and Ceylon. The basic principles as set out in the Preamble did not, in his opinion, state the problem adequately and failed to bring out the fact that the Convention involved an important departure in international law. The Convention aimed at setting up a forum where States and individuals were placed on a par.⁴⁵⁶

Later in this passage the Indian representative applied a principle of legal reasoning, that rights are balanced by obligations. Under the ICSID Convention, investors were given standing, which was a right, but there was no counterbalancing obligation, since the ICSID Convention lacked substantive rules.

Many representatives found it unsettling that the ICSID Convention effectively privileged foreign investors over domestic investors. The facilities created by ICSID would only be available to foreign investors. As the representative from Jordan noted, “the present Convention seemed to...place a foreign investor in a better position than the local investor.”⁴⁵⁷ Another representative remarked, “he was not clear...why it was considered necessary to create a forum where a foreign investor was placed in a position vis-à-vis the host state different to that of the national investor.”⁴⁵⁸ Granting an individual the same standing as a state under international law was not a continuation of existing practice.⁴⁵⁹ Many representatives were unconvinced by Broches’ ambiguous answers about the consequences of raising individuals to the same standing as states under international law. This concern deterred ratification. Few of the states that voiced this concern joined ICSID initially.⁴⁶⁰

⁴⁵⁴ ICSID 1970: 378.

⁴⁵⁵ ICSID 1970: 306.

⁴⁵⁶ ICSID 1970: 470. Emphasis mine.

⁴⁵⁷ ICSID 1970: 549.

⁴⁵⁸ ICSID 1970: 471.

⁴⁵⁹ Although individuals had access to international tribunals prior to ICSID (for instance at the Central American Court of Justice) the practice was not widespread. Puig 2014(a): 241.

⁴⁶⁰ Yet, demonstrating the power of incrementalism, many of these states’ positions gradually evolved and they eventually joined ICSID, decades later.

4.3.3 Concern Two: Local Remedies

The interests of capital-exporting and capital-importing states diverge sharply on the issue of local remedies. Capital-exporting states or investors seek direct access to arbitration. Host states seek to protect their sovereignty, and avoid becoming respondents in an international tribunal. Local remedies are central to the Calvo Doctrine.

In his opening speech, Broches asserted that ratifying ICSID could be compatible with exhausting local remedies, as discussed in section 3.3.1. This was a play for capital-importing states. Broches argued that states could ratify the ICSID Convention and insist investors exhaust local remedies before bringing a case to ICSID. As mentioned in section 3.3.1, this is a form of ambiguity. Broches' explanation conveys the way in which he attempted to bring together competing doctrines to appeal to all states:

While the Convention implied a recognition that local courts were not necessarily the final forum for the settlement of disputes between a state and a foreign investor, it did not imply that local remedies could not play a major role. When parties consented to arbitration, they would be free to stipulate either that local remedies might be pursued in lieu of arbitration, or that local remedies must first be exhausted before the dispute could be submitted for arbitration.⁴⁶¹

Broches argued ratifying the ICSID Convention did not necessarily give investors the ability to bypass local remedies. In practice, no capital-importing state ever ratified the Convention with a stipulation that local remedies should be exhausted first.⁴⁶² Reservations under the ICSID Convention serve for information purposes only⁴⁶³ and insisting on local remedies is generally perceived to go against the spirit of the Convention.⁴⁶⁴

Some experts were convinced by Broches' argument. These experts usually came from states with the least experience of investment arbitration. The representative from Nepal is a good example, and his words echo Broches' own:

The investor ought to be required to exhaust all his local remedies before he could avail himself of international conciliation or arbitration facilities such as those provided by the Center.⁴⁶⁵

⁴⁶¹ ICSID 1970: 303.

⁴⁶² Israel is the only state to have made a reservation that local remedies must be exhausted. Reservations under Article 25 (4) are discussed in Section 7.1.3.

⁴⁶³ Parra 2013: 169.

⁴⁶⁴ In addition, the advance consent clauses discussed in the next chapter accelerate investor access to ICSID.

⁴⁶⁵ ICSID 1970: 543.

In practice, Nepal did not ratify with a reservation to that effect.

Most experts did not adopt the Bank's framing that ICSID was compatible with local remedies. Strong opposition to the Convention centered on this point. Many Latin American representatives invoked their national constitutions. The Venezuelan representative noted that his constitution "clearly distinguished" inter-state agreements from "contracts touching the public interest that the Government, in its administrative capacity, concluded with private persons."⁴⁶⁶ The latter was "reserved to the exclusive competence" of domestic courts.⁴⁶⁷ Some argued their national constitutions made it impossible for them to privilege foreign investors over domestic ones, which was intrinsic to the structure of ICSID. The Ecuadorian representative put it plainly:

In Ecuador, as in other countries, the Constitution embodied the principle of equality of nationals and foreigners before the law. To make a different jurisdiction available to foreigners would place them in a privileged position.⁴⁶⁸

This point was not disputed. Broches responded by noting that states already gave foreigners rights to attract investment.

Some Latin American representatives, notably those from Brazil and Argentina, argued that their national constitutions prevented their ratification of ICSID. In his opening statement, the Brazilian representative noted:

The draft Convention raised constitutional problems, since it implied a certain curtailment of the scope of national legal processes...it would be inadmissible to create within the territory of the nation a body entrusted with decisions in the field of law. Were such activities to be delegated to an international organization, the violation of this constitutional precept would be even more flagrant.⁴⁶⁹

The word "flagrant" conveys the strength of opposition voiced by many Latin American representatives. These representatives rejected outright the Bank's attempted dissemination. It was not just Latin American representatives. A letter from the Finance Ministry of the Malagasy Republic to the Bank suggests the Convention anticipates controversies about subdivisions that would emerge decades later:

⁴⁶⁶ ICSID 1970: 309.

⁴⁶⁷ ICSID 1970: 309 (Representative from Venezuela).

⁴⁶⁸ ICSID 1970: 310.

⁴⁶⁹ ICSID 1970: 306.

In our opinion it would be preferable to limit the jurisdiction of the Center ... to exclude disputes involving political subdivisions and agencies... this principle, to the extent that it grants political subdivisions and agencies an international personality, is in conflict with the concept of Malagasy public law that the juridical personality granted to political subdivisions and agencies is a personality under municipal law and not international law. At the international level, only the state can represent them.⁴⁷⁰

Many representatives placed principles like independence and sovereignty at the core of their opposition. As the representative from El Salvador put it:

There must be an attempt to reconcile the constitutional side of the question with the need to find incentives to development, but that did not mean that in order to obtain such incentives, principles vital to the very existence of the Latin American countries could be abandoned. A way should be sought to reconcile differences, and if necessary to seek other solutions, always bearing in mind the idea of conciliation and arbitration.⁴⁷¹

The representative subtly invoked the UN Charter and its emphasis on peaceful means of dispute settlement with his last sentence. This quote is a good representation of the position of most Latin American states. As currently framed, the ICSID Convention was unacceptable, but their opposition was phrased in expert legal terms. Their states sought investment from foreigners, and were keen to find other peaceful means of dispute resolution, but the means should not bypass local remedies and national legal systems.

4.3.4 Concern Three: Public Policy Concerns

Public policy implications were another area of concern, particularly in the Asian consultative meeting. Broches did not broach issues of public policy in his opening speech. In the Bank's framing, it was assumed that public policies enacted in good faith would be unaffected by the ICSID Convention. Many states accepted this framing. Yet other states were concerned that ICSID's jurisdiction could indeed affect domestic policymaking.

With a half-century of hindsight, concerns over public policy look prescient. Yet in 1964, these controversies were a long way off. The constitution-based opposition in the Latin American consultative conference concerned the Bank far more than the possible implications for public policy expressed in the Asian conference. When Broches summarized the Asian

⁴⁷⁰ ICSID 1970: 657. Emphasis mine.

⁴⁷¹ ICSID 1970: 310. Emphasis mine.

consultative conference for the Bank's Executive Directors, he noted the priority given to public policy concerns:

[In Bangkok] there had been a preoccupation with matters of policy which had led to a close analysis of the political impact of the Convention as such on the position of capital-importing countries vis-à-vis investors or capital-exporting countries.⁴⁷²

Public policy concerns are distinct from the Convention's impact on a state's bargaining position, contrary to the way Broches combined them in his report to the Executive Directors. When state representatives suggested ICSID jurisdiction might constrain domestic policymaking, they anticipated controversies that would erupt within OECD countries about ICSID arbitration many decades later.⁴⁷³ The representative from India argued that policy that affected all investors equally—something like a new, tighter regulation on emissions—would not be suitable grounds for ICSID jurisdiction. He argued:

A refusal [of jurisdiction to ICSID] might very well be entirely bona fide as where, for instance, the matter concerned national policy, or again if the matter did not involve discrimination between foreign and national investors or conflict with any contractual obligations of the state.⁴⁷⁴

These comments anticipate cases that would not emerge for decades. Cases stemming from domestic legislation (that was not explicitly discriminatory against a foreign investor) were recognized as a possibility before the ICSID Convention came into force. Not just in Asia either—public policy concerns also appeared in the Latin American conference. In his remarks, the representative from Venezuela brought together constitutional problems and the pre-eminence of domestic policy.⁴⁷⁵

For the few representatives that raised public policy concerns, these concerns were a crosscutting argument that integrated several different reasons not to ratify. In his comments, the representative from Thailand argued that ICSID's jurisdiction entered into the territory of public policy, and consent was an inadequate limit on ICSID's jurisdiction. In his words:

Among the characteristic features of voluntary jurisdiction which unfortunately appeared also in the provisions of the draft Convention, was the fact that no detailed definition was given of the types of disputes which would come under the jurisdiction of the proposed...Center. The term "dispute of a legal character" given in Article II,

⁴⁷² ICSID 1970: 540.

⁴⁷³ The bifurcation continues into the present, with some arbitration lawyers (particularly American or American-trained lawyers) arguing that "good governance states" are unaffected by ICSID jurisdiction and it is only "weak governance states" that are affected. Private email, on file with the author.

⁴⁷⁴ ICSID 1970: 470.

⁴⁷⁵ ICSID 1970: 309.

Section 1 could give rise to uncertainty, particularly in view of the fact that a State, in the ordinary course of exercising governmental functions, may have to take various broad measures which could affect the interests of foreign investors, e.g. measures required to protect the health, morals and welfare of the community, as well as the security of the nation.⁴⁷⁶

This passage anticipates debates that would take shape nearly five decades later, which ask if investment agreements unduly constrain states' policy autonomy.⁴⁷⁷ Unlike Thailand or India, many representatives did not take seriously the idea that ICSID jurisdiction might constrain their policy autonomy. If representatives adopted the Bank's framing, then it was difficult to imagine ICSID having an impact on public policy.

4.3.5 Concern Four: Is Consent Enough? Limiting ICSID's Jurisdiction

Consent was at the core of the Bank's appeal to capital-importing states. Some experts found the Bank's argument compelling, and believed the double-consent formulation provided adequate protection against the abuse of ICSID's jurisdiction. At the same time, consent was insufficient to allay the concerns of several state representatives who sought more precise limits to ICSID's jurisdiction. The "optional character of the draft Convention" was not enough—the lack of precision was a "fundamental weakness."⁴⁷⁸

The ICSID Convention does not define investment, investor, dispute, or other terms.

Displaying his tactical reliance on ambiguity, Broches argued that any attempt to define these terms would end in disagreement. Few states accepted this argument. As the representative from Japan—a state supportive of the proposal—said:

Although he sympathized with the view of the Bank's staff that inclusion of a more precise definition of those terms would involve various difficulties and would not necessarily be useful, some further clarification of those terms – and, therefore, of the scope of the proposed scheme – seemed necessary.⁴⁷⁹

Israel, transitioning from being a net importer of investment to an exporter, concurred. The Israeli representative noted that a "more precise definition of some terms in the draft Convention seemed desirable, in particular of the terms 'investment dispute' and 'of a legal

⁴⁷⁶ ICSID 1970: 466. Emphasis mine.

⁴⁷⁷ Gallagher 2010; Spears 2010; Kleinheisterkamp 2012.

⁴⁷⁸ ICSID 1970: 306 and 470.

⁴⁷⁹ ICSID 1970: 474.

character’.”⁴⁸⁰ The lack of constraints on arbitrators also concerned representatives. The expert from the Central African Republic said:

Like Nigeria, we want more precise information on the powers of the arbitrators (would they, for instance, be able to undertake enquiries and investigate the situation in countries involved in disputes?).⁴⁸¹

Broches established that arbitrators would not investigate the situation in countries involved, but otherwise led the discussion away from limits and definitions—relying on ambiguity to make the Convention amenable to all parties.

Most representatives from investment-importing states did not accept Broches’ argument that limits should not be discussed because they were too controversial. These states perceived themselves as potential respondents, so for their representatives, definitions were their future legal defense. At the Geneva conference, the South African representative wondered if “the definition given of ‘national of another Contracting State’ were sufficiently circumscribed.”⁴⁸² In other words, was it appropriate that there were no limits on who or what could be considered an investor? The representative from Portugal, an investment-importing state, made his position clear:

[He] considered the definition of ‘investment’ inadequate – both from the economic and from the legal angle. In particular he was disturbed by the word ‘contribution’ which he thought was too broad. ... Actions of the state which expressed its sovereign powers should not properly be the subject of disputes under the Convention. ... He did not think the Center should question the fiscal, economic, and financial policies of a contracting state.⁴⁸³

The decision to not define the term “investment” in the Convention was a point of contention. It was unacceptable to many experts from investment-importing states, yet Broches stuck with ambiguity and the Convention does not contain a formal definition. The definition of investment has become the subject of subsequent legal analysis.⁴⁸⁴

Finally, some state representatives believed consent, even two forms of consent, was inadequate. It could not address the other flaws in ICSID’s design. The representative from

⁴⁸⁰ ICSID 1970: 468.

⁴⁸¹ ICSID 1970: 244. Interestingly, this comment anticipates the operating procedure of the World Bank’s Inspection Panel. The idea of site visits was not considered during ICSID’s drafting.

⁴⁸² ICSID 1970: 378.

⁴⁸³ ICSID 1970: 708.

⁴⁸⁴ Many ICSID tribunal decisions discuss the definition of investment at length. See Schreuer 2001: 82–344; Mortenson 2010: 257–318.

Thailand noted that judicial machinery for dispute settlement had not worked “even when jurisdiction was based on consent” in the past.⁴⁸⁵ Despite these objections, Broches remained firm that the proposed machinery would work, and that consent was sufficient protection. At the end of the Asian conference, he reiterated “the clearly established consensual nature of the mechanism established by the Convention offered adequate protection.”⁴⁸⁶

This section and the two preceding it have drawn out themes from the responses voiced by states representatives during the consultative road show. First, the Convention’s success depended on ratification by investment-importing states. Second, the World Bank’s appeal to investment-importing states relied on the premise that the Convention could improve a state’s investment climate. Some states accepted this premise, but many states did not— particularly initially. Third, the Bank’s strategy involved arguing that the Convention would not have serious implications for international law—it would merely institutionalize an existing practice. This argument was contested in all four consultative conferences. Many implications of the Convention were advanced, including that the Convention would elevate individuals to an equal standing with states—a profound change for international law—and that its jurisdiction was not bounded, thus overriding local remedies and possibly constraining future policymaking.

4.4 Initial Ratifications: To Join Or Not To Join?

This section turns to state behavior. Once the ICSID Convention opened for signature and ratification in 1965, did states act in accordance with the views their representatives voiced during the consultative meetings? The answer is largely yes. The first wave of ratifications between 1965 and 1970 had three defining characteristics. First, investment-exporting states ratified. Second, many states emerging from British colonialism ratified quickly. Third, there were strong regional trends: Latin American states were uniformly opposed, while most sub-Saharan African states ratified within five years.

⁴⁸⁵ ICSID 1970: 465.

⁴⁸⁶ ICSID 1970: 540–1.

Most investing-exporting states ratified ICSID easily and quickly. This matches their supportive statements during the consultative conferences. Ratification was easier since their policymakers and domestic legislatures did not imagine themselves as respondents in ICSID cases. Eighteen out of 24 OECD member states ratified ICSID before 1971.⁴⁸⁷ Some of these states waited to sign until a quorum of investment-importing states had signed the Convention. For instance, all US action was predicated on the Convention's acceptance by investment-importing states. In the words of an adviser briefing the Secretary of State on US support for ICSID:

We have not wanted to be the first to sign the Convention. Now, however, Tunisia, Jamaica, Ivory Coast, Nigeria, and Pakistan, as well as the United Kingdom, have signed the Convention, and Japan has formally communicated, to the President of the Bank, its intention to sign. It therefore seems appropriate for the United States now to signify its support for the Convention and to begin the necessary mechanisms for ratification and implementing legislation.⁴⁸⁸

The US signed the ICSID Convention on 27 August 1965.

The six OECD states that did not join ICSID were capital-importers. Australia, Canada, Ireland, Portugal, Spain, and Turkey were primarily investment-importing states in the first half of the 20th century. New Zealand, Israel, and other developed capital-importing states also did not ratify the Convention before 1970. This matches the statements of these states during the consultative conferences. Relatively high inflows proved that local courts were satisfactory, as the Australian representative put it (as quoted in section 4.2 above).

The developed capital-importers did not share the fear of reputational harm if they did not sign up. Some smaller states were explicitly afraid of signaling effects. The expert from Bolivia:

Observed that if the draft Convention were not unanimously rejected, foreign capital might blacklist the countries that did not wish to submit their disputes with investors to international adjudication.⁴⁸⁹

States with more experience of inward foreign investment, like Australia or Saudi Arabia, did not share this fear. Their states were not having any difficulties attracting foreign investment.

Saudi Arabia's representative noted his country was reforming its foreign investment

⁴⁸⁷ The 18 OECD states that ratified ICSID before 1971 were: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Italy, Japan, Korea, Luxembourg, Netherlands, Norway, Sweden, Switzerland, the UK, the US. Data from ICSID Secretariat and OECD.

⁴⁸⁸ Meeker. Undated [likely March 1965].

⁴⁸⁹ ICSID 1970: 308.

framework and said the consultative conference “had helped considerably to clarify the problems which might arise in connection with such investments.”⁴⁹⁰ The Convention might be useful, but Saudi Arabia could take it or leave it.⁴⁹¹ As it happened, Saudi Arabia did not join ICSID for 15 years, and even then joined with a restriction that ICSID cases could not be brought against Saudi Arabia that had anything to do with oil or gas.⁴⁹²

The year the ICSID Convention opened for signature, 1965, was the same year the Commonwealth Secretariat was created. Within five years, almost all state members of the Commonwealth would sign and ratify ICSID. Many were among the first states to join ICSID. The UK led by example on the ICSID Convention, and was the second state to sign, on May 26, 1965. The main statement on ICSID in the House of Commons shows how little controversy there was:

All that I need say after the rapid progress which we have made is to thank the House, on both sides, for their assistance in this matter. The Bill will be of great assistance to international investment. It includes no controversial principles, and we are fortified in the belief that the House will give it a Third Reading.⁴⁹³

The House of Commons’s decision to ratify was straightforward. The more interesting politics occurred within the Commonwealth Secretariat.

The Commonwealth had 30 states by 1971, not including the UK. Of these 30 states, 25 were members of the World Bank.⁴⁹⁴ Of the 25 Commonwealth states eligible to join ICSID, 19 signed and ratified quickly.⁴⁹⁵ Many of these states were still emerging toward greater self-rule, and had little experience of FDI. The six Commonwealth states that did not join ICSID were Australia, Canada, India, New Zealand, South Africa, and Tanzania. Apart from Tanzania, which was on a path to African Socialism under President Julius Nyerere at the time, these states can be distinguished from other Commonwealth states by their experience

⁴⁹⁰ ICSID 1970: 550.

⁴⁹¹ Saudi Arabia had been involved in a large arbitration case in the 1950s (*Saudi Arabia v Aramco*), which may have influenced Saudi views.

⁴⁹² ICSID/8-D.

⁴⁹³ Hansard, 26 November 1966 Arbitration (International Investment Disputes) Bill [Lords].

⁴⁹⁴ Barbados, Malta, Nauru, Samoa, and Tonga would join the Bank in later years.

⁴⁹⁵ With year of signature: Botswana (1970), Cyprus (1966), Ghana (1965), Guyana (1969), Jamaica (1965), Kenya (1966), Lesotho (1968), Malawi (1966), Malaysia (1965), Mauritius (1969), Nigeria (1965), Pakistan (1965), Sierra Leone (1965), Singapore (1968), Sri Lanka (1967), Swaziland (1970), Trinidad and Tobago (1966), Uganda (1966), Zambia (1970).

with, and intrinsic ability to attract, investment.⁴⁹⁶ Policymakers in these states did not believe ICSID was necessary. Their relatively high volumes of investment— or relative confidence that they could to attract investment if they sought it—meant they could afford to be ambivalent. Chapter seven picks up this line of argument and examines it using statistical methods.

There are strong regional trends as regards ratification. Many African states ratified quickly. Of the 20 ratifications required for the Convention to enter into force, 15 were African states.⁴⁹⁷ ICSID membership was proportionally highest in Africa, and particularly in sub-Saharan Africa. The World Bank had 40 African member states in 1971. Of these 40, 31 were members of ICSID.⁴⁹⁸ By contrast, only three of the World Bank's 22 member states in the Western hemisphere were members: Jamaica, the US, and Trinidad and Tobago. None of these states were Spanish speaking, and none were on the continent of South America.

The uniform rejection of the Convention by Latin American states troubled the Bank's staff. In 1970, Paul Szasz observed:

Perhaps the question most frequently put to those of us in the World Bank who administer the International Centre for Settlement of Investment Disputes is: Is such-or-such Latin American country party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States? And, on hearing our regretful negative reply...⁴⁹⁹

The Bank pursued ratifications most actively in Latin America as well. Discussing the opposition to the Convention among Latin American states, Szasz also noted:

If they did not join the Centre, it was not for lack of persuasion. An early effort was made by Mr Broches, the General Counsel of the World Bank and in practice the Father of the Convention – who later became the first Secretary-General of the Centre. In an address delivered on May 27, 1965 in San Juan, Puerto Rico, to a joint meeting [of a series of bar associations]... Mr Broches stated what he felt were the five principal 'wrong' arguments that had been advanced in Latin America against the Convention and presented his refutations.⁵⁰⁰

⁴⁹⁶ Nyerere's policies included taking a hard line with the World Bank. Aminzade 2013.

⁴⁹⁷ Nigeria (1965), Mauritania (1966), Ivory Coast (1966), Central African Republic (1966), Gabon (1966), Uganda (1966), Tunisia (1966), Congo-Brazzaville (1966), Ghana (1966), Sierra Leone (1966), Malawi (1966), Chad (1966), Upper Volta (1966), Malagasy Republic (1966), and Dahomey (1966). The five non-African states were: the US (1966), Iceland (1966), Malaysia (1966), Jamaica (1966), and the Netherlands (1966).

⁴⁹⁸ Algeria, Egypt, Ethiopia, Libya, Mali, Rwanda, South Africa, Sudan, and Tanzania were the nine African states that were not ICSID members in 1971.

⁴⁹⁹ Szasz 1970: 256.

⁵⁰⁰ Szasz 1970: 258.

Despite the efforts of Broches and the Bank, Latin American states remained uniformly opposed into the 1980s.

4.5 Procedure Now, Substance Later: The US Ratification of ICSID

The US ratification process illuminates the interplay between procedure and substance. The US ratified ICSID because it lacked substance. Once again, ambiguity was integral to the Convention's success. The US government would not have ratified a Convention that weakened its stance on investment protection. On the other hand, the State Department argued that the ICSID procedure would create a new body of substantive law on investment protection. The State Department expected that ICSID would reshape investment law subtly, through practice and precedent, and gradually redefine customary international law.

In the US, then the world's largest exporter of investment, there was intense political pressure for strong investment protection standards. The two Hickenlooper Amendments, both strong assertions of investment protection, were passed in the five years preceding the creation of ICSID.⁵⁰¹ The Hickenlooper Amendments demonstrate that the US government was prepared to take a hard line on expropriation.

While some Senators were concerned that the Convention could “perhaps get around our requirement that aid be suspended”⁵⁰² the State Department did not see any conflict between the Hickenlooper Amendment and ICSID. The State Department asked Senator William Fulbright, Chair of the Senate Foreign Relations Committee, to liaise with Bourke Hickenlooper. Fulbright then reported back to Thomas Mann, Undersecretary of State for Economic Affairs.⁵⁰³ Fulbright wrote on the margins of a private memo to his chief of staff:

⁵⁰¹ The first Hickenlooper Amendment (1962) required the President to suspend aid to any country that expropriates American-owned assets without paying “speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof.” The second Hickenlooper Amendment (1964) was included in the next Foreign Assistance Act, in response to outrage at the US Supreme Court ruling in *Banco Nacional de Cuba v. Sabbatino*.

⁵⁰² Hearings of the Committee on Foreign Relations, March 29, 1966. Senator Aiken speaking.

⁵⁰³ Thomas Mann was an authority on Latin America within the US State Department, with a reputation of providing strong support for US business. He set out a policy of supporting regime change to promote the interests of US business, which has been called “the Mann Doctrine.” LaFeber 1993:186.

Aug 18, I informed Sec Mann that there were no objections...Sen[ator] Hick[enlooper] has feeling convention has no guidelines for compensation and determining value.⁵⁰⁴

It was ICSID's ambiguity that earned Hickenlooper's support. With Hickenlooper's assent, the ICSID Convention looked set to be ratified quickly.

Before the US signed the Convention an obstacle arose: would the ICSID Convention affect US domestic law? The head of the US Securities and Exchange Commission (SEC) and concerned Senators raised this question. In response, the State Department explained that the ICSID Convention would not be used against the US. The State Department did not envision the US ever being a respondent in a dispute. The State Department official wrote a letter to the SEC Chairman explaining why the US should not declare exceptions. His letter affirms that the Convention would only apply in one direction:

The support of the United States for the Convention is primarily designed to establish another mechanism for peaceful settlement of investment disputes between investors and the less developed countries.... Also, from the nature of the Convention, there appears to be little likelihood that claims against the United States by private investors would be suggested for decision under the Convention. The legal and administrative remedies already available to the private investor in the United States are broad and effective.⁵⁰⁵

The same type of question arose later from Senators: would ICSID decisions have the ability to alter provisions of US law? In response to these questions, the State Department argued that ICSID would have no domestic policy implications in the US, because the US would not be a respondent in ICSID cases. When investors came to the US, they accepted that domestic law would govern the investment.

Would ICSID be effective? The Senate Foreign Relations Committee decided the answer was largely no, or at least not immediately. Most of the US expropriation disputes were with states in Latin America.⁵⁰⁶ When asked for examples of investment disputes from the last decade that could have been submitted to ICSID, James Meeker, the State Department Legal Adviser,

⁵⁰⁴ "Memo from Carl Marcy" August 16, 1965.

⁵⁰⁵ Letter from MacArthur to Harris, dated March 27, 1965. Emphasis mine.

⁵⁰⁶ The Hickenlooper Amendments were promulgated in response to seizures in Brazil and Cuba. Hogan (1969: 79) notes: "the Enactment of the Hickenlooper Amendment of 1962 was probably the immediate result of the taking of the Brazilian holdings of the International Telephone and Telegraph Company by the Government of Brazil." And "The 1962 Amendment was also the result of the vast number of American holdings which were expropriated by the government of Cuba without compensation." See also US Senate 1969.

gave an example of Argentine bonds and American-owned property in Brazil that had been expropriated. In response to this example, Fulbright asked “But have any Latin American countries signed this agreement?” The question was likely rhetorical, and Meeker did not answer it. No Latin American states were expected to join ICSID.

US policymakers ratified ICSID because they expected the decisions of ICSID tribunals would help to create a new body of international investment law. Meeker’s written testimony conveys the expectations of the US government:

The World Bank Convention does not lay down any substantive rules regarding investment... and the like. The Bank’s judgment, in which we concur, is that any attempt to lay down such rules could not have won the substantial support this convention has found among the less-developed states. However, it is anticipated that decisions through the convention’s mechanism will create a significant new body of international law. Thus international law in this area can be expected to grow as the result of this convention.⁵⁰⁷

The US government expected ICSID to facilitate a slow evolution in practice surrounding investment dispute resolution, just as section 2.1 argued has occurred in the 50 years since ICSID’s creation.

How would ICSID facilitate the evolution in practice surrounding investment dispute resolution? Through securing broad consent to ICSID in other agreements, primarily in individual investment contracts and bilateral treaties. As Meeker wrote in his testimony to the Senate Committee on Foreign Relations:

As investment agreements providing for use of the convention’s facilities become more common, the total climate for international investment will, we believe, improve substantially.⁵⁰⁸

Investment agreements are the mechanism through which the ICSID Convention could reshape international law on investment protection. These agreements would create the substance, as politics permitted, to fill in the structure created by the Convention.

The business interests that wrote to the US government in support of the ICSID Convention argued that it needed to be complemented with substantive agreements. Many US exporters used the ICSID Convention as an opportunity to urge the US government to negotiate

⁵⁰⁷ US Senate 1966, Appendix: written statement from James Meeker. Emphasis mine.

⁵⁰⁸ US Senate 1966, Appendix: written statement from James Meeker.

substantive rules on investment. A representative example is a letter from the President of the National Foreign Trade Council (NFTC) to Fulbright:

In addition...to the agreement now under consideration [the ICSID Convention], I would respectfully call your attention to the fact that the NFTC...also urges action by the US Government with respect to the Draft Convention on the Protection of Foreign Property prepared by a committee of the Organization for Economic Cooperation and Development.

And later in the same letter:

The NFTC is strongly in favor of the negotiation of additional treaties with individual foreign governments for the protection of private investment.⁵⁰⁹

Fulbright only received letters in support of the Convention, and no letters against it.⁵¹⁰ No opposition to ICSID appears in any archive records associated with US ratification of ICSID.

One reason for the lack of opposition is because the ICSID Convention was couched in soft, pro-development language. Under-Secretary of the Treasury Barr opened his testimony about ICSID to the Senate Foreign Relations Committee with a statement that was filled with sympathy about the political plight of leaders in former colonies:

As new nations come into the world, they adopt certain policies for what may be good political reasons. However, sometimes these good political reasons do not jibe with the economic realities that are in the world today. For instance, I think the great multinational corporations have much to offer in the world today, but some small countries are very frightened, perhaps for good reasons. Perhaps the conduct of the corporations in the past has provided the excuse. But regardless of the reason, economic facts show the small nations need this investment; political facts, however, seem to hold it off.⁵¹¹

This empathetic tone is maintained throughout his testimony.⁵¹² This tone also characterized the only speech made on the floor of the Senate about ICSID, titled, “A New Hope for Developing Nations.”⁵¹³ The overriding priority was getting capital to the places it was needed most. Cold War security imperatives were not mentioned, nor were past investment disputes.

⁵⁰⁹ Letter from Norris to Fulbright, dated March 1, 1966.

⁵¹⁰ I reviewed all of Senator William Fulbright’s papers related to ICSID at the US National Archives.

⁵¹¹ US Senate 1966. Under Secretary Barr speaking.

⁵¹² This language is likely the product of both genuine internationalist sentiment and the strategic Cold War imperative of courting allies in “the Third World.”

⁵¹³ Congressional Record – Senate, May 5, 1966 (Hartke statement.)

The ICSID Convention passed easily through the US ratification process for many reasons.⁵¹⁴ First, the Convention was for use in less developed countries, and would not apply or affect investment disputes in the United States. Second, the Convention lacked substance, so it would not weaken the Hickenlooper Amendments. Despite the absence of substance from the Convention itself, the practice of dispute resolution that it created was expected to fundamentally reshape international investment law. This understanding was shared by decision-makers in the State Department and by interested investor lobby groups, but does not appear to have been widely shared beyond those groups. In large audiences, the ICSID Convention was couched in pro-developmental rhetoric. None of this would have been possible without ambiguity. The Convention, however, was just the beginning. It made it possible to reshape international investment law without having visible public debates over standards.

Conclusion

This chapter evaluates the extent to which the World Bank's initial dissemination was successful. Success was improbable: previous attempts to create a multilateral organization dedicated to investment failed, and the drafting process could easily become a political battlefield, given the contentiousness of investment protection. The World Bank and capital-exporting states alike recognized that ICSID's success rested on its acceptance by capital-importing states.

To shield the drafting process from politicking and circumvent the obstacles to ICSID's creation, the Bank relied on expertise. Not just any type of expertise: the Bank invited states to send individuals with procedural legal expertise specifically. Shared expertise makes a group of individuals more likely to frame problems in a similar way, and consider a similar universe of potential solutions. In ICSID's case, legal training predisposed these individuals to see

⁵¹⁴ It passed unanimously out of the Senate Foreign Relations Committee and then unanimously on the floor of the Senate. See: US Senate 1966 and Congressional Record 1966.

arbitration as a useful method. They were able to frame and discuss the options in a mutually comprehensible language.

These experts shared a method, but they did not agree on the solution. This is why they form the beginnings of a community of practice, but not an epistemic community. No individual present disagreed with the idea of arbitration, or the idea that foreign investment was necessary for development. Every expert involved in ICSID's drafting had lived through World War II and the signing of the UN Charter. The appeal of peaceful dispute settlement was strong, and the idea of arbitration "fit" this context and this audience well. These experts were the Bank's sympathetic interlocutors. Yet many of the assembled experts did not easily accept the proposal for ICSID. They viewed investor-state arbitration as a departure from international law, and raised concerns about its consequences.

The Bank framed ICSID as an institutionalization of existing practice, but many experts raised prescient concerns about the legal and public policy implications of the Convention. Concern tended to cluster around four topics. Many experts questioned the wisdom of granting individuals standing under international law. Some were similarly concerned about the long-term effect of giving investors the ability to bypass local remedies, and national justice systems. Representatives from Latin America, India, and other states asserted that arbitration was inter-state, and that disputes between an investor and a state were a matter for national courts. Some representative suggested the Convention might have public policy implications.

Broches and the Bank attempted to assuage all of these concerns by emphasizing that two forms of consent would be required to register a dispute at ICSID. Many experts found the double-consent formulation insufficient to allay their concerns. They found it insufficient, despite the fact that no evidence existed at the time to suggest clauses granting blanket advance consent would become common practice. Within a few years of the Convention coming into force, however, advance consent clauses spread that would largely undermine the Convention's double-consent formulation. The next chapter addresses these developments.

Chapter Five: Consent to ICSID Automated, 1967–1972

In the previous two chapters, World Bank officials proposed ICSID as “machinery” and as an “optional procedure.” The language used by Bank officials during ICSID’s creation and emergence suggested ICSID would be passive: ICSID would administer arbitrations. It would not do anything else. To what extent was this characterization accurate? Was ICSID passive machinery during its first five years?

There were several reasons why a dynamic ICSID Secretariat was unlikely. The global environment was not conducive to rulemaking on FDI: decolonization was ongoing and investment protection still divisive. There were also at least four organizational reasons to expect a passive ICSID. First, the Secretariat was tiny: it had three staff members for many years. Second, ICSID had no cases for almost a decade. Third, the organization had a weak mandate: many states, even World Bank member states welcoming of foreign investment, remained outside the organization. Fourth, McNamara became President of the World Bank in 1968, and his support for ICSID—and his personal regard for Broches—was lukewarm, at best.

Against these odds, the ICSID Secretariat⁵¹⁵ was a dynamic, influential agent during its first five years. Using archival records from 1967 to 1972, this chapter demonstrates that the Secretariat was a strategic actor pursuing one primary goal: advance consent. I argue the Secretariat’s approach was successful because it was incremental. The Convention was promulgated first, and then, a few years later, the Secretariat promulgated advance consent clauses. The Secretariat pursued advance consent in contracts, treaties, and domestic laws. By separating consent into smaller pieces, the Secretariat was able to secure broad consent to its facilities.

⁵¹⁵ In this chapter, the Secretariat and the Centre are used interchangeably, as they are used in ICSID publications from this period.

The Secretariat promulgated model clauses, and then promoted the use of these clauses in contracts and treaties. The model clause documents show continued ambiguity, in an attempt to appeal to all parties. The documents provided many options, enabling investors and states to adapt the wording to their circumstances. European capital-exporting states took the Centre's advice and began to integrate advance consent into their BITs. It was as a result of the Secretariat's efforts that advance consent clauses became accepted practice around the world. Contrary to widespread perceptions that ICSID did not enter BITs until the 1980s, nearly 70 BITs containing advance consent to ICSID were signed during the 1960s and 1970s.

Characterizing ICSID as an actor clarifies the origins of the most important clause in BITs.

Advance consent clauses are the defining feature of modern BITs. Franck, for instance, observes, "the real innovation of BITs was the provision of procedural rights that gave investors a mechanism to enforce the substantive rights directly."⁵¹⁶ Simmons argues:

This private right to sue a government for damages and to choose the forum in which to do so constitutes the most revolutionary aspect of the international law relating to foreign investment in the past half-century.⁵¹⁷

Advance consent to ICSID or other investor–state arbitration bodies is what separates modern BITs from those that came before. Despite their importance, existing literature asserts that these clauses appeared only after 1990. With the exception of Parra, no existing study identifies their origin.⁵¹⁸ In contrast, this chapter demonstrates that these clauses emerged in the late 1960s at ICSID, and that the Secretariat disseminated them around the world.

Advance consent clauses matter because they automate consent. The Convention requires that states consent in two places before a dispute can be registered against them.⁵¹⁹ Ratification provides the first consent, but ratification is meaningless without the second consent.⁵²⁰ It was the second consent that assuaged the fears of capital-importers during the consultative

⁵¹⁶ Franck 2007: 343. See also Ginsburg 2005; Yackee 2007; Allee and Peinhardt 2010; and Poulsen and Aisbett 2013. This argument recalls a much older legal principle, which Puig (2014a) references in the title of his recent chapter about ICSID, "No Right Without a Remedy."

⁵¹⁷ Simmons 2014: 17.

⁵¹⁸ Parra (2012: 114) quotes Broches recommending advance consent to ICSID in BITs at the first meeting of the ICSID Administrative Council. Parra does not discuss the ramifications of this advocacy at length.

⁵¹⁹ The Convention's jurisdiction is based on two forms of consent rather than on defined terms. The jurisdiction of ICSID is a topic of immense legal scholarship, in part because of its unique double-consent requirement. Schreuer (2009) devotes 340 pages to the jurisdiction (Article 25) of the ICSID Convention.

⁵²⁰ Technically both parties can consent to ICSID after a dispute has arisen, but this does not provide the investor with the same sense of security that advance consent or direct access to ICSID provides.

conferences; yet the double-consent system was undone by clauses that provide advance consent to ICSID.⁵²¹ To take one example, if a state ratifies ICSID and then ratifies a BIT with an advance consent clause, the state grants investors direct access to binding arbitration. Some states did this without realizing it.⁵²²

This chapter is organized around two goals of the new Secretariat, and the means used to accomplish those goals. The main goal was to secure advance consent. A prerequisite for consent was to create awareness of ICSID. The chapter begins by setting out the goals of what the Centre termed its “Information Activities.” Then it evaluates the steps the Secretariat took to foster awareness among governments, and to foster awareness among private investors. The second section of the chapter focuses on the Centre’s main goal, which was securing advance consent. This section evaluates the Centre’s strategy for disseminating model clauses, which was the means used to achieve the goal of advance consent. The chapter ends with descriptive statistics on the early spread of advance consent clauses.

5.1 Fostering Awareness

The ICSID Secretariat needed to introduce itself. Awareness was a prerequisite for securing advance consent from states, and for creating demand among investors. It was the first step in an incremental strategy. The staff of the Secretariat took on the task of fostering awareness with entrepreneurial energy. This is clear in the first Annual Report:

With the entry into force of the Convention, an urgent task of the Centre became the distribution of information to acquaint potential parties (both public and private) to proceedings under the Convention, as well as other persons, organizations, and authorities likely to be interested in the work of the Centre, with the availability and principal characteristics of the new institution.⁵²³

⁵²¹ Elihu Lauterpacht (2009: x) wrote in the foreword to Schreuer’s Commentary: “Consent to jurisdiction under the system was originally foreseen as deriving principally from express references to it in the arbitration clauses of investment contracts. However, the sources of consent have been significantly widened by the development of recourse to ICSID on the basis of legislation and provisions in inter-state bilateral investment treaties as well as by multilateral arrangements such as NAFTA and ECT.”

⁵²² The “unexpectedness” of some early BIT/ICSID arbitrations is well documented. One anecdote is the Pakistani attorney general receiving notice of an ICSID case and googling “BITs” and “ICSID” to try to understand how this could have happened. Poulsen 2011: 13–16.

⁵²³ First Annual Report: 4. Emphasis mine. Parra (2012: 132) also notes this quote, arguing “In ICSID’s initial years, Broches and his staff were preoccupied with the ‘urgent task’ of disseminating knowledge about the Centre to potential parties to proceedings.”

This section evaluates ICSID's strategy to foster awareness. First it briefly sets out the context and constraints of ICSID's information activities. Then it evaluates the steps the Secretariat took to foster awareness among governments, and to foster awareness among private investors. Fostering awareness was not always easy for the small Secretariat. While it was relatively easy to build relationships with the Bank's member governments (and even to construct a role for itself informally advising national investment laws), the Secretariat found it difficult to reach investors.

5.1.1 Information Activities

During ICSID's first decade, the Annual Reports had a sub-heading titled "Information Activities." Under this sub-heading, the Secretariat reported on its progress in publicizing ICSID. Some of the ways ICSID got its message out would be familiar to any entrepreneur. ICSID produced a leaflet: the Second Annual Report notes, "the Centre has issued in three languages and distributed widely a small information leaflet, similar in format to the pamphlets used by other members of the World Bank Group."⁵²⁴ This leaflet would be updated and re-issued as states joined ICSID. The Secretariat also built mailing lists: the first Annual Report notes, "the Centre has built up extensive mailing lists (totaling approximately 2000 addresses on June 30)."⁵²⁵ By the next year, that number had grown to 4000 addresses.⁵²⁶

The information activities, later termed "promotion of the Centre", continued for many years, with mixed results. Limited awareness of the Centre was still a cause for concern in the Centre's Seventh Annual Report, published in 1973. The Report noted:

As in the past years, the Centre's activities were directed mainly towards the encouragement of a greater use of the Centre... The Centre is aware that, despite the great progress already made in making the Centre better known, the potential of the Centre has not yet been fully realized. It has therefore, as in the previous years, continued to distribute information about the functioning of the Centre to governmental agencies, private business firms and other institutions.⁵²⁷

Two years later, in 1975, the Annual Report still portrayed the Centre's staff trying to stimulate interest in ICSID:

⁵²⁴ Second Annual Report: 4.

⁵²⁵ First Annual Report: 4.

⁵²⁶ Second Annual Report: 4.

⁵²⁷ Seventh Annual Report.

In addition to distributing information...members of the Secretariat have initiated or participated in discussions at various levels for the purpose of further stimulating interest in the Centre's disputes settlement procedures.⁵²⁸

In its early years, the Centre found it difficult to stimulate interest from investors. Between 1960 and 1981, ICSID was mentioned only four times in the *Financial Times*, and once in *The New York Times*.⁵²⁹ Coverage of ICSID in the investor press is a rough proxy for investor awareness, but it does suggest an absence of interest.⁵³⁰ In 1976, Ryans and Baker conducted a survey of the top legal counsel within Fortune 1,000 firms, seeking to determine "practices regarding, and attitudes toward, the provisions of the [ICSID] Convention."⁵³¹ The second question in their survey asked, "Are you familiar with the Convention on the Settlement of Investment Disputes?" Only 15 per cent of the respondents, of which there were 165 total, answered that they were familiar with ICSID.⁵³² Ryans and Baker concluded that:

While the total responses of the 165 participants in the study do provide some interesting insights, they seem to mainly reinforce the dramatic lack of knowledge and understanding of the Convention and ICSID on the part of a group that seemingly should be aware of their features.⁵³³

The Centre worked hard to disseminate information that might spark demand – but for two decades it was unsuccessful. Georges Delaume, who worked in the Bank's Legal Department from 1956 to 1986, recalled that in its first twenty years, ICSID was "begging for cases [but] cases didn't come."⁵³⁴ He remembered ICSID was considered a failure within the Bank:

It didn't succeed at first. It was a total calamity originally. Everybody was actually laughing at it in the Bank. They all said—"ICSID, well, you do nothing!"⁵³⁵

Why did the ICSID Secretariat struggle to raise awareness about itself? One answer was its size: it was tiny. ICSID's operating budget in its first year was \$32,000.⁵³⁶ Even in 1966, this was not much money for an autonomous international organization. By comparison, the IDA,

⁵²⁸ Ninth Annual Report: 3.

⁵²⁹ Author's search of archives, including ancillary terms, such as "World Bank investment court." Three out of four references in the *Financial Times* concern the Jamaica bauxite cases, discussed in the next chapter.

⁵³⁰ It is illuminating to compare mentions of ICSID across years. Since 2000, ICSID has appeared nearly 50 times in the *Financial Times*, a notable difference from four mentions in its first 20 years.

⁵³¹ Ryans and Baker 1976: 69.

⁵³² Ryans and Baker 1976: 70. 81 per cent were not familiar and the rest did not report an answer.

⁵³³ Ryans and Baker 1976: 73.

⁵³⁴ Delaume Oral History 2004: 13.

⁵³⁵ Delaume Oral History 2004: 12.

⁵³⁶ As discussed below, during ICSID's first twenty years, it was a Secretariat of four or five: two administrative assistants, one or two lawyers (usually from the World Bank's Legal Department), and the General Counsel. As mentioned below, the main salary costs were paid by the World Bank, since Broches and others were employed by the World Bank's Legal Department. Parra 2012: 128, Footnote 55 (also quoted below).

another recently created arm of the World Bank, had an administrative budget over \$3,350,000 in the same year.⁵³⁷ This comparison is illustrative, but it under-represents the resources that ICSID had at its disposal. As a legal institution, ICSID's resources should be measured by the extent of its legal expertise, institutional credibility, and access. In these, ICSID was rich. It was able to draw on the World Bank Legal Department and to rely on the World Bank's credibility. The Bank's Legal Department, as discussed in chapter three, had "a very broad and deep top" and was accustomed to more diverse work than most legal departments.⁵³⁸ As Broches put it, "in addition to normal operational work there were the President's Council, relations with the Board, questions of interpretation of the Articles of Agreement, the Annual Meetings, and special problems cropping up from time to time, such as China, valuation of capital, review of borrowing instruments, a great variety of subjects."⁵³⁹ Additionally, the Legal Department, and particularly its head, Aron Broches, had access to governments around the world.

5.1.2 Fostering Awareness Among Governments

The Secretariat's first priority was to introduce itself to governments. ICSID's framers were accustomed to operating in a public, inter-state context. Broches' first request was for member states to help spread the word:

In recognition of the fact that if the Convention and the Centre are to fulfill the purpose for which they were created, wide knowledge of their existence and availability is essential. We are continuing to expend considerable effort to maintain a flow of information concerning the Convention and the Centre to potentially interested circles. I hope that we may count on the governments of Contracting States to support these efforts. It would be particularly helpful if contracting states, capital exporters as well as importers, were to draw attention to the existence of the Centre in the information they provide through governmental, diplomatic and consular channels as well as through official or semi-official investment promotion agencies.⁵⁴⁰

Wide ratification was still seen as the path toward legitimacy. ICSID sought ratifications, particularly from capital-importing states. Broches saw it as his mission to bring more states

⁵³⁷ The exact operating budget was \$3,345,049. IDA had nearly \$2 billion in assets, and disbursed \$117 million in development credits in 1966. Appendices F and D, "Summary Statement of Development Credits, June 30, 1966", International Development Association. In "1965-1966 Annual Report World Bank and IDA."

⁵³⁸ Delaume illustrates the variety of legal work and prestige of the Legal Department in this era through a comparison to the McNamara era. Whereas in Black's Bank, lawyers had been counsel, and Black actively sought their advice, in the McNamara era, "the role of the lawyer by itself declined. The lawyers became draftsmen, not counsel." Delaume Oral History 2004: 17.

⁵³⁹ Broches Oral History May 1984: 41.

⁵⁴⁰ "Opening Remarks of Aron Broches to the First Annual Meeting." September 25, 1967.

into the ICSID fold. Broches did not undertake this mission on behalf of investors. He believed ICSID provided a better way of solving disputes—one that would benefit host states—by removing force and fostering confidence among investors. As he put it in his address to the second meeting of the ICSID Administrative Council:

It will take time before the contracting states and other states which have not yet joined the Centre fully realize and exploit the potential benefits they can derive from the availability of bids procedures and facilities. It is our task to help bring about this realization.⁵⁴¹

As General Counsel of the World Bank, Broches had more tools to bring about this realization than almost anyone else.

Travelling as General Counsel of the World Bank, Broches met with top officials and discussed ICSID. The ICSID Annual Reports from the first decade mention dozens of such trips. For instance, in 1968:

The Secretary-General has continued to address interested groups privately and publicly on the subject of the Convention. In the course of a journey to Australia, Indonesia, the Philippines and Singapore devoted largely to the affairs of the Centre, he had the opportunity of talking to groups of officials in several of these countries.⁵⁴²

Or the next year:

During the year, the Secretary-General visited several countries in Africa and Europe for conversations with officials about the affairs of the Centre.⁵⁴³

The Secretary-General, widely known as “Ronnie”, was personable, and forcefully compelling when explaining the logic and benefits of ICSID.⁵⁴⁴ Although personal influence is not a systematic explanation for why states ratify Conventions, in this case ignoring personal influence would be an oversight. Broches played an outsize role in promoting the institution.

How did Broches have enough time to discuss ICSID in these countries, while serving as General Counsel of the World Bank? There are two reasons. First, Broches was quietly

⁵⁴¹ “Address by Aron Broches to the Second Annual Meeting.” September 30, 1968. Emphasis mine.

⁵⁴² Second Annual Report: 4.

⁵⁴³ Third Annual Report: 3.

⁵⁴⁴ The *travaux* provide many examples of Broches’ firm leadership and persuasiveness in action. In a randomly-selected and generally representative Legal Committee meeting, Broches made 37 of the 89 comments recorded. This count includes a few comments that were administrative statements from the chair, but the majority of the 37 comments explained the logic of particular Articles. OECD states made 12 comments, and 40 comments were made by non-OECD states, including detailed amendments put forward by Haiti and Australia. “Summary Proceedings of the Legal Committee Meeting, 30 November” SID/LC/SR/6.

sidelined when Robert McNamara became World Bank President, and not asked to fulfill many of the General Counsel's typical tasks.⁵⁴⁵ McNamara preferred to rely on Lester Nurick, the Bank's Associate General Counsel.⁵⁴⁶ Nurick was an American with experience in the US government, like McNamara. Although Broches remained General Counsel throughout McNamara's tenure as President, it was Nurick who acted as the President's lawyer. Although Broches was still closely involved with the running of the Bank, his workload was lessened by this arrangement. Second, Broches viewed ICSID as his primary legacy. The World Bank's historian during this era, and a close friend of Broches, referred to ICSID as "his baby."⁵⁴⁷ Broches saw important potential in ICSID, and turning this potential into reality defined his career. McNamara, in contrast, neglected ICSID. ICSID fit awkwardly with his vision and plans for the Bank, and he disliked being referred to as the Chairman of ICSID.⁵⁴⁸ McNamara often failed to attend the one meeting each year that had to do with ICSID. This meeting only lasted one hour, but in many years McNamara could not be bothered to chair it.⁵⁴⁹ McNamara's neglect and sidelining of Broches in the Bank's main activities were not detrimental to ICSID's development. If anything, this state of affairs left Broches with time, the Bank's credibility, and the Bank's legal experts, at his disposal to promote and shape ICSID. During McNamara's tenure, the Bank grew exponentially and shifted focus from large infrastructure projects to pro-poor policies.⁵⁵⁰ ICSID was largely unaffected by these developments. It remained a tiny and relatively low-status part of the Bank.

⁵⁴⁵ When asked why the Bank had created ICSID, Georges Delaume said, partially in jest: "Because Mr. Broches, who was General Counsel at the time, didn't get too well along with McNamara. He decided to create something else where he could maybe one day retire." Delaume Oral History 2004: 12. Note: While ICSID was created before McNamara became President, Delaume's memory of ICSID as an outlet or haven for Broches once McNamara was in power is telling.

⁵⁴⁶ Broches Oral History May 1984: 40–41.

⁵⁴⁷ Broches Oral History May 1984: 45.

⁵⁴⁸ The same was true with the IFC. McNamara never wanted to be referred to as the head of IFC or of ICSID publicly, because of their association with private investment. As Broches recalled, "he saw himself as the friend of the poor, and since ICSID had to do with private investment, he did not like to have identified himself as Chairman of the Administrative Council of ICSID. I once said that to an Executive Vice President of IFC, the late Bill Gaud, who laughed and asked me whether I didn't realize that he had never spoken as President of IFC, because it is private. Inside the institution he took a great interest in private investment and IFC's role in the private sector, but this was not to tarnish his image for the outside world." Broches Oral History May 1984: 45.

⁵⁴⁹ For instance, the 1972 meeting, discussed below. In a 1983 oral history, Asher, the Bank historian's, asked Broches very well-informed and hard-hitting questions that give away the nature of McNamara's feelings for ICSID. "Asher: You indicated that McNamara's interest was less than intense, and I guess that's understandable..." Broches Oral History May 1983: 45.

⁵⁵⁰ The changes in the Bank's focus were also related to broader geopolitical shifts and US political developments, including increased scrutiny from Congress of the Bank's activity. See Gwin 1997: 210.

Only a few years after ICSID’s creation, Broches proposed an ambitious project to catalogue all the investment laws in the world. The project would be housed at the Centre, but it would draw on the resources of the Bank and the IFC. For Broches, the Bank and the Centre’s resources were interchangeable. The Bank paid most of ICSID’s operating costs during this period and one of the main contributions made by the Bank to the Centre was staff time.⁵⁵¹ For instance, Broches was paid as the head of the Bank’s Legal Department, not as the head of ICSID, yet he spent a considerable amount of time on ICSID work.⁵⁵² The arrangement was similar for other members of the Bank’s Legal Department.⁵⁵³ This arrangement ensured that any project ICSID took on would be *de facto* a project of the Bank’s Legal Department. The young Centre was able to take on an ambitious project and construct a role for itself as the global clearinghouse for information about investment laws because of its position within the Bank. In his proposal, Broches was clear that the investment law project would be a collaborative effort across the World Bank Group:

I have proposed, in the draft budget for the current fiscal year, the initiation of a pilot project for the creation, classification, and eventual dissemination of national legislation and international agreements relating to foreign investments. The World Bank, the IFC, and the Centre are well situated for gathering much of this information as part of their routine operations.⁵⁵⁴

The investment law project put ICSID in an advisory relationship with states.⁵⁵⁵ The Secretariat constructed a role for itself classifying domestic laws on investment and informally advising governments on how to reform them. From this position, ICSID could: (a) encourage ratification (b) facilitate advance consents (c) do preparatory work for a potential multilateral

⁵⁵¹ The Bank paid ICSID’s operating expenses during this period. Revenues from the sale of ICSID publications were credited to the World Bank, but these revenues were “tiny.” As Parra explains, “In accordance with the Memorandum of Administrative Arrangements between ICSID and the World Bank, the expenditures were all covered by annual contributions to the Bank.” Parra 2012: 128. Footnote 55.

⁵⁵² Parra (2012: 125–127) provides the clearest exposition of this relationship: “McNamara explained that the business of the Centre still did not require a full-time Secretary-General and...[the Bank] wished to retain Broches as its General Counsel...on that basis, Broches would continue to serve the Centre without compensation.”

⁵⁵³ Again, Parra (2012: 127): “For most of the Centre’s first 20 years, the Secretariat had five staff members: two lawyers, two administrative assistants, and a research assistant. ...There were periods in which one or the other of the lawyer positions was vacant. At such times, and when the need otherwise arose, Legal Department lawyers were asked to work temporarily on ICSID matters.”

⁵⁵⁴ “Address by A. Broches to the Third Annual Meeting.” September 29, 1969.

⁵⁵⁵ Broches also continually announced that ICSID stood ready to act in an advisory capacity, outside the investment law project. See, for instance, “Address by Aron Broches to the Sixth Annual Meeting” on page 3. “He mentioned this activity principally to remind contracting states that the Centre stood ready to render this advisory service.” Note: Later Secretary-Generals of ICSID distance the Centre from advisory work.

agreement. Did the Secretariat use the investment law project to carry out these tasks? As the next paragraphs illustrate, the investment law project did not translate into additional ratifications, but it did lead governments to give advance consent in domestic law.

ICSID used the investment law project to establish closer relations with all World Bank member states. The project reflected the ambition of ICSID, not its current membership. Eight of these 19 states included in the initial project were not ICSID member states. The 19 states had been “selected to represent a variety of legal systems and traditions.”⁵⁵⁶ In 1970, Broches announced that the project aimed “to encompass all those requiring foreign capital to further their development.”⁵⁵⁷ Presumably the laws project could have been a means of facilitating ratification. Yet the project largely failed to encourage additional ratifications. Of the initial eight states that were not ICSID members when the project began, only one joined ICSID during the project—the Democratic Republic of Congo.

The investment law project was more successful at facilitating advance consent. The Bank advocated that advance consent be enshrined in domestic law. Even the “Report of the Executive Directors on the ICSID Convention”, included with the Convention text sent to states, gives advance consent in domestic law as an example: “thus, a host state might in its investment promotion legislation, offer to submit disputes arising out of certain classes of jurisdiction to the Centre.”⁵⁵⁸ The investment law project was the Centre’s main method of advocating for advance consent to ICSID in domestic law.⁵⁵⁹ Within seven years, the Centre was able to report multiple examples of domestic laws that referred disputes to ICSID:

Examples of national legislation [which include ICSID clauses] are found in the laws of Ghana, Niger, Tunisia, and Zaire, among others.⁵⁶⁰

⁵⁵⁶ Afghanistan, Chad, Chile, Democratic Republic of the Congo, Ethiopia, Ghana, Indonesia, Iran, Ivory Coast, Jamaica, Kenya, Malaysia, Mali, Nigeria, the Philippines, Thailand, Tunisia, Turkey, and Uganda. “Address by A. Broches to the Fourth Annual Meeting.” September 23, 1970.

⁵⁵⁷ ICSID Fifth Annual Report: 5.

⁵⁵⁸ ICSID 1970: 1077.

⁵⁵⁹ The Centre did not publish any model legislation for national investment, but always made an announcement when domestic laws were promulgated that referred disputes to ICSID. “Recent national legislation, such as the Settlement of Investment Disputes (Convention) Act, 1970 of Botswana, and the 1971 Proclamation to Promote the Development of Mineral Resources of the Empire of Ethiopia, have included provisions authorizing the submission to the Centre of certain disputes that may arise under these instruments. Though the Secretariat has not published any model legislation clauses, it stands ready to advise governments on the formulation of appropriate provisions to be included in such instruments.” Fifth Annual Report: 4. Emphasis mine.

⁵⁶⁰ Seventh Annual Report.

By the end of Broches' tenure in 1981, 13 domestic laws gave advance consent to ICSID.⁵⁶¹

Consenting to ICSID in domestic law gives foreign investors a right to take the state directly to arbitration. It is a peculiar decision for a government to take outside of bilateral negotiations with a capital-exporting state or a specific foreign investor (when presumably access to ICSID is seen as a trade-off for more investment). When advance consent is enshrined in domestic law, it is a unilateral ceding of sovereignty. Why did 13 governments enshrine access to ICSID in their domestic law during the 1970s, a decade of high resource prices and New International Economic Order (NIEO) proposals? The answer is primarily technical assistance. No overt conditionality was used to pressure states to give advance consent in their domestic law. States, particularly poor capacity-constrained states, sought technical assistance. ICSID provided technical assistance, and it arrived through the same pipelines as Bank loans.

The investment law project had ambitions beyond securing consent to ICSID. The project aimed to create a global repository of investment laws. It analyzed domestic laws and classified them into 12 subject areas (such as: "obligations of investors", "incentives, benefits and guarantees", "settlement of disputes", and "tax provisions") and 300 detailed sub-categories.⁵⁶² This classification could have served as preparatory work for a larger international organization's effort to harmonize substantive standards in the future. Broches argued:

Apart from its obvious utility as a guide for the investment community and, accordingly, for potential host countries, the results of this work should be of great benefit to the World Bank and other organizations interested in the field of international investment, as well as UNIDO [the United Nations Industrial Development Organization] with its special responsibilities, in providing background material for their consideration of industrialization and foreign investment problems in the developing world.⁵⁶³

⁵⁶¹ Afghanistan, Benin, Congo (Brazzaville), Egypt, Ghana, Madagascar, Niger, Senegal, Sudan, Sri Lanka, Tunisia, Upper Volta, Zaire. Annex 4 "Provisions Relating to ICSID in National Investment Laws" Fifteenth Annual Report: 28.

⁵⁶² "Address by A. Broches to the Fourth Annual Meeting." September 23, 1970.

⁵⁶³ "Address by A. Broches to the Fourth Annual Meeting." September 23, 1970.

This passage shows how Broches viewed his work: the ultimate goal was host state development, but the proximate goal was to assist other international organizations. He was not working on behalf of investors—they were ancillary to his goals.

5.1.3 Fostering Awareness Among Private Investors

ICSID and the Bank found it challenging to reach investors. ICSID was created with an expectation that it would be useful for investors, but there was no outright demand for ICSID from investors, as mentioned in chapter two. ICSID had to create its own demand, by disseminating information. As the Eighth Annual Report notes:

In addition the Secretariat has sought to stimulate interest in the Centre through discussions with governments, government agencies, groups representing investors as well as practicing lawyers. During the year the Secretary-General addressed an information conference organized by the Federation of Belgian Industries.⁵⁶⁴

Despite the Centre's activities, the uptake by investors was slow.

There are many reasons why ICSID struggled to drum up demand from private investors. First and foremost, foreign investors are not easy to corral at the global level, and the Bank had no experience doing so. Government officials can be identified and brought together. Foreign investors are more difficult to find and bring together. The foreign investors that were easy to identify, for instance large corporations with a lobbying presence in Washington DC, would not have sought out a three person center within the World Bank to discuss investment protection—they would have lobbied the US Commerce Department.⁵⁶⁵ Additionally, most foreign investment was undertaken only after the firms developed local knowledge, and usually only after the firms had found the most advantageous ownership and legal structure.⁵⁶⁶ These were not advisory tasks that ICSID was prepared to help with, and the Secretariat likely had a relatively shallow understanding of the determinants of investment or the complex relations between foreign investors and host states.

⁵⁶⁴ Eighth Annual Report: 3. Emphasis mine.

⁵⁶⁵ Firms still relied on the Commerce and State Departments for diplomatic protection, and it is possible that some investors thought ICSID might prevent them from accessing diplomatic pressure (as it was designed to do: what ICSID's framers called "depoliticizing" disputes.)

⁵⁶⁶ Foreign investors generally satisfied with their current relations may have been hesitant to shake up or renegotiate their agreement with host states, particularly if they considered the agreements lucrative or well-fit political balances.

The Centre dedicated considerable energy to stimulating investor interest in ICSID, but this fit awkwardly with the Centre's inter-governmental origins. Broches was a public international lawyer, accustomed to speaking with other public international lawyers and government officials. As Delaume put it,

[ICSID] was not known, because Broches never went to ... touch the particular [private] lawyer, not the government lawyer who in six months will be replaced by someone else and who doesn't care about law or whatever.⁵⁶⁷

Finding opportunities to speak with investors was outside the normal range of activities for the General Counsel of the Bank.⁵⁶⁸

As with governments, Broches' first step to foster awareness among investors was in-person speeches. These were not casual, they were things the Secretariat considered central to its mission—they were accomplishments listed in the Annual Reports. The first Annual Report states:

The Secretary-General has addressed several meetings on the subject of the Convention, including meetings of the Legal Committee of the Council of Europe (Malta, November 1966), the Institut Royal des Relations Internationales (Brussels, April 1967), the International Chamber of Commerce (Montreal, May 1967), the Association pour le Développement du Droit Mondial (Paris, May 1967), the Colloquium on Joint International Business Ventures (Belgrade, June 1967), and the World Assembly of Judges (Geneva, July 1967).⁵⁶⁹

Four of these six organizations are legal organizations. Broches would later note that ICSID “has had more attention in legal periodicals than in business periodicals, and that's partly my fault.”⁵⁷⁰ Speaking with lawyers did not stimulate investor demand.

The lack of demand troubled the Secretariat. By the early 1970s, ICSID had not received a single request for conciliation or arbitration. The Sixth Annual Report noted:

Although the Centre was established some five years ago, its existence and the services it can render are not yet sufficiently known to the investing community.⁵⁷¹

⁵⁶⁷ Delaume Oral History 2004: 24.

⁵⁶⁸ Additionally, the interests of foreign investors are sector-specific in most cases. The ICSID Secretariat possessed generic expertise. Investors, on the other hand, may employ lawyers with a specialty in their area; for instance, mining contracts. Additionally, to continue the example, mining investors might not have the same interests in a legal system as manufacturing investors: while a manufacturing investor might require broad legal reform, a mining investor might have a serious interest in not disrupting the institutional or political *status quo*, if they have a workable existing arrangement.

⁵⁶⁹ First Annual Report: 4.

⁵⁷⁰ Broches Oral History May 1984: 44.

⁵⁷¹ Sixth Annual Report.

New actions were needed to stimulate demand. At this point Broches, true to his roots as a public international lawyer, went to governments. This time he went to capital-exporting governments.

Broches approached the investment insurance agencies of capital-exporting governments. The Sixth Report explained the new pathway to investors:

The Secretary-General has been in contact with the authorities of a number of contracting states, both capital exporting and capital importing, with regard to potential use of the procedures of the convention. As a result of these contacts the investment guarantee institutions of several contracting states are now drawing the attention of investors to the existence of the Centre.⁵⁷²

A year later, the Annual Report confirmed that ICSID was introducing itself to investors through national investment insurance programs. The Seventh Annual Report noted:

The Secretariat also conducted a survey of the use of ICSID clauses and investment arrangements covered by insurance by the Overseas Private Investment Corporation of the United States and in the course of it was able to bring the Centre to the attention of many investors who were otherwise unaware of it.⁵⁷³

This provided a platform for ICSID to introduce itself to investors, but that was the extent of the partnership between the Overseas Private Investment Corporation (OPIC) and ICSID. OPIC has an in-house arbitration system and no investment with OPIC insurance has ever gone to ICSID arbitration.⁵⁷⁴

Other capital-exporting insurance agencies were more enthusiastic, and began to recommend ICSID. In 1972, the UK representative at the Administrative Council meeting observed:

The United Kingdom had taken a number of active but modest steps to give further publicity to the Centre's work. The Secretary-General had mentioned the interest of Lloyd's, which was perhaps something that went beyond publicity. But apart from that, in publicizing the new overseas investment insurance scheme, the United Kingdom government had drawn attention to the Centre's facilities and had pointed out that a satisfactory arbitration agreement between the investor and the host government was clearly a favorable factor in considering insurance. They hope that other investment insurance agencies were considering similar steps.⁵⁷⁵

⁵⁷² Sixth Annual Report. Emphasis mine.

⁵⁷³ Seventh Annual Report.

⁵⁷⁴ OPIC also has a strong track record in settling disputes informally, before they reach formal arbitration. As the OPIC website puts it: "OPIC, in cooperation with the U.S. investor, other U.S. government agencies, the local United States embassy, and the host government, works to avert potential claim situations before they materialize." OPIC 2014. I thank Geoffrey Gertz for this addition.

⁵⁷⁵ Sixth Annual Meeting: 8. Broches had already noted that Lloyd's was actively promoting provision for recourse to ICSID arbitration of disputes arising out of investments insured by Lloyd's against political risks.

The UK government was helping publicize ICSID to investors. As with OPIC, however, ICSID clauses have never been a condition of receiving investment insurance from the UK government. Even the German program, which required a BIT for investment insurance, never made insurance conditional on ICSID access.⁵⁷⁶ Investment insurance agencies provided a new way for ICSID to meet investors, but that was all.

5.2 Securing Advance Consents

After the first step of creating awareness, the next step in ICSID's incremental strategy was advance consent. During its first five years, the Secretariat pursued advance consents in investment contracts and treaties, in addition to the domestic laws discussed above. It drafted model clauses for insertion into investment contracts, and a specialized set of clauses for BITs. This section evaluates the Centre's strategy for disseminating model clauses, which were used to achieve the goal of advance consent.

5.2.1 Advance Consent as the Benchmark for ICSID's Success

The Centre used the number of advance consents as its benchmark for success. The Centre could not use the number of cases as a qualitative indicator of success, because there was not a single case during ICSID's first seven years. Successive Presidents of the World Bank and Broches emphasized that zero cases did not mean ICSID was not a success. In 1967, George Woods set out the following standard of evaluation:

For those of us used to dealing with the reports of financial institutions, such as the World Bank, and evaluating the success of an organization largely in terms of the volume of its operations, the report of the Centre might appear to be disappointing since as yet no disputes have been submitted to it. However, I would like to point out that the success of the Centre is not to be judged by the amount of litigation it handles.⁵⁷⁷

ICSID and the Bank always took a consistent line: advance consent and not the number of disputes defined success. As Broches put it in 1972:

⁵⁷⁶ Poulsen (forthcoming).

⁵⁷⁷ "Opening Remarks of George D Woods, Chairman, to the First Annual Meeting." September 25, 1967. Emphasis mine.

The test for the success of the Centre was not the number of conciliation or arbitration proceedings that came before it, but rather the willingness of investors and host governments to agree in advance to accept the jurisdiction of the Centre.⁵⁷⁸

Accordingly, the Centre reported the number of new agreements that included advance consent to ICSID. The Third Annual Report notes:

While no cases have been brought to the Centre, the number of instruments – including investment contracts, bilateral investment treaties and national legislation – containing provisions for the conciliation or arbitration of future disputes pursuant to the Convention is increasing.⁵⁷⁹

While in some ways this seems like a definition of convenience (if ICSID had had cases during its first years, the Centre would have used them as an indicator of its success), the number of advance consents is nevertheless a justifiable benchmark for success.

Advance consent increases the likelihood of settlement between disputing parties. Even skeptical contemporary observers who found this argument unsatisfying because it was difficult to evaluate empirically, had a hard time dismissing it. O’Keefe observed:

Knowing that arbitration will occur if a dispute is not settled induces settlement [...] is really an *in terrorem* argument. It is one for which there is considerable support in general arbitration, “clauses on arbitration fulfill principally a prophylactic, preventative function...” [but] the validity of this argument applied to the role of the ICSID depends on the extent to which provision actually is made in investment contracts for arbitration under ICSID auspices. Here it is impossible to obtain accurate figures.⁵⁸⁰

O’Keefe would go on to note that the number of investment contracts and treaties providing access to ICSID was in decline.⁵⁸¹ Yet he did not challenge the idea that advance consent matters.

ICSID’s most important function may be preventative. The vast majority of disputes are settled through negotiation, and ICSID casts a shadow over those negotiations. Bargaining that occurs in the shadow of ICSID may be more likely to lead to a settlement. Access to ICSID shifts the bargaining power of investors and states. Investors can use the threat of an

⁵⁷⁸ “Address by Aron Broches to the Sixth Annual Meeting.” September 28, 1972.

⁵⁷⁹ Third Annual Report: 3. Another example is in the Fourth Annual Report of ICSID: 5, or the accompanying Press Release: “While no disputes have yet been submitted to the Centre, provision is made in an increasing number of legal instruments for the submission to the Centre of legal disputes to the Centre.”

⁵⁸⁰ O’Keefe 1980: 287–8.

⁵⁸¹ O’Keefe 1980: 304. He also argued ICSID’s caseload compared unfavorably with that of similar cases at the ICC, on the basis of the limited information available about the caseloads of both institutions. O’Keefe 1980: 289–90.

ICSID case to induce cooperation or settlement from states. Robert McNamara articulated this in 1970:

What matters is that parties to investment agreement should consent in advance to have recourse to it [ICSID] as a last resort. ...I share the widely held belief that the confidence inspired by the mere existence of such an ultimate forum will go a long way to avoiding the very situation for which it was created, by providing an atmosphere favorable to the adjustment, by the parties, of the disputes by means of negotiations.⁵⁸²

McNamara suggested advance consent could prevent disputes. His statement referenced foreign investors' low levels of trust in local courts—the crux of investment protection. The existence of ICSID increased trust in local courts, and made the amicable settlement of disputes – without actually using ICSID's facilities—more likely. This in turn made the investment climate better. On the basis of this reasoning, the mere existence of ICSID improved the investment climate.

This was not an excuse until ICSID had cases. ICSID's deterrent effect may still be its most important effect. As Broches put it in 1984:

If there are no disputes, so much the better. In some cases there are disputes, but they don't come to ICSID, even though there's an agreement to take them to ICSID. Why? Because at the last moment, both sides realized that they may win or may lose, and make a last effort at settlement, which is often successful. Generally, an ironclad commitment to go to a court or to arbitration is a strong incentive to settlement. The preventative value of these institutions is very great.⁵⁸³

As discussed previously, advance consent alters bargaining positions—it compels the state to settle. The late 1960s and early 1970s were an era of property seizures and politicized nation-building acts, which made the peaceful resolution of disputes a priority. Broches did not advocate advance consent to unduly privilege investors. He did so because he believed that advance consent would lead to the peaceful resolution of disputes. Strong advance consent could discourage home state involvement.⁵⁸⁴

As years passed without cases, the Centre began presenting advance consent as an effective deterrent—ICSID had few cases because advance consent worked, and deterred disputes:

⁵⁸² “Opening Remarks of Robert S McNamara, Chairman, to the Fourth Annual Meeting.” September 23, 1970. Emphasis mine.

⁵⁸³ Broches Oral History May 1984: 43. Emphasis mine.

⁵⁸⁴ Yet other observers were less sanguine. O’Keefe (1980: 292) observed that for capital-exporting states, ICSID advance consent becomes “another weapon in the armoury for protection of foreign investment.”

In view of the large number of existing ICSID arrangements, the small number of arbitration cases appears to confirm the often expressed belief that the very existence of binding arbitration agreements acts as a powerful incentive for the amicable settlement of such disputes as may arise.⁵⁸⁵

This allowed Broches to argue that the Centre was useful, even if it never received a request for arbitration. In 1969, he told the Administrative Council:

The Centre serves a useful role through its very existence, even before it assists in the conduct of any conciliation or arbitration proceeding [through its deterrence function.]

But this does not mean the Centre should remain entirely inactive, pending the submission of disputes.⁵⁸⁶

The Centre was not inactive, as this chapter demonstrates. It actively pursued advance consents.

5.2.2 Model Clauses

Model clauses were the most effective tool to promote advance consent to ICSID. The promotion of model clauses by ICSID itself has long been forgotten.⁵⁸⁷ Yet the Secretariat's promulgation and dissemination of model clauses directly impacted state practice. The Secretariat promulgated these model clauses when the idea of investor–state arbitration was novel. Without early, active dissemination from the Secretariat, the spread of these clauses would have occurred later, or not at all.

The proper provision of consent requires legal expertise. Vaguely worded consent can lead to cases being frustrated at the jurisdictional phase. ICSID's jurisdictional requirements were unusual, in particular the second consent. There was demand for technical assistance drafting clauses.⁵⁸⁸ In early 1968, the Centre released its first set of model clauses.⁵⁸⁹ The model clauses were a 27-page document that showed governments and investors how to consent.⁵⁹⁰

This document has a more prescriptive tone than the documents surrounding the initial

⁵⁸⁵ Tenth Annual Report: 3.

⁵⁸⁶ "Address by A. Broches to the Third Annual Meeting." September 29, 1969. Emphasis mine.

⁵⁸⁷ Parra (2012: 132–133) and Poulsen (forthcoming) are notable exceptions: both mention ICSID's early promotion of model clauses promoted.

⁵⁸⁸ "Many of the specific inquiries addressed to the Centre relate to the formulation of the written consents recording agreements to submit actual or potential disputes to the jurisdiction of the Centre." Second Annual Report: 4.

⁵⁸⁹ Second Annual Report: 4.

⁵⁹⁰ The primary drafter of the model clauses was Paul Szasz, the same young lawyer discussed in Chapter 4.3.3 who drafted ICSID's Rules of Procedure. On Szasz being the primary drafter of the model clauses, see Parra 2012: 132, footnote 88.

Convention. The introduction noted that the Convention itself left open many options with respect to the law and the procedure to be applied.⁵⁹¹ This openness was a recipe for jurisdictional challenges.

The model clause document approaches the Convention primarily in terms of its requirements—the model clauses are designed to satisfy all the Convention’s jurisdictional requirements. The introduction states:

The Convention does, however, lay down a number of substantive requirements relating to the jurisdiction of the Centre. ...a properly drafted consent clause can serve as a check-list or a reminder of the applicable jurisdictional requirements.⁵⁹²

The model clauses were designed to ensure cases were not frustrated at the jurisdictional phase.

The model clause document has an implicit preference for consent that is broad and early. Securing consent to arbitration is easiest in advance: it becomes more difficult after a dispute has arisen. The Secretariat suggested providing consent in the original contract:

Experience shows that as to certain points it is advisable to record an understanding in advance – and this can most conveniently be done as part of the consent agreement.⁵⁹³

Although the document presents states and investors with many options, including some that exclude particular types of disputes or require additional consent, in general the document pushes toward stronger, earlier consent. As mentioned in section 5.2.1, an “ironclad commitment to go to a court or to arbitration”, was preferred because it was a strong deterrent to disputes.⁵⁹⁴

The model clauses were an additional opportunity for the Centre to act in an advisory capacity. When he discussed the model clauses, Broches always offered the Centre’s advisory

⁵⁹¹ The Convention “confirms the great freedom accorded to the parties as to the modalities of recording that consent.” “Model Clauses Recording Consent to the Convention on the Settlement of Investment Disputes” ICSID/5: 3. Broches and Szasz took care to ensure the clauses in this document could be modified so as to comply with many legal traditions. For instance, a model clause was provided that required investors to exhaust local remedies.

⁵⁹² ICSID/5: 3.

⁵⁹³ ICSID/5: 3.

⁵⁹⁴ Broches Oral History May 1984: 43.

services.⁵⁹⁵ Broches saw advice about model clauses as straightforward technical assistance, well within the tradition of the Bank:

At times the World Bank group is asked to provide technical advice or assistance to its member governments in preparing suitable legislation for the promotion and protection find investments. In relation to these the expertise of the Secretariat will be readily available to help formulate, if the government so desires, appropriate clauses for settlement of disputes.⁵⁹⁶

This quote illustrates the ease with which Broches switched from being Bank General Counsel to being ICSID's Secretary-General. If the Bank were asked for assistance, ICSID would respond, relying on the Bank's legal expertise.

The model clauses were widely adopted. There was no official count of their adoption, since not all of the investment contracts that used ICSID clauses were furnished to the Centre. Yet enough contracts were furnished to the Centre for Broches to feel the model clause effort had been successful. The ICSID Annual Report for 1971 noted:

The texts furnished to the Centre do yield significant indications of some of the types of transactions in which an ICSID clause was used, more and more of which reflects the language of the model clauses formulated for this purpose by the Secretariat some years ago.⁵⁹⁷

The model clauses became integrated into standard practice, and helped to make the idea of advance consent to investor–state arbitration common. The language in the model clauses was disseminated around the world. The language became so ordinary it was forgotten that the language had originated within the ICSID Secretariat.

5.2.3 Model “ICSID Clauses” for BITs

Building on the success of the first model clause document, the ICSID Secretariat released a similar document tailored to BITs. The document was released in 1969 and disseminated widely.⁵⁹⁸ At the time these clauses were released, BITs did not refer disputes to ICSID.⁵⁹⁹

⁵⁹⁵ “Address by Aron Broches to the Second Annual Meeting.” September 30, 1968.

⁵⁹⁶ “Address by Aron Broches to the Second Annual Meeting.” September 30, 1968. Emphasis mine.

⁵⁹⁷ Fifth Annual Report: 4.

⁵⁹⁸ These clauses were later released as Model Clauses Relating to the Convention on the Settlement of Investment Disputes Designed for Use in Bilateral Investment Agreements ICSID/6. They were released in International Legal Materials (ILM) in September 1969, as 8 ILM 1341. They were also announced in the Third Annual Report: 4. Once again, these clauses were drafted by Paul Szasz. Parra 2012: 133.

⁵⁹⁹ There was one exception to this, the Netherlands-Indonesia BIT, discussed below.

The initiative to include ICSID access in BITs came from the Centre itself, and not from capital-exporting states. The German Executive Director to the Bank mentioned the idea of incorporating ICSID access into German BITs in 1963, at the very first meeting within the Bank to discuss ICSID.⁶⁰⁰ Yet Germany and other capital-exporting states continued to sign BITs without ICSID access, after ICSID was created.

The ICSID clauses in BITs spread only after the Centre suggested they do so, and only after the Centre provided model clauses and advisory help. In 1970, the ICSID Annual Report noted:

Since foreign investments are increasingly being made with the encouragement and under the protection of investment treaties, it appears that these instruments too could become a vehicle incorporating both governmental consent to the jurisdiction of the Centre and appropriate inducements for investors to submit on their part. To assist in the formulation of such provisions, the Centre has just issued a set of Model Clauses for Insertion into Bilateral investment Treaties.⁶⁰¹

The ICSID Secretariat continued to advise governments on how to insert ICSID clauses into their investment treaties.⁶⁰²

The Secretariat was instrumental in the early BIT movement. McNamara even implied that ICSID was created to facilitate investment treaties. In 1968, speaking to the ICSID Administrative Council, McNamara argued:

The Centre, through its very existence, is helping to ease and accelerate the process of negotiating investment agreements and is thus already fulfilling the purpose for which it was so recently established.⁶⁰³

McNamara's comment was echoed by other contemporary observers, like Ryans and Baker. ICSID was an agent capable of facilitating agreements and influencing BIT provisions. McNamara's words serve as a corrective to the literature on BITs, which accords ICSID no

⁶⁰⁰ Discussed in Chapter 3.3.1.

⁶⁰¹ "Address by A. Broches to the Third Annual Meeting." September 29, 1969.

⁶⁰² Sixth Annual Report: 5 notes that "further consultations have taken place between interested governments and the Centre [about BITs]. The set of model clauses prepared for the Centre for use in such treaties may be of assistance to the states concerned."

⁶⁰³ "Opening Remarks of Robert S McNamara, Chairman, to the Second Annual Meeting." September 30, 1968. Emphasis mine.

agency in this regard.⁶⁰⁴ ICSID was the source of the isomorphism observed in dispute resolution clauses.

The 13-page “Model Clauses ...for Use in Bilateral Investment Agreements” document was sensitive to the concerns of both investors and respondent states. On the one hand, it contained clauses designed to help investors secure ironclad consent to arbitration. On the other, it contained clauses designed to prevent capital-exporting states from intervening in, or putting pressure on, respondent states.⁶⁰⁵ Like the earlier model clause document, the BIT-specific document provided governments with many drafting options. What options did governments actually choose to use? The next section takes up this question.

5.2.4 ICSID Clauses in BITs

The BIT model clauses promulgated and disseminated by ICSID led to a change in state behavior. The Centre was successful at getting states to use these model clauses, and it became even more successful over time.

The first BIT to include access to ICSID was the Netherlands-Indonesia bilateral investment agreement of 1968.⁶⁰⁶ The Dutch government had participated vigorously in the ICSID negotiations.⁶⁰⁷ The government’s support for ICSID was reinforced by Broches, who was Dutch and maintained relationships within the Dutch government.⁶⁰⁸ In 1968, the Indonesian government signed and ratified ICSID.⁶⁰⁹ In the same year, Broches visited Indonesia, and Indonesia became one of the participants in ICSID’s investment laws project. Both governments, therefore, had close relationships with the Centre. The relationship between the

⁶⁰⁴ Poulsen (forthcoming, chapter 3) is an exception—he treats ICSID as an agent and provides evidence of the Secretariat’s influence on early BIT dispute resolution clauses.

⁶⁰⁵ The most prominent of the clauses which were designed to “depoliticize” disputes were the “waiver of right to intervene diplomatically” and “waiver of subrogated rights” clauses.

⁶⁰⁶ Article 11 of the Indonesia–Netherlands BIT.

⁶⁰⁷ The Dutch even inserted an article making the PCA (in The Hague) a possible seat of proceedings.

⁶⁰⁸ Broches had been a member of the Dutch delegation to Bretton Woods, which likely gave him cachet in the eyes of younger Dutch diplomats. The Dutch delegation to Bretton Woods was noted for its excellent preparation and outsize influence on the negotiations, despite the wartime weakness of the Dutch government-in-exile.

⁶⁰⁹ Indonesia ratified ICSID on September 28, 1968.

two governments was also fraught at the time, because the treaty was negotiated following extensive expropriations of Dutch property in Indonesia without compensation.⁶¹⁰

The ICSID Secretariat was well informed about the treaty's development. The agreement was a headline in the 1968 Administrative Council meeting.⁶¹¹ This treaty was the first instrument that enshrined advance consent to ICSID in international law. It was a turning point for international law on investment protection.

The Indonesia-Netherlands treaty was drafted before the model clauses were released.

Tellingly, the consent to ICSID contained in the Indonesia-Netherlands treaty is confused.

About the dispute resolution clause referencing ICSID in this treaty, Newcombe and Paradell write:

The effect of the article is unclear. On the one hand it could be viewed as a binding offer to the investor to arbitrate. On the other hand it could be viewed as a binding obligation on the state to agree to arbitrate if an investment dispute arises.⁶¹²

After the model clauses were released, the Netherlands updated their practice. The Netherlands added protocols with ICSID clauses to pre-existing treaties. The Netherlands-Côte d'Ivoire BIT of 1965 was updated with a protocol that provided ICSID access in 1971.⁶¹³ The Netherlands included advance consent in their BITs with South Korea (1974), Egypt (1976), Yugoslavia (1976), and Senegal (1979). The first Dutch model treaty, drafted in 1979, also included direct access to ICSID arbitration. This was one of the first times ICSID appeared in a model treaty.⁶¹⁴

Other European states soon followed the Netherlands and incorporated advance consent to ICSID in their investment treaties. In 1969, the same year that the BIT model clauses were

⁶¹⁰ On the expropriation, see Lindblad 2011.

⁶¹¹ Second Annual Meeting Press Release, September 30, 1968.

⁶¹² Newcombe and Paradell 2009: 44–45. The clause states:

“The contracting parties in the territory of which a national of the other contracting party makes or intends to make an investment, shall assent to any demand on the part of such national and any such national shall comply with any request of the former contracting party, to submit for conciliation or arbitration, to the Center established by the convention of Washington of 18 March 1965, any dispute that may arise in connection with the investment.”

⁶¹³ Dolzer and Stevens 1995: 130 footnote 362.

⁶¹⁴ Poulsen (forthcoming) identifies the 1971 UK Model BIT as the first treaty to include ICSID access.

released, ICSID access appeared in the Italy–Chad treaty.⁶¹⁵ In 1970, Belgium and Indonesia negotiated a treaty with a strong variant of an ICSID model clause:

Each contracting party hereby irrevocably and anticipatory gives its consent to submit to conciliation and arbitration any disputes relating to a measure contrary to this agreement, pursuant to the convention of Washington of 18th of March 1965, at the initiative of a national or legal person of the other contracting party, who considers himself to have been affected by such a measure. This consent implies renunciation of the requirement that the internal administrative or judicial resorts should be exhausted.⁶¹⁶

European states began incorporating advance consent to ICSID into their treaty practice. In 1972, the French representative at the ICSID Annual Meeting said:

[The French government] participated during the last year in negotiations with other countries on agreements for the protection of private investments abroad ...Negotiations underway or already concluded have provided for reference to ICSID—explicit reference to ICSID—in the event of disputes.⁶¹⁷

For the French government, ICSID had become the body of recourse in the event of arbitration proceedings. French treaties referred to ICSID, and not the ICC—despite the fact that the ICC’s headquarters are in Paris.

In 1972, the UK government drafted its first model treaty. This model treaty included only one option for dispute settlement: ICSID. Poulsen provides detailed evidence of Broches’ influence on the UK model BIT: Broches had encouraged the UK government to include ICSID access in previous agreements, and Broches even visited London in order to promote the inclusion of ICSID’s conciliation facility in the model BIT.⁶¹⁸ Poulsen observes:

When the UK began its BIT program negotiators would occasionally justify their ICSID clauses with the argument that they had been encouraged and cleared by Broches.⁶¹⁹

Within a few years of ICSID releasing model clauses for BITs, these clauses had become accepted practice in BITs signed by European states.

⁶¹⁵ Article 7 of the Chad–Italy BIT. The accessible treaty text is in Italian. For an explanation of why it is “unqualified” see Newcombe and Paradell 2009: 45–46. Remarkably, the treaty does not provide for inter-state dispute resolution, which was dominant at the time. The last line in Article 8 suggests disputes over interpretation should be settled through diplomatic channels. Potesta 2011: 753.

⁶¹⁶ Article 10 of Belgium–Indonesia BIT, 15 January 1970. The ICSID Model Clause reads: “Each Contracting Party hereby agrees to submit any legal dispute arising out of an investment to the jurisdiction of the International Centre for Settlement of Investment Disputes for settlement by arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.” ICSID/6: 5.

⁶¹⁷ Sixth Annual Meeting: 5.

⁶¹⁸ Poulsen (forthcoming): chapter 3.

⁶¹⁹ Poulsen (forthcoming): chapter 3.

Policymakers in capital-exporting states recognized that automating the second consent to ICSID might be politically sensitive. More accurately, they expected it to be politically sensitive, but in many instances their negotiating partners gave the second consent freely. Policymakers in the UK were concerned about the politics of negotiating direct access to ICSID with former colonies. In the commentary that accompanied the first model treaty, UK negotiators expressed their apprehension about Article 8, the dispute resolution clause that referred to ICSID. They wrote that it:

...may well be very difficult to negotiate since prospective signatories may wish to reserve to themselves the right to decide in the case of each individual dispute whether they are prepared to have it referred to the Centre [ICSID] for arbitration.⁶²⁰

If the UK asked a state to sign its model BIT, investors would have unfettered access to bring cases to ICSID. Yet the UK's early negotiating partners seemed to give this blanket consent easily. Fourteen out of the first 15 UK treaties refer disputes exclusively to ICSID.⁶²¹

If two states sign a BIT with ICSID as the sole option for dispute resolution, both states need to be members of ICSID to bring that clause into effect. If the governments of capital-exporting states had a strong preference for ICSID, we would expect them to encourage, and perhaps even require, their negotiating partners to ratify ICSID as a condition of the investment treaty. Did this occur? The next section takes up this question.

5.2.5 Do ICSID Clauses in BITs lead to ICSID Ratifications?

The coercion argument explored in chapter 2.5 suggests there may be a one-to-one correlation between ICSID clauses in BITs and ratifications. If capital-exporting states include ICSID access in their BITs, then we would expect them to have a preference for their BIT partners to be ICSID members, particularly before the creation of the Additional Facility in 1978.

Therefore, we would expect capital-exporting governments to promote ICSID to their BIT partners, and for their capital-importing BIT partners to join ICSID. To what extent are these

⁶²⁰ Commentary quoted in Brown and Sheppard 2013: 744.

⁶²¹ Two of these treaties did, however, state that the consent of the host state is required before a dispute can go to ICSID. UK-Philippines Investment Promotion and Protection Agreement (IPPA) of 1980 and the UK-Indonesia IPPA of 1976. The exception is the UK's treaty with Thailand, which has no language about investor-state dispute resolution. Thailand was not an ICSID member.

expectations supported by empirical evidence? The first expectation – that capital-exporting governments support and promote ICSID – is supported. The second expectation—that capital-importing governments join ICSID before they ratify their first BIT—is not supported.

During the period being reviewed, capital-exporting states did spread the idea of ICSID, but the Secretariat itself was the key agent of dissemination. No capital-exporting state consistently included ICSID access in its BITs. Instead, several capital-exporting states slowly, sometimes haphazardly, incorporated ICSID access into their treaty practice. By 1981, the year that Broches retired from ICSID, there were 67 BITs in force that provided advance consent to ICSID. The table below shows which capital-exporting states signed these treaties. The data in the first column is drawn from ICSID Annual Reports of the period, while the data in the second column is drawn from UNCTAD.⁶²² The figures have been corroborated with the original treaty text wherever possible.

Table 5: BITs with Advance Consent to ICSID as at June 30, 1981

Capital-Exporting State	BITs with ICSID Clauses	Total BITs
Belgium	6	8 (BITs with Tunisia and Morocco were negotiated before ICSID was in force)
France	17	20 (Not in treaties with Liberia, Malta, or the Philippines)
Germany	3	51 (In no treaties, except those with Israel, Ivory Coast, and Romania)
Italy	4	5 (Not in the treaty with Romania)
Netherlands	13	16 (Not in the treaties with Tanzania, Thailand, and Sudan)
Sweden	2	10 (In the treaties with Malaysia and Pakistan)
UK	11	14 (Not in the treaties with Thailand, Senegal, and Papua New Guinea)

Note: Switzerland had no BITs that referred to ICSID. The US had no BITs at all.

⁶²² Specifically, from UNCTAD 1996. Data on early BITs is not perfectly reliable. I have corroborated the figures in the table with Dolzer and Stevens (1995) and other sources where possible, but more complete datasets of bilateral investment treaties may emerge in the future and bring to light treaties not reflected in this table. It is unlikely that the additional data would alter the overall picture presented in the table, however.

Investment treaties do not have a specific and direct effect on ICSID ratification before 1980; if there is an effect, it is diffuse. The German BIT program illustrates this ambivalence and possible diffuse effect best. The West German government signed the world's first BIT in 1959, with Pakistan. Germany adopted its first model BIT in 1960, and negotiated a handful of BITs before ICSID was created. As we would expect, none of these treaties even mention the idea of investor-state arbitration.⁶²³ When ICSID was first proposed, the German Executive Director of the World Bank connected it immediately to their BIT program. Yet investor-state arbitration does not appear in German BITs for 15 years. Even when Germany and its negotiating partner were both ICSID members, their investment treaties did not include ICSID access. For instance, the Singapore-Germany BIT of 1973 does not include investor-state arbitration. The German government led the way in negotiating BITs, and even made national investment insurance conditional on BITs, but the German government did not lead the way on ICSID clauses. The ICSID Secretariat did. The German government waited until 1981 to include advance consent to ICSID in a BIT.⁶²⁴ Like many other capital-exporting states, once Germany began to include ICSID clauses, the government included them in almost every investment treaty they negotiated.⁶²⁵

The ICSID Secretariat monitored the spread of these clauses in BITs. The Centre's publications from this era provide a yearly list of all the treaties that provided advance consent.⁶²⁶ They were the only organization in the world that did this before the 1980s. The Centre, and Broches in

⁶²³ These treaties illustrate that the idea of investor-state arbitration was not credible before the creation of ICSID. State to state dispute resolution was the only option in the treaty, for example the Germany-Cameroon BIT (1962), Article 10.

⁶²⁴ The Germany-Somalia BIT (1981) was the first. I have reviewed publicly available German treaties (in English, French or German language versions), but there are treaty texts that are unavailable. Poulsen (forthcoming, chapter one) brings forth archival evidence in which German officials suspect Somali negotiators had not read the BIT text in full and did not appreciate the treaty's binding nature.

⁶²⁵ Based on my analysis of Article 10 (the dispute resolution article) in all available German BITs. ICSID was the only arbitration institution mentioned in the model German investment treaty until 2008, when the government made changes anticipating a future European Union (EU) model treaty. In 2008, the German model changed to offer investors a menu of choices. The 2008 menu may reflect the German government bringing their policy in line with other EU states in advance of the transfer of investment competence to the EU. See Shan and Zhang (2010) for the implications of shifting competence.

⁶²⁶ "References to the Centre in national legislation and in bilateral treaties between capital exporting and capital importing states have been increasing steadily. Annex 4 gives an up-to-date list of all such laws and treaties." Thirteenth Annual Report: 5.

particular, recognized that investment treaties could bring an enormous potential caseload to the Centre. In 1984, before there had been a single investment treaty case, Broches said:

There are now about sixty treaties between states, generally industrialized and developing, which provide for access to ICSID in case of disputes about violations of the treaties. And those treaties are investment protection treaties. So, ICSID has an enormous potential clientele.⁶²⁷

The Secretariat had a better view of the global system of investment protection than any other actor during this period. Elkins, Guzman, and Simmons' widely cited account suggest BITs spread through decentralized mechanisms of competition.⁶²⁸ Most studies investigating a possible connection between BITs and investment flows seek to identify the rational reason why states adopted these treaties, particularly when they contained binding investor–state dispute resolution. Yet these studies do not identify the pattern of initial diffusion. Including ICSID in this picture reorganizes the data, and shows that BITs with ICSID access spread outward from a centralized starting point. The ICSID Secretariat was that centralized starting point.

The BIT system developed as a hub-and-spoke system around the model treaties of powerful, typically investment-exporting states. Or as an early US negotiator put it, the system reflects “divergent developed country emphases in proselytizing BIT standards.”⁶²⁹ After advance consent to ICSID became a standard element in the model BITs of capital-exporting states, it started appearing in other BITs. For instance, South Africa negotiated its first BIT with the United Kingdom.⁶³⁰ This treaty is almost a verbatim copy of the UK's model treaty. Poulsen shows that South Africa then adopted the UK model as its own, and tabled it in negotiations.⁶³¹ The dispute resolution clause in the UK model investment treaty has an explicit preference for ICSID arbitration.⁶³² Therefore, in tabling the UK model, South Africa tabled a text with a preference for ICSID arbitration, despite the fact that South Africa was not then—and has never been—a member of ICSID. The 1995 Canada-South Africa BIT lists

⁶²⁷ Broches Oral History May 1984: 44–45. Emphasis mine.

⁶²⁸ Elkins, Guzman, and Simmons 2006.

⁶²⁹ Gudgeon 1986: 134.

⁶³⁰ United Kingdom-South Africa IPPA, 1994.

⁶³¹ Poulsen 2013: 7–13; Poulsen (forthcoming).

⁶³² Brown and Sheppard 2013: 744.

ICSID as the first option for dispute resolution, despite neither state being a member.⁶³³ The clause reflects Canada's experience negotiating NAFTA Chapter Eleven (off the US model) and South Africa's experience with the UK model.

Conclusion

This chapter uses archival evidence to demonstrate that the ICSID Secretariat was a dynamic actor during the period 1967–1972.⁶³⁴ The influence of legal organizations is usually judged by their caseload and by the evolution of case law under their auspices, but these indicators systematically underrepresent ICSID's activities during these years. The Secretariat introduced itself to states and investors, advised states on domestic legal frameworks, drafted model clauses for contracts, drafted model clauses for treaties, and consistently promoted the idea of investor–state arbitration around the world. The Centre sought to secure wide advance consent; therefore, focusing advance consent reveals the Secretariat's dynamism as an actor.⁶³⁵

The Secretariat's dynamism did not yield impressive short-term results. ICSID did not have a single case for many years. Many observers, like O'Keefe quoted above, believed ICSID had failed to live up to its promise and would end without having much impact. These observers often failed to appreciate thousands of advance consents to ICSID were provided during this period—in contracts, treaties, and domestic laws—which put in place the infrastructure for a large caseload.

Many observers missed ICSID's potential because of the incremental strategy pursued by the Secretariat. If the Convention and advance consent had been pursued simultaneously (that is,

⁶³³ In Article XIII, the text acknowledges it will only be possible for investors to use ICSID facilities if both Canada and South Africa become members of ICSID. South Africa-Canada BIT, not in force.

⁶³⁴ This point might seem obvious, but it is nonetheless important. For example, Schreuer's (2009) commentary on ICSID mentions Broches during the drafting, and mentions tribunals as actors, but does not consider the ICSID Secretariat as an actor.

⁶³⁵ The dynamism discussed in this chapter is particular to ICSID during this era. The contemporary ICSID Secretariat only carries out procedural tasks, and considers itself operationally separate from the World Bank. It registers cases and publishes statistics on its caseload, and the current Secretary-General is circumspect and careful. She does not engage in the type of proactive promotion work undertaken by her predecessors. Interview with Meg Kinnear, March 2013.

if advance consent had been paired with the Convention and presented as a single entity), it would have been discussed much more. It is also likely that opposition from capital-importing countries would have defeated the initiative. By first creating the Convention and *then* pursuing advance consent, the Secretariat brought the system into operation. During the years under study in this chapter, hardly anyone even noticed when advance consent clauses came into force.

The Secretariat's existence, plus the widespread provision of advance consent, enabled a fundamental reshaping of customary international law. Yet these developments received scant attention from capital-importing states, or any other type of state or international organization. Pauwelyn also characterizes the international investment regime's development as incremental. Bringing the regime's development up to the present, he observed:

Rather than the result of a deliberate treaty negotiation—such as the 1994 WTO treaty consenting to compulsory jurisdiction for all State-to-State disputes under all covered WTO agreements—it [the international investment regime] was the result of incremental developments in distinct treaty contexts—first, ICSID, then second-generation European BITs, and, finally, US BITs—the crux of which was only definitively established through arbitral awards many years later.⁶³⁶

Incrementalism, and its component principle that policymakers operate with limited information about the future, does explain many of the contradictions and peculiar contours in the international investment regime.

Incrementalism is not necessarily sufficient to explain all the decisions explored in this chapter. Incrementalism does not explain why the governments of 13 capital-importing states enshrined access to ICSID in their domestic law during this era, a time of high resource prices and of the NIEO proposals. To explain that, another principle of modest multilateralism is required: expertise. States, particularly poor, capacity-constrained states, sought technical assistance. The idea to include ICSID access in domestic law travelled to states through technical assistance, and in particular through the investment law project. The project and the Centre's advisory work were presented as apolitical legal expertise.

⁶³⁶ Pauwelyn 2014: 29.

Similarly, while incrementalism helps explain the later spread of the model clauses, it is not sufficient to explain their initial success. For this, the third element of modest multilateralism, ambiguity, is needed. The Secretariat's model clause documents outlined the best practice for drafting, but they included multiple options. If the Secretariat had prescribed these clauses, they would have met resistance and likely not been widely adopted. These clauses were more influential because the Secretariat presented them in a way that demonstrated deference to the state's sovereign choice, and merely suggested possible options. As during the drafting, the Secretariat did not stake out a firm position: this absence of a stated mission increased the Secretariat's perceived impartiality and likely increased its influence. This softly-softly, technical approach worked for the Secretariat during its first five years. How would it fare after 1972, when the global policymaking environment for FDI became increasingly polarized? The next chapter turns to this question.

Chapter Six: ICSID Quietly Carries On, 1972–1980

The previous chapter focused on the steps taken by the Secretariat to promote advance consent to ICSID jurisdiction. In its first five years, the Secretariat promulgated model advance consent clauses and advised governments and investors on their use. In the late 1960s and early 1970s, the new Secretariat was a dynamic agent. To what extent was the ICSID Secretariat able and willing to continue this active promotion between 1972 and 1980?

Several factors made it unlikely that the Secretariat would be able to carry on its promotion of advance consent and other activities. First, the nature of international debates on FDI became increasingly hostile during this period. Second, the conspicuous absence of Latin American states from ICSID—as well as the continuing lack of cases—made ICSID appear impotent. As a UN report put it in 1973, ICSID provides a limited machinery with unproven practical usefulness.⁶³⁷ The ICSID Secretariat was not in a position of strength. Yet this chapter demonstrates that ICSID continued its work uninterrupted during the period, by relying on ambiguity, expertise, and incrementalism, as before. The chapter contrasts ICSID's approach to developments within the UN during these years.

The chapter has two sections. The first section evaluates work within the UN. During the 1970s, capital-importing states put forward resolutions on investment in the General Assembly and at UNCTAD, which were heralded as the foundations of a NIEO. They spurred the creation of the United Nations Centre for Transnational Corporations (UN CTC). The UN CTC brought new energy to the study of relations between host states and investors, becoming a hub for scholars and technical experts. The OECD also became a forum for active debate on guidelines for multinational enterprises, among capital-exporting states. The focus within these organizations was not traditional expropriation disputes: UN CTC and OECD efforts aimed to understand the nature of new multinational activity, and find ways to govern it.⁶³⁸

⁶³⁷ UN DESA 1973: 94 (full quote below).

⁶³⁸ In this chapter, I use both “transnational” corporation and “multinational” corporation, following usage at the time. The decision to use “transnational corporation” was elaborated at length in UN DESA 1973, yet UN DESA's flagship publication on the issue was called “Multinational Corporations in World Development.” Broches disliked the term MNC, and observed “from a lawyer's point of view the term ‘multi-national corporation’ has, of course, no validity.” He also believed the term MNC was usually an attempt by American corporations “to be less ‘American’.” Broches [1974] 1995: 517.

The second section of the chapter examines how the ICSID Secretariat continued its work during the 1970s. While capital-importing states passed ambitious resolutions in the General Assembly, the ICSID Administrative Council, which operates with a one-state, one-vote system like the General Assembly, widened access to investor-state arbitration. The Administrative Council approved the creation of the Additional Facility, approved reciprocal agreements with regional arbitration centers, and approved ICSID's appointing authority. Why did it do so? As discussed in chapter three, the structure of ICSID deflected debate. The Administrative Council was not a forum for deliberation: the purpose of its meetings was to approve ICSID's annual budget. The substantive discussions that occurred at the UN and the OECD did not appear at the Administrative Council.

Ultimately, however, the slow evolution of legal practice facilitated by ICSID may have had greater influence on investment law than the UN resolutions. ICSID access continued to be enshrined in treaties, contracts, and domestic law. At long last, cases began coming to ICSID, and remarkably, even when they concerned natural resources and other core issues of the NIEO, they did not become garner attention at the UN. In 1974, the same year the UN General Assembly passed the NIEO Resolution, three high-profile ICSID cases were registered against Jamaica. Jamaica did not participate in the arbitration cases, which were brought by US corporations arguing that an increase in tax levied on bauxite mining constituted expropriation.⁶³⁹ Given the salience of natural resources to the NIEO proposals, and that the Jamaican Prime Minister was one of the NIEO's most eloquent statesmen, one might expect these cases to be a flashpoint in the debates at the UN. They were never mentioned. ICSID's structure (and the ambiguity of its Convention) meant it did not attract political attention during this period; therefore, it could continue expanding through incremental, expert-led steps as before.

⁶³⁹ *Alcoa Minerals of Jamaica, Inc v Jamaica; Kaiser Bauxite Company v Jamaica; Reynolds Jamaica Mines, Ltd v Jamaica*. Discussed in section 6.2.3 below.

6.1 Work on Investment within the UN

This section analyzes what drove the work on investment within the UN, and how ICSID fit into this work. It demonstrates the attention paid to substantive standards within the UN, and the belief that procedure without substance was unimportant. In the long run, these efforts to promulgate new substantive standards would have little impact.

6.1.1 What Impelled the UN to Act in 1972?

Work on investment in the UN intensified in the early 1970s.⁶⁴⁰ Both capital-importing and capital-exporting states became more confrontational in their rhetoric. This section discusses three drivers of the new rhetoric. Fundamental shifts in global political economy and widespread questioning of US leadership were the first driver. Disillusionment with decolonization was the second driver. Revelations of corporate malfeasance and political meddling by corporations were the third driver, and the proximate cause of action.

The early 1970s were a tumultuous period. The continuing war in Vietnam, events in the Middle East and the Organization of the Petroleum Exporting Countries (OPEC) shock hardened positions and led to a retrenchment by leaders in many capital-exporting states. As Toye and Toye observe, “After 1968, the world political and economic situation began to undergo profound changes that weakened the international power and prestige of the OECD countries.”⁶⁴¹ The US government in particular was unwilling and unable to provide the kind of multilateral leadership to which it had aspired during the immediate postwar years. Charles Kindleberger observed in 1977:

Another requirement [for a stable world economic system] is leadership to enforce a public-spirited mode of behavior...In the nineteenth century that leadership came from Britain; between 1945 and about 1968, from the United States. Before the new international economic order can function effectively, we need to build stronger and independent international institutions, which seems utopian at this conjuncture, or to find new or renewed leadership.⁶⁴²

⁶⁴⁰ Multiple UN bodies worked on investment before the 1970s, including the General Assembly, UNCTAD, and UNIDO. Notable resolutions were passed in the 1960s, including General Assembly Resolution 2087 (XX) in 1965, ECOSOC Resolution 1286 (XLIII) in 1967, and an ECOSOC panel on FDI, chaired by Philippe de Seynes. See Dell 1990.

⁶⁴¹ Toye and Toye 2004: 230.

⁶⁴² Kindleberger 1977: 365. Throughout his scholarly career (and as a primary architect of the Marshall Plan) Kindleberger emphasized the need for a “stabilizer – one stabilizer” in the world economy. He argued US

Kindleberger was likely thinking in particular of Nixon's decision to exit the Bretton Woods system, but his argument is valid for international economic relations generally. Facing domestic inflation and high unemployment, the US government's bargaining positions hardened. The Nixon administration adopted a defensive and at times adversarial approach to economic negotiations, and often attributed the hardening in tone to the rising power of "third world" countries, particularly oil exporters and middle-income countries.⁶⁴³

Disillusionment with decolonization also drove the UN to act during the 1970s. Many of the tensions discussed in section 1.6 were still present. Concession agreements with asymmetrical terms were still in force in many states, and postcolonial governments felt their sovereignty was constrained by foreign dominance of large segments of their economies. The tensions of the era are exemplified in the hard bargaining over commodities agreements at UNCTAD.⁶⁴⁴ Reflecting the confrontational politics of the era, the Under-Secretary-General of the UN observed that when it came to work on investment during the 1970s, "the United Nations changed from a forum for dialogue into a prime battleground."⁶⁴⁵

These changes in the world economy brought to prominence a wave of new scholarship on FDI. While previous scholarship on investment focused on balance of payments or related macro-economic issues, this new wave of scholarship probed the political relations and governance of FDI. Transnational corporations were analyzed as organizations. The policy dimensions of FDI were examined.⁶⁴⁶ In much of this research, the host country was not assumed to be a developing state.⁶⁴⁷ Yet the concerns of OECD and non-OECD states were

leadership was necessary to stabilize the world economy. Therefore he is particularly well placed to comment on the changing nature of US leadership in the 1970s.

⁶⁴³ Terminology matters. Between his tenure working for Henry Kissinger at the State Department and working as US Undersecretary of the Treasury, C Fred Bergsten (1977: 351) spoke at a conference on the NIEO. He drew a sharp distinction between the "third world" and "fourth world": "It becomes necessary to create a third group of countries for purposes of international rights and obligations, in recognition of the emergence of a true international "middle class" – the Third World. The traditional bifurcation of the globe into "haves" and "have-nots", "rich" and "poor", "developed" and "less developed", no longer fit the facts. The speech illustrates one strategy of American economic diplomacy at the time, to divide "third world" coalitions.

⁶⁴⁴ There is a rich academic literature on these negotiations, which were prioritized by many developing countries. They are not discussed here because the negotiations did not concern the investment dispute settlement. See: Rothstein 1979; Murphy 1983; Taylor and Smith 2007; Toye and Toye 2004, chapter 10.

⁶⁴⁵ De Seynes, quoted in Sagafi-Nejad 2008: 49.

⁶⁴⁶ Sagafi-Nejad 2008: 51. Lall (1975) elegantly summarizes the contemporary literature on FDI.

⁶⁴⁷ For instance, John Dunning's first major work focuses on the UK as a capital-importing state. Dunning 1958.

increasingly the same. In a 1970 article, Goldberg and Kindleberger outlined a future dominated by global corporations, and warned that “such a situation may leave individual nation-states relatively helpless in the face of a powerful, closely interlocked, and geographically mobile network of industrial enterprise.”⁶⁴⁸ The core proposition underlying the UN CTC work and the OECD work was the same: multinational corporations need to have both rights and obligations.

Governing FDI was now about much more than protecting property. OECD and non-OECD states both sought to encourage technology transfer, and ensure the activities of foreign firms supported domestic industrialization.⁶⁴⁹ Taxation, anti-trust rules, balance of payment controls, export controls, and securities regulation appeared alongside expropriation, or sometimes instead of it, on policymaking agendas. Goldberg and Kindleberger excluded expropriation and disputes over expropriation from their proposal for rules on investment. They argued:

[We excluded] the traditional problem of expropriation and its compensation, an issue on which the IBRD has developed a vehicle for dispute settlement. While expropriation does involve conflict between host and home countries...there is little to be gained from merging this apocalyptic problem with the issues that arise in the day-to-day operations of the international corporation.⁶⁵⁰

The third driver of action at the UN was revelations of malfeasance and political meddling by corporations. Outrage at the actions of the International Telephone and Telegraph Company (ITT) in Chile impelled action.⁶⁵¹ Juan Somavía, a progressive young Chilean diplomat with strong connections to the UN began to call for a study of corporate activities in 1972.⁶⁵² Chile was sliding into instability, but Pinochet did not seize power until 11 September 1973. After the change of government, Somavía continued working on transnational corporations in the

⁶⁴⁸ Goldberg and Kindleberger 1970: 296.

⁶⁴⁹ There is an importance difference between trying to ensure FDI supports domestic industrialization and development (typically associated with UNCTAD), and a rejection of FDI (associated with dependency theories).

⁶⁵⁰ Goldberg and Kindleberger 1970: 297.

⁶⁵¹ These well-known events have been studied at length elsewhere. In summary, the Nixon administration and CIA, under pressure from the ITT to “exert economic pressure on the Allende government”, engaged in a destabilization campaign in Chile that culminated in hyper-inflation and eventually a coup d’état led by General Augusto Pinochet. Democratically-elected President Salvador Allende shot himself as Pinochet’s forces approached on 11 September 1973. See Sampson 1973.

⁶⁵² Somavía’s father in law, Hernan Santa Cruz, was the first Chilean ambassador to the UN. Santa Cruz was active in the formation of the UN ECLA and had been the President of ECOSOC. Somavía went on to become the Director-General of the International Labor Organization (ILO), from 1999 to 2012, and before that twice President of ECOSOC (1993/94 and 1998/99). Somavía Oral History 2001. See also Sagafi-Nejad 2008: 56, 234.

UN. In 1974, he became a member of the new Group of Eminent Persons studying the activities of transnational corporations, and subsequently its rapporteur.

Key individuals in the UN seized on the growing public attention given to corporations and used it to build the Commission and the Centre on Transnational Corporations. Philippe De Seynes, Under-Secretary General for the Department of Economic and Social Affairs (DESA), was particularly committed and consistent in his leadership. De Seynes had been involved in drafting the investment provisions of the Havana Charter in 1944, and was still “determined to place MNC-host country relations on the global agenda” 30 years later.⁶⁵³ Prebisch’s biographer notes, “De Seynes was a skillful bureaucratic infighter, committed to international development but also to building coalitions that diluted US negativism.”⁶⁵⁴ As head of DESA, De Seynes led the preparation of a bold, agenda-setting report on FDI in the early 1970s. Titled “Multinational Corporations in World Development,” the report drew on the new scholarship mentioned earlier, as well as on new data.⁶⁵⁵ Sagafi-Nejad calls the report “ground-breaking in its scope, content, and layout.”⁶⁵⁶ This report was the first comprehensive treatment of FDI written by an international organization since ICSID’s creation. How did the report treat ICSID?

6.1.2 ICSID in Early UN Work on Corporations

The 1973 report came to mixed conclusions about ICSID. The report first listed the shortcomings of the contemporary architecture for dispute resolution. As mentioned in the introduction of this chapter, ICSID was limited in scope and membership, and untested. The authors observed:

Without a strong international authority, disputes involving multinational corporations and host countries fall within national jurisdictions, which are often inadequate or conflicting. The Convention on the Settlement of Investment Disputes

⁶⁵³ Sagafi-Nejad 2008: 50, 233.

⁶⁵⁴ Dosman 2008: 295.

⁶⁵⁵ The report contains many references to top scholars, many of whom would later be involved in the UN CTC, including: Raymond Vernon, Jack Behrman, Pierre Uri, John Dunning, John Stopford, Louis Wells, Franklin Root, Howard Perlmutter, Gerald Helleiner, WB Reddaway, Constantine Vaitsos, A. E. Safarian, Lawrence Franko, Joseph Nye, Arhyrios Fatouros, Jean-Jacques Servan-Schreiber, Harry Johnson, Stephen Hymer, Walter Chudson, Gary Hufbauer, Raul Prebisch, Albert O Hirschman, Charles Kindleberger, and George Ball. Annex III of the report provides 80 pages of statistical tables on foreign investment, the most advanced compilation of information on FDI up to that point.

⁶⁵⁶ Sagafi-Nejad 2008: 60.

provides a limited machinery for conciliation or arbitration but its work has thus far been very limited, chiefly on account of the non-participation of many countries, notably in Latin America, on the grounds that disputes in their territories should come under national jurisdiction. Moreover, the practical usefulness to the participants will have to be demonstrated by the outcome of the first case in its history (*Morocco versus Holiday Inn*).⁶⁵⁷

At the time, ICSID was still in its first decade: its small membership and caseload of one could grow. The 1973 report was nevertheless dismissive about ICSID's potential. The text was unambiguous, procedure without substance was meaningless: "so long as international authority is lacking, there can be virtually no appropriate machinery for the settlement of disputes."⁶⁵⁸

ICSID appears only once in hundreds of pages of testimony to the DESA working group on investment. The Permanent Representative of Jamaica to the UN, H. S. Walker, added this reference—as an afterthought—to support his point that Jamaica was cautious about nationalization:

Question: What is your policy as regards nationalization?

Answer: Jamaica, being a country dependent on large capital inflows for its development, is naturally cautious about nationalization, and it is not a policy that we would lightly undertake. However, in those cases where it is clearly in the public interest to have public control of an enterprise, e.g., a public utility, this is only done after a long period of negotiations, and in accordance with the Constitution, and compensation is, of course, paid. Jamaica is a member of the International Centre for Settlement of Investment Disputes.⁶⁵⁹

Walker did not elaborate on the meaning of ICSID membership. His reference to ICSID, however, was not coincidental. Later that year, Jamaica became the respondent in three ICSID cases.⁶⁶⁰

6.1.3 Cases Against Jamaica at ICSID, in Context

The three cases registered against Jamaica were the first high-profile ICSID cases.⁶⁶¹ Putting them in context helps us to understand the challenges facing ICSID tribunals and the complexity of most ICSID cases. The circumstances that led to these cases are explored in

⁶⁵⁷ UN DESA 1973: 94.

⁶⁵⁸ UN DESA 1973: 103. In the context, authority refers to substantive rules.

⁶⁵⁹ Walker replying to Questions of Dunning, Domavia, Browaldh, and Weinberg, UN DESA 1974: 427.

⁶⁶⁰ Walker testified in November 1973, the nationalization took place in January 1974, and the cases were registered at ICSID in June 1974.

⁶⁶¹ For instance, the Jamaica bauxite cases are the first time an ICSID tribunal is mentioned in the *Wall Street Journal*.

depth below, to illustrate ICSID's role in an actual investment dispute. The section concludes by connecting the Jamaica cases back to action at the UN. While these cases could have created awareness of ICSID or advance consent, they did not.

The cases all stemmed from a new 7.5% tax levied on bauxite mining, which Jamaican Prime Minister Michael Manley planned to use to fund a program of populist reforms. The new tax contravened "no further tax" clauses in existing contracts between the government of Jamaica and North American mining companies. Manley was aware that the tax would violate the contracts; in a public speech on 3 January 1974 he announced bauxite contracts had been "abrogated by history."⁶⁶² Within two days of this public speech, Manley asked for a secret meeting with the US Ambassador.⁶⁶³ In the meeting, he emphasized to the US government (whom he relied upon to communicate with the bauxite companies) that he wished to renegotiate. Full nationalization was not his aim; he only sought to increase revenue from bauxite. To the US Ambassador, he pleaded: "improving [Jamaica's] revenues from the bauxite industry was not only a matter of simple justice for Jamaica, it was a matter of survival."⁶⁶⁴

Manley's renegotiation plans faced formidable opposition. A handful of American and Canadian firms owned 100% of the bauxite mines in Jamaica. Bauxite mining was vital for both the Jamaican and the US economies. Unprocessed bauxite was Jamaica's main export and source of foreign exchange. The US, in turn, was "dependent on imports of Caribbean bauxite and alumina (processed bauxite) to meet its consumption needs for primary aluminum."⁶⁶⁵ The US government, through OPIC, had provided over \$500 million in guarantees to these firms. It was OPIC's most concentrated exposure to a single industry in a single country. The Church Subcommittee conducted "a special investigation" of the OPIC guarantees in Jamaica, because it "appeared to be excessively large" and was thus an

⁶⁶² Speaking to the American Ambassador four days later, Prime Minister Manley backpedalled. "At one point in the speech he had said that contracts made in the distant past under completely different circumstances 'had been abrogated by history.' He said that some people had taken this phrase to mean that he intended to abrogate the bauxite contracts and start over, while in fact he merely intended it as a rhetorical device. He said he had made his belief in the sanctity of contracts quite clear elsewhere in the speech." Wikileaks cable ID: 1974KINGST00069_b from 7 January 1974.

⁶⁶³ Wikileaks cable ID: 1974KINGST00054_b from 5 January 1974.

⁶⁶⁴ Wikileaks cable ID: 1974KINGST00069_b from 7 January 1974.

⁶⁶⁵ Deal 1978: 68.

important test case to see if the “investment guarantee program accomplishes the purpose of assuring the United States a secure source of a vital raw material without leading to a deepening political involvement in the affairs of host countries.”⁶⁶⁶ The question may have been rhetorical.⁶⁶⁷ The US government had been monitoring Jamaican bauxite mining for years.⁶⁶⁸

Before Manley was elected, the US Ambassador told him to keep bauxite ownership out of his campaign.⁶⁶⁹ Possible bauxite nationalization in Jamaica received attention from the highest levels in the US: Secretary of State Kissinger himself sent rush telegrams to Kingston over the Christmas holidays in 1973.⁶⁷⁰ The US government sought to prevent Manley from becoming “another Castro.” In spring 1974, the US Embassy sent dozens of play-by-play summaries of the negotiations between company lawyers and the Jamaican government back to Washington, where the “conclave of CEOs” was meeting.⁶⁷¹ The US government was involved in the negotiations, but maintained a formally neutral stance.⁶⁷² As negotiations continued, the US Embassy in Kingston seemed more impressed with the government than with the corporations. One cable observed the corporations:

Had no coherent strategy in mind outside of departing from the status quo as little as possible. In addition, they seem to have made the grave error of underestimating their opponents. For once the Jamaicans had done their homework thoroughly and knew as much about most of the issues as the industry.⁶⁷³

The US government knew the Jamaican government would “go out of its way to avoid a direct confrontation with the USG. In particular, it is likely to avoid actions which will automatically trigger OPIC claims.”⁶⁷⁴ The Jamaican government and the US government cultivated cordial relations throughout the negotiations.

⁶⁶⁶ Wikileaks cable ID: 1973STATE206992_b from 19 October 1973.

⁶⁶⁷ In any case, the testifying Ambassador said that “the assumption of that risk...led it [the US government] into the internal politics of Jamaica.” Wikileaks cable ID: 1973STATE206992_b from 19 October 1973.

⁶⁶⁸ Not only the Embassy in Kingston, but smaller branches of the US government, like the Internal Revenue Service (IRS) were closely monitoring relations between the Jamaican government and the mining companies (the IRS suspected the companies of tax evasion through transfer pricing). Wikileaks cable ID: 1973KINGST03921_b from 17 November 1973.

⁶⁶⁹ Wikileaks cable ID: 1973STATE206992_b from 19 October 1973.

⁶⁷⁰ Wikileaks ID: 1973STATE250610_b from 27 December 1973.

⁶⁷¹ For descriptions of a drinks reception at US Embassy and the CEOs meeting in Washington, see: Wikileaks ID: 1974KINGST01492_b from 26 April 1974. For another description of the “conclave of CEOs” in Washington, see: Wikileaks ID: 1974KINGST01495_b from 27 April 1974.

⁶⁷² Wikileaks ID: 1974STATE083254_b from 24 April 1974.

⁶⁷³ Wikileaks ID: 1974KINGST01772_b from 21 May 1974.

⁶⁷⁴ Wikileaks ID: 1974KINGST01772_b from 21 May 1974.

The corporations did not file their claims at ICSID to “depoliticize” or remove home country intervention from the dispute. Negotiations had not broken down. The corporations filed their claims at ICSID to strengthen their bargaining positions. All parties perceived the resort to ICSID as an attempt to put pressure on the Jamaican government.⁶⁷⁵ Upon being informed of the three companies’ resort to ICSID: “Manley said that he hoped this did not mean that industry intended to escalate the confrontation and ‘come on tooth and claw’.”⁶⁷⁶

The Jamaican government tried to rescind its advance consent to ICSID by making an Article 25 (4) notification shortly before the cases were registered.⁶⁷⁷ The tribunals found that the government could not limit its consent through this notification, as that “would very largely, if not wholly, deprive the Convention of any practical value for Contracting States and investors.”⁶⁷⁸ The decision on jurisdiction demonstrated that advance consent to ICSID could not be revoked unilaterally.⁶⁷⁹

The corporations wanted to continue doing business in Jamaica, so their negotiators were careful about how they presented the decision to go to ICSID. One of the main lawyers representing the corporations in negotiations was Lloyd Cutler, a veteran Washington insider.⁶⁸⁰ His explanation of the corporations’ decision to invoke ICSID is telling: “They felt they had no alternative since the remedy existed and their obligation to their stockholders compelled them to exhaust all available remedies.”⁶⁸¹ In other words, since ICSID existed, the corporations had to use it. This position did not win the corporations any sympathy from the US government, or, needless to say, the Jamaican government.

⁶⁷⁵ This runs counter to the argument that international institutions “depoliticize” disputes, advanced by many scholars, but most fully in Maurer 2013.

⁶⁷⁶ Wikileaks ID: 1974KINGST01706_b from 15 May 1974.

⁶⁷⁷ Jamaica’s notification was made May 8, 1974, and excluded from ICSID jurisdiction any dispute “arising directly out of an investment relating to minerals or other natural resources”. ICSID 8/D. Note: Article 25 (4) notifications “serve for purposes of information only.” Parra 2013.

⁶⁷⁸ Schreuer 2001: 256–7, quoting *Kaiser Bauxite v Jamaica*, Decision on Jurisdiction.

⁶⁷⁹ Schmidt 1976.

⁶⁸⁰ Wikileaks ID: 1974KINGST0259_b from 13 June 1974.

⁶⁸¹ Wikileaks ID: 1974KINGST01706_b from 15 May 1974.

The ICSID cases caused disquiet within the US State Department. Throughout the dispute, the State Department worked overtime to avoid the appearance of putting diplomatic pressure on Jamaica, which would have given ammunition to Manley, one of the most eloquent statesmen of the NIEO.⁶⁸² The cables from the US Embassy in Kingston increasingly express frustration with the corporations pursuing ICSID cases, and in particular with Alcoa, the most recalcitrant.

[Former US Supreme Court Justice Arthur] Goldberg noted that it would be typical of Alcoa to go down in flames, possibly inviting expropriation with consequent OPIC claim, and pursuit of the ICSID suit, rather than accede to Jamaican demands, a course which could cause diplomatic problems for the US Government for a long time to come.⁶⁸³

Alcoa's position is, as usual, ambiguous. Apparently they mean to negotiate in good faith when the time comes, but from the strongest position they can possibly develop.⁶⁸⁴

Pittsburgh [Alcoa's headquarters] still 'trigger happy' and unwilling to change.⁶⁸⁵

The US Ambassador in Kingston reported that an Alcoa board member "indicated his immediate intention to express his dissatisfaction with the job being done by the American Ambassador to Secretary Kissinger" for not being "sufficiently supportive of Alcoa."⁶⁸⁶

This was an empty threat, since Kissinger was not especially sympathetic to Alcoa. He cabled an article from *The Washington Post* titled "Alcoa's Second Quarter Profits Soar" to Kingston just as ICSID proceedings were getting underway.⁶⁸⁷ Kissinger did not provide commentary, but organized the facts of the article into a suggestive outline:

(d) [Alcoa's] first half revenues were \$1.4 billion, and income was \$95.8 million
(g) Alcoa said earnings for the first six months [same time period as in d] were reduced about \$7 million because of Jamaica's unilateral action recently that 'increased by more than 700 percent taxes and royalties on bauxite mined in that country'.⁶⁸⁸

⁶⁸² The State Department also went out of its way to ensure an IBRD loan to Jamaica was approved during this time, although McNamara discussed the pending ICSID proceedings while approving the loan. Wikileaks cable: 1974KINGST02613_b from 29 July 1974. Also Wikileaks cable: 1974STATE194229_b from 4 September 1973.

⁶⁸³ Wikileaks ID: 1975KINGST02242_b from 11 June 1975.

⁶⁸⁴ Implicit in this quote is the sentiment that having jurisdiction at ICSID strengthens Alcoa's bargaining position, when negotiating with the Jamaican government, presumably eager to avoid an ICSID case. Wikileaks ID: 1975KINGST02242_b from 11 June 1975.

⁶⁸⁵ Wikileaks ID: 1975KINGST02414_b from 24 June 1975.

⁶⁸⁶ Wikileaks ID: 1975KINGST02414_b from 24 June 1975.

⁶⁸⁷ Wikileaks ID: 1974STATE158129_b from 22 July 1974.

⁶⁸⁸ Wikileaks ID: 1974STATE158129_b from 22 July 1974.

Kissinger's arrangement of these facts suggest frustration with Alcoa for drawing in diplomatic resources and risking backlash, when the financial impact had not exceeded \$7 million and the company recorded revenue over \$1 billion and record profits.

Ultimately, the corporations reached negotiated settlements with the Jamaican government and the ICSID cases were discontinued. Yet these three cases illustrated that advance consent to ICSID could have serious consequences for governments. The three companies had attempted to use advance consent to ICSID in order to gain a stronger bargaining position vis-à-vis the Jamaican government. In response, Manley could have chosen to exit ICSID. Manley could have spoken about ICSID on the floor of the General Assembly. He did neither. Manley, nor any other representative of the Jamaican government, ever raised the issue of advance consent to ICSID on the world stage.⁶⁸⁹ Apart from a few small steps, states did not alter their policies in response to these cases.⁶⁹⁰ The power of advance consent remained largely ignored. The Jamaican cases, despite their publicity, created little awareness of ICSID.

6.1.4 ICSID Overlooked in the UN CTC's Quest for Substantive Rules

Within the UN CTC, the focus was on substance, not procedure. When it came to disputes, UN CTC publications often emphasized dispute *prevention*, including at the stage of contract negotiation. The goal was conflict avoidance, or conflict resolution in a context other than formal adjudication. In a book published in 1975, Louis Wells, an academic closely involved with the UN CTC's work, argued:

The interest of lawyers in arbitration clauses has meant that these clauses are frequently the longest and most detailed provisions in agreements. In fact, the legal literature about concessions deals far more extensively with arbitration than with many technical issues – royalties, taxation, land use, employment, processing, and the like – which have been at the heart of most concession negotiations. ...To an extent, arbitration has proved inadequate for both the big job of revision and for the small jobs of interpretation. On the other hand, the mere presence of an arbitration mechanism may have assisted in the nonlitigious settlement of minor contract disputes.⁶⁹¹

⁶⁸⁹On May 22, 1974, the Jamaican Mission to the UN circulated a note about its bauxite, and permanent sovereignty over natural resources, but did not mention ICSID. Wikileaks ID: 1974USUNN01923_b from 22 May 1974.

⁶⁹⁰Guyana, another bauxite producing state, made an Article 25 (4) notification in 1974. Papua New Guinea, Saudi Arabia, and Israel would all make notifications under this Article within the decade. Saudi Arabia's notification "reserved the right of not submitting all questions pertaining to oil and...acts of sovereignty." ICSID 8/D. See also Schreuer 2001: 405.

⁶⁹¹Smith and Wells 1975: 122–123.

Wells conceded that arbitration might have a preventative function (as discussed in section 5.2.1) but most of the time, it was the wrong tool. His view that most investment disputes could be better resolved through non-litigious means, and substance deserved more attention, has considerable merit. Yet this view misses out on the way that direct access to arbitration shifts bargaining positions, and on the incremental expansion of ICSID jurisdiction.

UN CTC concentrated its resources on promulgating a Code of Conduct. The proposed code would have established rules for both the conduct of international investors in host countries and treatment by host governments. The UN CTC code was the most advanced of several proposals for multilateral, substantive rules on investment at the time.⁶⁹² In 1976, Philippe De Seynes described the aims and challenges of this work.

Some of us have not given up all hope of seeing the emergence of quasi judiciary international instances which were once visualized. ...the application of automatic and uniform rules...would have to be based on a very broad consensus, which is unlikely, as long as a climate of mutual confidence has not emerged and as long as it is felt more important to prevent any possible encroachment on national sovereignty. Yet they may gradually appear more acceptable when it is realized that coalitions and oligopolistic behavior not only are liable to create very unstable and turbulent conditions, but that they may also lead to solutions where all the parties involved are losers.⁶⁹³

Ultimately, the UN CTC code would end in frustration. Its demise was slow, however, and supporters, like Ibrahim Shihata, remained hopeful about the code for decades.⁶⁹⁴ During the 1970s, the UN CTC was the focal point for international negotiations on FDI.

⁶⁹² The Soviet Union supported the proposal for an International Trade Organization. Paul Goldberg and Charles Kindleberger proposed a GATT for investment in 1970, which was taken up by some in the US State Department. Goldberg and Kindleberger 1970: 295–325. The UN DESA report (1974: 100–102) noted both these efforts. OECD member states agreed the “OECD Declaration and Decisions on International Investment and Multinational Enterprises” in 1976.

⁶⁹³ De Seynes 1976: 15.

⁶⁹⁴ Writing in 1991, Shihata charted the obstacles to agreement. They remained largely the same issues that prevented agreement in past attempts: “Unresolved issues include the appropriateness of a general reference to international law, the precise wording of a formula for compensation of expropriated property (while host countries’ right of expropriation is not called into question), the scope of the so-called ‘National Treatment’ standard, and an endorsement of international arbitration for the resolution of disputes between investors and their host countries. Responsible for the slow pace of negotiations on these issues are the widely divergent – often incompatible – views on such fundamental questions as the applicability of customary international law to investment relations and which international rules govern expropriation and compensation.” Shihata 1991: 247–248.

Advance consent clauses were never a topic of sustained discussion at the UN CTC. The 1973 report discussed in section 6.1.2 above exemplifies this. After noting the limits on ICSID's use, the report observed that contracts providing advance consent to ICSID were spreading.

On the other hand, there have been a number of recent cases in which a resort to the settlement of disputes through this channel [ICSID] has been specified in agreements between host countries and multinational corporations.⁶⁹⁵

While that line of thinking might have invited further analysis, the report says nothing else about the desirability or implications of advance consent clauses. Advance consent was not on the UN CTC agenda in 1973.

Advance consent was rarely mentioned in later UN CTC publications either. In 1978, the UN CTC Reporter (a newsletter sent to a wide audience) contained an article on the growing network of BITs. The discussion about dispute settlement clauses does not mention advance consent, and obscures more than it illuminates about investor–state dispute resolution. The article reports:

In addition to fostering substantive agreement in the defined areas, such commercial treaties have fulfilled a variety of functions on the subject of dispute settlement. First, they have been instrumental in securing access by the nationals and companies of the contracting states to their respective courts for the purpose of obtaining judicial settlement of controversies. Secondly, they are used as vehicles to make provisions for matters such as commercial arbitration, for which no other practical media are available. Thirdly, they contain special compromissory clauses (without reservation), which usually stipulate that disputes concerning the interpretation or application of the treaty shall, if the parties do not settle them satisfactorily by diplomatic or other pacific means, be submitted by the contracting states either to arbitration or to the International Court of Justice.⁶⁹⁶

This description gives the reader no sense of the cost and benefits associated with advance consent. It provides no guidance for policymakers. Given the high quality of most UN CTC work, it is reasonable to expect UN CTC publications to provide clear analysis of dispute resolution clauses. They did not.

Dispute resolution clauses were low priority in the UN CTC Code of Conduct. In 1978, the Code of Conduct had three provisions on dispute resolution:

53. Entities of transnational corporations are subject to the jurisdiction of the countries in which they operate.

⁶⁹⁵ UN DESA 1974: 94.

⁶⁹⁶ "Information on Contracts and Agreements: Bilateral Commercial Treaties" 1978: 22.

54. Disputes between a state and a transnational corporation, which are not amicably settled between the parties, are subject to the jurisdiction of the courts and other authorities of that state and are to be submitted to them, except for disputes which the state has agreed to settle by arbitration or by other methods of dispute settlement.
55. The validity of clauses providing for selection of applicable law or the forum for settlement of disputes or for commercial arbitration in contracts between private parties, at least one of which is an entity of a transnational corporation, is to be determined by the national law of the countries concerned.⁶⁹⁷

These clauses are vague. They assert that local remedies and national law are the default jurisdiction for disputes, but they do not require the exhaustion of local remedies. Article 54 is ambiguous and provides no guidance for governments coming to terms with the emerging practice of including ICSID access in investment treaties.

Was it ever suggested that access to ICSID be incorporated into the UN CTC Code of Conduct? The ICSID Secretariat never made any public contribution to the UN CTC's work, or any public suggestion that the proposed code incorporate ICSID access.⁶⁹⁸ William Park, a lawyer and arbitrator, did write to the UN CTC and argue ICSID access should be included in the code.⁶⁹⁹ His letter was printed in the UN CTC Reporter in 1980. Park argued:

[It is] a matter of concern that Article 54 of the draft United Nations Code proposes, somewhat naively in the view of the writer, that in the event of a dispute between a TNC and a host country, the sovereign courts of that country should decide the dispute in the absence of any arbitral arrangements. ... It is suggested that, as to arbitration clauses, use of the World Bank ICSID should be encouraged. This appears to be a universally acceptable body. As to sovereign courts, it should be possible for TNCs to have access to international tribunals even though local remedies have not been exhausted, and without the TNC having to seek diplomatic protection from its national parent government.⁷⁰⁰

This is probably one of the earliest examples of a lawyer in private practice advocating the idea of investor–state arbitration for a policy audience. Many individuals within the UN CTC audience would have disputed his claim that ICSID “appears to be a universally acceptable body.” In 1980, ICSID membership was far from universal. Australia and New Zealand were both OECD members, but not ICSID members.

⁶⁹⁷ “Transnational Corporations: Code of Conduct; Formulations by the Chairman” 1978: 8.

⁶⁹⁸ The first CTC Reporter (December 1976) mentions cooperation with the ICC (page 25) but not with ICSID. It also reports on the activities of other international organizations active in investment, including WIPO, ILO, and UNIDO (page 22–23) but not ICSID.

⁶⁹⁹ Park would go on to be an arbitrator at ICSID. He was appointed to the ICSID Panel of Arbitrators for the US in 2008, and became President of the London Court of International Arbitration in 2010.

⁷⁰⁰ Park 1980: 2. Emphasis mine.

6.1.5 ICSID Ignored by Other Branches of the UN

While ICSID did make an occasional appearance in UN CTC work, it was never mentioned in resolutions adopted by other UN organizations during the period.

UNCTAD adopted many resolutions related to FDI in May 1972. These included resolutions on the relationship of foreign private investment to development;⁷⁰¹ restrictive business practices;⁷⁰² transfer of technology;⁷⁰³ export promotion;⁷⁰⁴ and the Charter of Economic Rights and Duties.⁷⁰⁵ None of these resolutions mentioned dispute settlement. These resolutions focused on expressing substantive principles.

In the 1970s, the General Assembly adopted resolutions that moved away from international arbitration. Arbitration was mentioned in the 1962 Declaration on Permanent Sovereignty over Natural Resources. The 1962 Resolution stated:

(4) Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the state taking such measures shall be exhausted. However, upon agreement by sovereign states and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.⁷⁰⁶

This resolution endorsed the idea of arbitration.⁷⁰⁷ That endorsement disappeared from similar resolutions in later years. In 1973, the General Assembly adopted Resolution 3171, which affirmed that: “any disputes which might arise should be settled in accordance with the national legislation of each state carrying out such measures.”⁷⁰⁸ In December 1974, the General Assembly adopted Resolution 3281, the Charter of Economic Rights and Duties of States. Article 2 (2c) of the Charter provided the right:

⁷⁰¹ UNCTAD Resolution 46 (III) Foreign Private Investment in its Relationship to Development. May, 19 1972.

⁷⁰² UNCTAD Resolution 73 (III) Restrictive Business Practices. May, 19 1972.

⁷⁰³ UNCTAD Resolution 39 (III). Transfer of Technology. May 16, 1972.

⁷⁰⁴ UNCTAD Resolution 75 (III) Export Promotion. May 19, 1972.

⁷⁰⁵ UNCTAD Resolution 45 (III). Charter of the Economic Rights and Duties of States. May, 18 1972.

⁷⁰⁶ UNGA Resolution 1803 (XVII) Permanent Sovereignty over Natural Resources. Adopted on December 14, 1962 by 87 votes in favor to two against, with 12 abstentions. Emphasis mine.

⁷⁰⁷ It is common for treaties, particularly within the UN system, to end with a clause about settling disputes through peaceful means. In a broader sense, both the UN approach and the ICSID approach share a common aim, which is to remove force (or the threat of force) from the settlement of disputes.

⁷⁰⁸ UNGA Resolution 3171 (XXVIII) December 17, 1973.

To nationalize, expropriate, or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing state and by its tribunals, unless it is freely and mutually agreed by all states concerned that other peaceful means be sought on the basis of the sovereign equality of states and in accordance with the principle of free choice of means.⁷⁰⁹

The 1974 formulation left open the possibility of arbitration, but did not endorse it. Arbitration is against the spirit of the resolution.

Despite the energy put into the drafting of these resolutions, their long-term legal impact fell short of their drafters' intentions. These resolutions were promulgated within the central forum of the international community, and were publicly heralded as resolutions that would change international economic law. While the Charter's sponsors wished the document to become legally binding, the General Assembly never reached a determination on the matter.⁷¹⁰ The resolutions were not enforceable.

6.2 Amid Neglect, ICSID Widens Access

Throughout the 1970s, as FDI received unprecedented scrutiny, ICSID received almost no attention. During this era, the ICSID Secretariat took several steps to widen access to ICSID. ICSID's leadership recognized that state membership was far from universal, and created means through which non-member states could engage with ICSID. These actions embedded ICSID in the international architecture for investment dispute resolution, and spread the practice of arbitration. The procedures created during this time—the Additional Facility, the regional centers of arbitration, and the appointing authority—have now operated for over two decades and continue to grow.

⁷⁰⁹ UNGA Resolution 3281 (XXIX) December 12, 1974. Adopted by a vote of 120 to six, with ten abstentions. The states voting against were: Belgium, Denmark, German Federal Republic, Luxembourg, and the US. Emphasis mine.

⁷¹⁰ Meagher 1979: 89.

6.2.1 Administrative Council Meetings

Administrative Council meetings were poorly attended in the 1970s. Often capital-exporting states had full representation, while many capital-importing state representatives were absent. The nature of participation also differed between the two types of states. Some capital-exporting states used the meetings as an opportunity to make substantive statements, despite the administrative character of the meeting. In contrast, when representatives from capital-importing states spoke at Administrative Council meetings, they did not raise the substantive points or rhetoric of the NIEO.

The next few paragraphs use the minutes of the 1972 Administrative Council Meeting to illustrate the nature of Administrative Council meetings. The 1972 Meeting is selected as a typical case: it is representative of most Administrative Council meetings during the 1970s. The Annual Meeting of the ICSID Administrative Council was roughly one hour long, and it was appended to the World Bank and IMF Annual Meetings. It was the only meeting of the year. In 1972, McNamara did not attend, nor did any other senior Bank officials, apart from Broches. A temporary replacement from Mauritania replaced McNamara as Chair. The meeting consisted of a short statement from Broches, a motion to adopt the budget, and then five statements from state representatives. Not enough representatives attended to adopt the budget.⁷¹¹ Of the 36 states that attended, 15 were capital-exporting states, and 21 were capital-importing states (including OECD members like Greece, Ireland, and Iceland as capital-importing states). Capital-exporting states had nearly complete representation, while dozens of capital-importing states were absent.

Four of the five statements were made by capital-exporting countries: the US, UK, Japan, and France. The representatives from the UK and the US made strong statements about investment protection. Both referenced and defined customary international law. Resolutions being passed on the floor of the General Assembly in the same year defined customary international

⁷¹¹ All representatives present at the meeting voted in favor of the budget, but that only totaled 36 state representatives—and at least 42 states were required to adopt the budget. The Convention requires two-thirds approval from member states to adopt the budget.

law differently.⁷¹² Yet at ICSID, the only voices in the debate were capital-exporting states.

The UK representative stated:

The United Kingdom has been concerned in the past year with the treatment received by foreign private investment in some countries where expropriations without adequate compensation had taken place. While the British government recognizes the right of countries to nationalize foreign owned investments, they hold that in order to meet generally accepted legal standards among civilized nations, such nationalization should be undertaken for a public purpose related to the internal needs of the taking state, and should be accompanied by the payment of prompt, adequate, and effective compensation.⁷¹³

The US representative echoed him, using the word “just” instead of “effective” compensation.

The US representative integrated the US definition of customary international law into his comments. He warned representatives that the US government would vote against loans if their states did not comply with the US standard of compensation after expropriation, or submit the dispute to ICSID. He said:

The President [Nixon, in his expropriation policy statement of January 18, 1972] had noted that one method of making reasonable provision for just compensation in an expropriation dispute was to refer the dispute to international arbitration under the auspices of ICSID. The Gonzalez amendment to the United States multilateral financial institution legislation had adopted a similar rationale. That amendment required that, in certain circumstances, the US vote against loans by the international development banks to an expropriating country. However, there was an exception which applied when investment disputes were submitted to ICSID for arbitration. Submitting a dispute to ICSID was viewed as equivalent to good-faith negotiations aimed at providing prompt, adequate, and effective compensation.⁷¹⁴

This comment is more assertive than the US stance in the Santiago consultative conference, discussed in chapter four. In Santiago, the US representative emphasized that ICSID was premised on consent. In this meeting eight years later, submitting a dispute to ICSID was equivalent to complying with the US standard of prompt, adequate, and effective compensation. ICSID was now machinery equivalent to customary international law, as defined by capital-exporting states.

Both the UK and US statements were intended to deter governments from expropriation. The US representative enumerated specific actions the US government would take to punish expropriating states, like the removal of aid mentioned above, as well as general harms, like the loss of “managerial assistance” and “diminishing flows of private funds and technology

⁷¹² As discussed in section 6.1.5 above.

⁷¹³ Sixth Annual Meeting: 8.

⁷¹⁴ Sixth Annual Meeting: 6–7. Emphasis mine.

vital to development.”⁷¹⁵ Meanwhile, the UK representative said that markets would punish expropriating states. In the words of the UK representative:

They did not believe that it was in the interest of developing countries – and they constantly had the interests of developing countries in mind – for foreign owned assets to be expropriated without adequate compensation; for when this happened, doubts were cast over the credit worthiness of the developing country, and this in turn was likely to deter much-needed new investment from overseas with the results that the pace of development itself would suffer.⁷¹⁶

The statements of the UK and the US were openly substantive, even prescriptive. The message was that ICSID was best practice.

There was no response from developing states. Only one representative from a capital-importing state spoke at the 1972 meeting, apart from the temporary Chair. That representative, from Liberia, did not say anything regarding substance. He made a plea for technical assistance. He acknowledged that Liberia had signed contracts without fully understanding their implications, and said he hoped the ICSID Secretariat could help developing countries better understand these contracts. The representative from Liberia:

Drew attention to the rate of return from the contractual arrangement for both parties. In the case of Liberia, over the years contractual arrangements for long terms have been so negotiated that the government and the people have not clearly appreciated the rate of return for these arrangements. ... He called the Centre’s attention to obtaining copies of some of these long-term arrangements in order to discover some of the anomalies and ambiguities, and perhaps present a form or a standard or a norm which most of the underdeveloped countries could follow. This would be of technical assistance to developing countries.⁷¹⁷

The Liberian representative viewed ICSID as a technical organization that could provide expert advice. He did not view it as a forum through which substantive standards could develop.

6.2.2 Additional Facility

The Additional Facility widens access to ICSID. It makes use of the Centre a possibility even if one of the two states (either the investor’s home state or the host state) has not ratified ICSID. Proceedings under the Additional Facility do not have the same automatic

⁷¹⁵ Sixth Annual Meeting: 6–7.

⁷¹⁶ Sixth Annual Meeting: 8.

⁷¹⁷ Sixth Annual Meeting: 7. Emphasis mine.

enforcement, but in other ways they mirror those conducted under ICSID.⁷¹⁸ Creating the Additional Facility was a substantial opening up of the Centre's mandate, yet it was accomplished with little controversy.

The creation of the Additional Facility mirrors the creation of ICSID itself in many ways. The first hint of the Additional Facility appeared in the 1975 Annual Report:

Investors from non-member countries and parties proposing to invest in non-member countries have repeatedly approached the Centre to inquire whether they could make use of the mechanisms laid down in the...Rules. In such circumstances, the Centre frequently advised the parties to provide for arbitration as much as possible in accordance with these mechanisms.⁷¹⁹

The next year, Broches suggested that ICSID's mandate be broadened, so it could administer fact-finding proceedings, which would be useful "in connection with the renegotiation by parties of investment agreements."⁷²⁰ During the next year, the contract renegotiation element was dropped from the proposal.⁷²¹

Broches and the Secretariat prepared a draft proposal for an Additional Facility, which was transmitted to Administrative Council members for comments in May 1977.⁷²² Parra recalls that:

Between May and September 1977, comments were received from the governments of 21 of the 68 contracting states. The responses were mostly positive. But several governments had doubts. One took the view that giving non-Contracting States and their nationals access to the Centre's facilities could deprive such states of the incentive to become parties to the Convention.⁷²³

The states that supported the logic of ICSID most consistently, the Netherlands and Belgium, were the states opposed to the Additional Facility's creation. They argued that the Additional Facility diminished the incentive for states to ratify.

⁷¹⁸ From a legal point of view, one of the key innovations of the ICSID Convention is its automatic enforcement. The ICSID Additional Facility does not have this automatic enforcement. This is a crucial difference, but in practice, contracts or treaties can be structured to use the New York Convention for enforcement, which renders this difference less important. See Annex for an example of this in a BIT.

⁷¹⁹ Ninth Annual Report: 4.

⁷²⁰ Tenth Annual Meeting: Annex.

⁷²¹ Yet Parra (2012: 142) notes "Broches was and would remain ardently in favor of such renegotiation where necessary to restore the economic equilibrium of long-term agreements in light of changed circumstances." See also Broches (1974: 519), in which he discusses inequitable agreements.

⁷²² "Administration by the Centre of Proceedings Outside the Scope of Article 25" May 13, 1977.

⁷²³ Parra (2012: 141–44) on the additional facility.

The debate over the Additional Facility occurred between capital-exporting states. In the 1978 Administrative Council meeting, the voices on record as supporting the proposal come from the UK, Denmark, France, Germany, Italy, Japan, the US, the Netherlands, and Belgium.⁷²⁴ The Additional Facility was created during that same meeting.⁷²⁵ As with ICSID itself, judging success required patience: “It will take some time before the Additional Facility becomes widely known and an assessment of the usefulness of the Additional Facility will have to wait.”⁷²⁶

The Additional Facility reflected both success and failure on ICSID’s part. Insofar as the creation of the Additional Facility widened access to the Centre, it was a success. At the same time, creating the Additional Facility was an admission of failure, or at least of limited success. Broches aspired to universal membership, but the Additional Facility is only necessary if states refuse to become members of ICSID. To create the Additional Facility required a pragmatic recognition that membership was—and would remain—far from universal.

Although the Additional Facility’s creation went largely unnoticed, it would have a lasting influence on investment law. The Additional Facility provided a pathway for bringing states that had not joined ICSID into the realm of investor-state arbitration. The Additional Facility integrated these states into the regime of investment law that was evolving through procedure and practice.⁷²⁷ Like ICSID itself, the Additional Facility was embedded in contracts and treaties. Hundreds of BITs and contracts were written providing access to the Additional Facility. For instance, no NAFTA cases go to ICSID itself: all NAFTA disputes filed at ICSID are Additional Facility cases.

⁷²⁴ Twelfth Annual Report: 3.

⁷²⁵ Twelfth Annual Report: 3.

⁷²⁶ Thirteenth Annual Report: 4.

⁷²⁷ Private arbitral organizations, like the ICC, provided alternate pathways to integrate these states into the regime, but the inter-state pedigree of the ICSID Additional Facility gives it more influence.

6.2.3 Reciprocal Arrangements with Kuala Lumpur and Cairo

During the 1970s, ICSID entered into reciprocal agreements with arbitration institutions in Kuala Lumpur and Cairo. Both agreements were the result of a partnership with the Asian-African Legal Consultative Committee (AALCC).⁷²⁸ The AALCC was an outcome of the 1955 Bandung Conference, which was attended by 29 newly independent countries that would go on to form the Non-Aligned Movement.⁷²⁹ By 1979, the membership of the AALCC stood at 37 members. Of these 37 members, 19 were members of ICSID.⁷³⁰ These were precisely the type of states in which access to ICSID was believed to be important.

The reciprocal agreements matter because they brought ICSID to the attention of policymakers in Asian and African countries. The agreements were signed between ICSID, the AALCC, and the two newly established regional centers for commercial arbitration. They provided for “reciprocal assistance in connection with proceedings conducted under the auspices of ICSID and the Kuala Lumpur (or Cairo) Centre respectively.”⁷³¹ The agreements were similar in substance to the arrangements between the PCA and ICSID concluded in 1968. It is not the text of the agreements that mattered. The reason these agreements are noteworthy is because they confirmed goodwill between ICSID and newly independent, capital-importing states. Amid the politics of the NIEO, what led to this cooperation between the AALCC and ICSID?

Biswanath Sen, Secretary-General of the AALCC, spearheaded the cooperation. Sen had close links with both the World Bank and with commercial arbitration. He had been the chief Indian negotiator for the implementation of the Indus Water Treaty, which was one of the World Bank’s most visible successes, as discussed in chapter three. He would go on to become a commercial arbitrator.⁷³² Sen and Broches shared a strong belief in arbitration. The two men brought the institutions they led closer together. The ICSID Annual Report notes:

⁷²⁸ The AALCC was originally known as the Asian-African Legal Consultative Committee, but is today known as the Asian-African Legal Consultative Organization (AALCO).

⁷²⁹ The final communiqué does not mention the organization by name, but the AALCC cites the conference as its origin. Indonesian Ministry of Foreign Affairs 1955: 161–169.

⁷³⁰ My calculation, using AALCC membership data and ICSID ratification data.

⁷³¹ Fourteenth Annual Report.

⁷³² Sen would do a lot of work with UNIDROIT in particular. Sen (undated).

Mr Sen attended the Thirteenth Annual Meeting of ICSID as a representative of the AALCC, and the Secretary-General of ICSID [Broches] attended the twenty-first session of the AALCC in Jakarta on April 24-May 1, 1980.⁷³³

Sen and Broches recognized that their respective institutions would benefit from an affiliation with the other. At the opening of the Cairo Arbitration Centre, for instance:

The signing ceremony in Cairo was presided over by the Minister of Justice, Mr Anwar A Abou Sehly. Mr B Sen (Secretary-General of the AALCC) and Mr Broches delivered lectures on their respective institutions.⁷³⁴

The association with the AALCC did not lead to any new black-letter law. It was one part of a slow spreading and embedding of arbitration around the world. The embedding of arbitral practice would have a lasting influence. The Kuala Lumpur and Cairo Regional Centres of Arbitration have been in continuous use since their creation. Today the Kuala Lumpur Centre handles dozens of commercial arbitrations each year.

6.2.4 Appointing Authority

In 1970, the ICSID Annual Report explained how parties could designate the Secretary-General as appointing authority, even if the arbitration was not held under the auspices of ICSID. The Report cited the ICJ as a precedent.⁷³⁵ The 1970 Annual Report suggested that parties “consult with the Centre before concluding such agreements and submit at least a draft of the disputes settlement procedure to it for comment.”⁷³⁶ This suggestion is similar to the ICSID Secretariat’s suggestion to parties that they include advance consent clauses in BITs, discussed in chapter five. Again, the ICSID Secretariat is in an advisory position, providing legal expertise.

The impact of appointing authority took decades to develop, just like the impact of advance consent. The Secretary-General was not asked to make any appointments during the 1960s or 1970s. During the 1980s, the Secretary-General was asked to make three appointments.⁷³⁷ The use of appointing authority developed because of model clauses. This time the model clauses

⁷³³ Fourteenth Annual Report.

⁷³⁴ Fourteenth Annual Report.

⁷³⁵ Fourth Annual Report: 5. The ICJ Statute does not mention appointing authority, but the President of the ICJ had long acted in this capacity. Discussed in Parra 2012: 151.

⁷³⁶ Fourth Annual Report: 5. Quoted in Parra 2012: 151.

⁷³⁷ Parra 2012: 153. Two cases in 1984, and one in 1988.

were the UNCITRAL Arbitration Rules.⁷³⁸ The UN General Assembly approved these Rules in 1976, but contracts and treaties incorporating them only became common in the 1980s. Article 6 of the Rules creates a need for appointing authority: “(b) If no appointing authority has been agreed upon by the parties, the name or names of one or more institutions or persons, one of whom would serve as appointing authority.”⁷³⁹

ICSID was not the only choice for appointing authority. The PCA was a popular choice for appointing authority, and issued model clauses specific to the UNCITRAL Arbitration Rules. ICSID did not issue a specific set of model clauses, but it made its advisory services available to states. ICSID became a common choice for appointing authority. Parra observes:

Towards the end of the 1980s, such UNCITRAL arbitration clauses referring to the ICSID Secretary-General as appointing authority were increasingly seen [in contracts]... UNCITRAL clauses of this kind began to appear in BITs a few years later.⁷⁴⁰

Appointing authority did not lead to any new black-letter law. Like the reciprocal agreements with Kuala Lumpur and Cairo, it was one part of a slow spreading and embedding of arbitration around the world.

The appointing authority was particularly effective at bringing states that had opposed the ICSID Convention into the realm of ICSID arbitration. Writing as Secretary-General in 1991, Shihata pointed out:

A notable example of this [appointing authority] may be found in several recent guarantee agreements executed by Brazil, which is not a member of ICSID, in respect of loans to Brazilian public entities by a national of Canada [a Canadian bank], which is not a member of ICSID either.⁷⁴¹

It is remarkable that two non-member states agreed to select the ICSID Secretary-General as appointing authority. This action demonstrates the success of modest multilateralism. Through a gradual evolution, the procedure was accepted, even by the states that had opposed the idea of investor–state arbitration most strongly.

⁷³⁸ Broches (1990) wrote a commentary on the UNCITRAL Model Law in his retirement.

⁷³⁹ UNCITRAL Arbitration Rules, Article 6.

⁷⁴⁰ Parra 2012: 152.

⁷⁴¹ Shihata 1991: 297, footnote 34. See also Delaume 1983: 13.

This section has demonstrated how access to ICSID was widened during the 1970s. The Secretariat took actions to embed investor–state arbitration in many legal frameworks. It created the Additional Facility, which opened access to ICSID to non-member states. It fostered goodwill with regional centers in Kuala Lumpur and Cairo. It provided guidance on how to designate the Secretary-General as the appointing authority. The idea of investor–state arbitration, and advance consent to it, was accepted incrementally around the world. The ICSID Secretariat was in the middle of these developments, even as it kept a low profile. Ultimately, the procedures put in place by the ICSID Secretariat would outlive the substantive standards promulgated during this era.

Conclusion

During the 1970s, the ICSID Secretariat continued its work without interruption. While debates over investment became confrontational in other international organizations, the Secretariat did not become a target for political attention. This was no accident—the ambiguity, expertise, and incrementalism that had served the Secretariat well in previous years continued to deflect political attention. The ICSID Administrative Council, despite having a similar voting structure to the UN General Assembly, even approved decisions that widened access to ICSID during these years.

The ways in which ICSID expanded—through the Additional Facility, reciprocal agreements, and appointing authority—all appeared minor and almost inconsequential. None of these expansions were an attempt to create binding black-letter law. Collectively, however, they spread the idea of investor-state arbitration and embedded ICSID itself into substantive agreements and frameworks. These actions contributed to the groundwork of a dispute resolution architecture that continues to settle hundreds of investment disputes per year. As the next chapter shows, after 1980 when policy attitudes toward FDI shifted again, the groundwork set down in earlier years was picked up again and began to be used much more frequently. Through the negotiation of treaties and the settlement of disputes, a body of practice has been developed, and continues to develop, which informs the practice of states and substantive law on investment.

The chapter compares the ICSID approach with the UN approach. During the 1970s, work within the UN system had a powerful mandate and capable leadership. Multiple efforts within the UN aimed at promulgating new substantive rules on investment. Different UN bodies passed resolutions, some that set out a vision for a NIEO, and others that provided detailed new law. None of these resolutions, however, would become binding or enforceable. Their lasting impact on international law or the practices of states is open to question.

The differences between the ICSID approach and the UN approach provide for a stark contrast. Three differences between the approaches are particularly instructive. The first is procedure versus substance. ICSID focused on procedure, while the UN focused on substance. The second is the level of ambition. ICSID took a minimalist approach, while the UN took a maximalist approach. The third is becoming a visible “legislative” hub for deliberation. The UN framed itself as a legislative organ. ICSID framed itself as a judicial and administrative organ, with no space for deliberation. This non-deliberative framing made it easier for ICSID to widen access, because it faced very little scrutiny. It also contributed to the fact that state representatives perceived the ICSID Secretariat as a center of technical expertise; state representatives came to ICSID for legal expertise and advice—they did not actively engage in its management or carry out deliberations under its auspices. This approach to international rule-creation raises questions about accountability, and the tradeoff between effectiveness and accountability, which are discussed in the conclusion.

Chapter Seven: Why Not Join ICSID? An Event History Model

The preceding chapters provide an analytic narrative of ICSID's creation and development. This chapter tests the conclusions of earlier chapters with quantitative tools. Can the reasoning used to explain why most states joined ICSID also explain why some states did not? Or why states ratify ICSID at different times?

This chapter argues any capital-importing state's receptiveness to the idea of ICSID is determined primarily by its ability to attract investment. This argument extends the findings of chapter four, in which the reactions of representatives correlated with the ability of their state to attract investment. If the state has characteristics that give it a long-term advantage in attracting FDI, it is less likely to ratify ICSID. The chapter also develops two alternate hypotheses to explain the variability in ratification, extending the discussion of existing literature in chapter two. The first alternate hypothesis is that institutional credibility determines a state's likelihood of ratifying ICSID. The second is that external coercion determines a state's likelihood of ratifying. All three hypotheses (ability to attract FDI, institutional credibility, and coercion) are evaluated with event history models. The models demonstrate that institutional credibility and coercion do not add anything to the explanation.

To anticipate the chapter's conclusions, the findings of other chapters are supported. Collectively, the chapters illuminate a fundamental but often underappreciated feature of the international investment regime. The intrinsic ability of states to attract investment shapes the contours of the international investment regime. ICSID is the only multilateral convention on investment. Of the BRICS states, only one of the five—China—is a member of ICSID. Equally, there is no treaty covering flows from the US to China, or to Brazil, or to Russia, or to South Africa, or to India. The intrinsic ability of states to attract investment places them in profoundly different positions when it comes to interacting with the international investment regime. Existing frameworks, which focus on institutional tools to enhance credibility, underplay the main story. Investment treaties cover a minority of the world's investment flows.

Using ICSID ratification as a dependent variable provides powerful insight into the larger investment regime.

7.1 The Dependent Variable

Ratification of the ICSID Convention is a new dependent variable, which I use to test the conclusions of other chapters. This section describes the observed variation in ICSID ratification, before demonstrating how it relates to other dependent variables used to study the international investment regime.

7.1.1 Signing and Ratifying

Ratification requires two steps. The first step is signing. There are over a dozen states that have signed, but not ratified, the ICSID Convention. The second step, ratifying, is the step with consequences, and the dependent variable in this thesis. Haftel and Thompson point out: “states are not legally bound by treaty commitments until they are ratified.”⁷⁴² Haftel observes that the difference between signing and ratification matters for theoretical accounts too. Here he focuses on how the difference between signing and ratifying affects credible commitment theories and signalling theories:

In order to generate *credible commitments*, treaties have to be in force – only then can they carry strong legal obligations and penalize noncompliance. ... International institutions may also serve as a *costly signal* of governments’ preferences and intentions ... here too, the ratification process and the legal obligations created by the treaty produce the kind of costs that render the signal possible.⁷⁴³

Ratification has its own politics, distinct from signing. It is more likely to be shaped by domestic political concerns and the structure of government than signing. Egger and Pfaffermayr, and Salacuse and Sullivan found the ratification of BITs had a greater positive effect on investment flows than signing.⁷⁴⁴ Ratification data is reported in the models below, and signing is used as a robustness check. The findings do not vary between the two.

⁷⁴² Haftel and Thompson 2013: 356.

⁷⁴³ Haftel 2010: 349.

⁷⁴⁴ Egger and Pfaffermayr 2004; Salacuse and Sullivan 2005: 109.

7.1.2 Describing the Variation in Ratification

State approaches to ICSID ratification vary widely. The figure below displays the number of ratifications in three-year intervals. Between 1965 and 1971, 47 states ratified. Chapter 4.4 discusses the initial ratifications: most were OECD states, former British colonies, and states in Sub-Saharan Africa. Of the twenty ratifications required for the Convention to enter into force, fifteen were African states.⁷⁴⁵

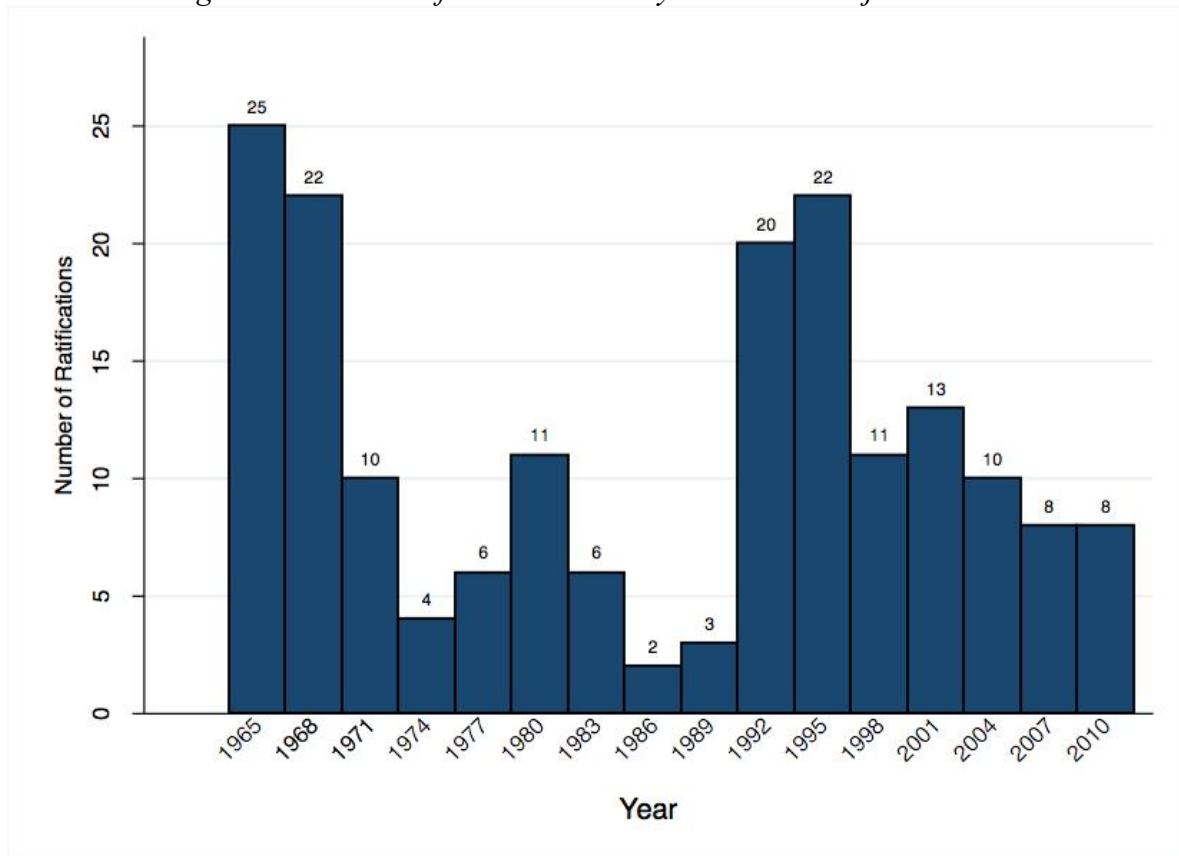
After 1971 the number of ratifications dropped off. This is consistent with geopolitical events and the changing nature of global debates about foreign investment, discussed in chapter seven. Then, in the early 1990s, the number of ratifications rose sharply, creating the second peak in the figure below. That peak represents the wave of ratifications across Eastern Europe and Central Asia. Nine Latin American states ratified during this period.⁷⁴⁶ These ratifications are in line with the changing ideas toward foreign investment. They occurred at the same time as the global trend toward liberalization and other policies intended to facilitate greater investment flows.⁷⁴⁷

⁷⁴⁵ The twenty states ratifications that brought the Convention into force were: Nigeria (23 Aug 1965), Mauritania (11 Jan 1966), Ivory Coast (16 Feb 1966), Central African Republic (28 February 1966), Gabon (4 April 1966), Uganda (22 June 1966), Uganda (22 June 1966), United States (10 June 1966), Tunisia (22 June 1966), Congo-Brazzaville (23 June 1966), Ghana (13 June 1966), Iceland (25 July 1966), Sierra Leone (2 August 1966), Malaysia (8 August 1966), Malawi (23 August 1966), Chad (29 August 1966), Upper Volta (29 August 1966), Malagasy Republic (6 September 1966), Dahomey (6 September 1966), Jamaica (9 September 1966) and the Netherlands (14 September 1966). See 4.4 for more detail.

⁷⁴⁶ The states in the Western hemisphere that joined between 1992–1997 are: Argentina, The Bahamas, Bolivia, Chile, Colombia, Costa Rica, Nicaragua, St Kitts and Nevis, and Venezuela. Bolivia and Venezuela have since denounced the Convention.

⁷⁴⁷ During the 1990s, 95% of the changes in foreign direct investment policy in developing countries were liberalizing rather than restrictive. Kobrin 2005. From 1992–2001, out of 1086 FDI policy changes, 1029 were liberalizing.

Figure 1. ICSID Ratification: in what years did states join ICSID?



Source: Author's calculations, using data from ICSID Secretariat.

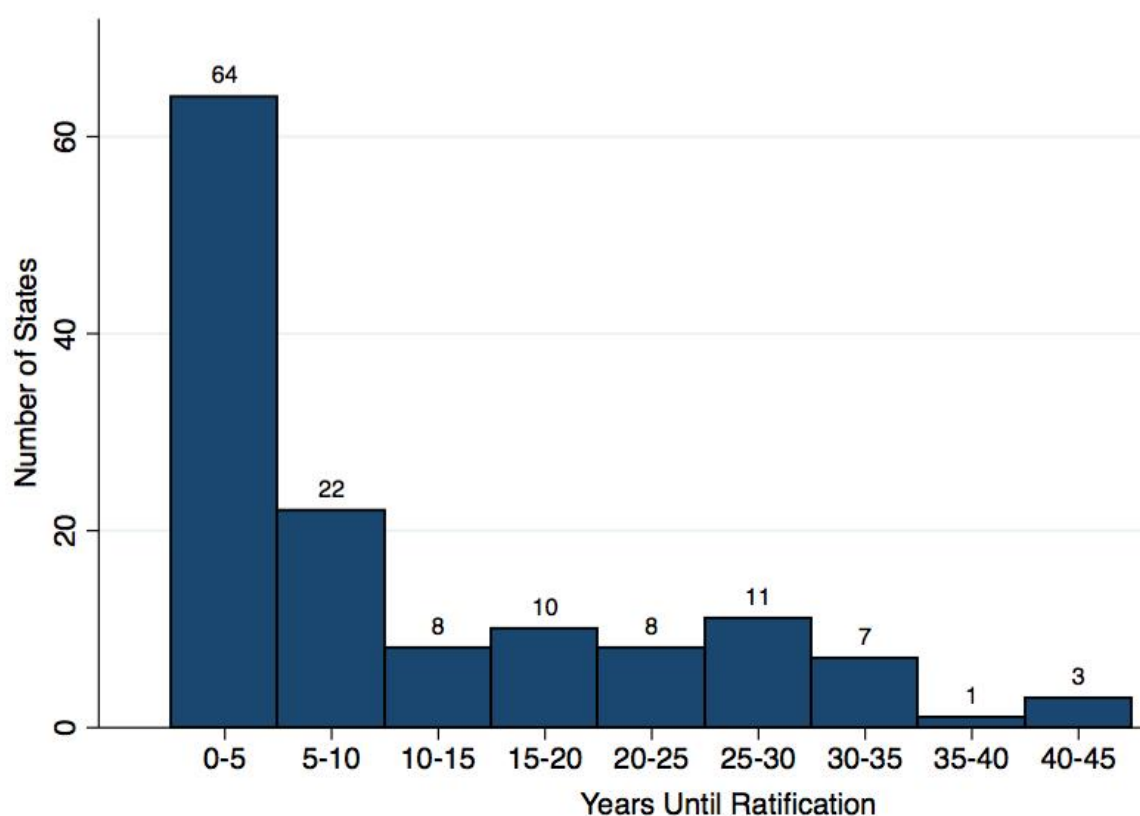
Most of the states that ratified after 1998 are relatively small, including Lebanon, Malta, Cape Verde, Syria, and Bulgaria. Many, like Kosovo, South Sudan, Montenegro, Serbia, and East Timor, were newly independent. Qatar and Brunei also ratified during this period, likely to protect their outward FDI. By 2010, an additional 60 non-OECD states had joined, bringing the total to 148.

Figure two emphasizes the number of eligible states that had not yet ratified, which is likely the way Broches and his staff viewed the situation. The figure below displays the years that elapsed between when a state became eligible to ratify ICSID, and when they actually joined.⁷⁴⁸ This figure, like figure one, only represents those states that eventually joined ICSID.⁷⁴⁹

⁷⁴⁸ States are eligible to join ICSID if they are members of the World Bank. The Convention provides an exception to this, but only Switzerland and the Seychelles have become members of ICSID without being members of the World Bank. Switzerland joined ICSID in 1967 and the World Bank in 1992. The Seychelles joined ICSID in 1978 and the World Bank in 1980.

⁷⁴⁹ These figures keep the two types of variation (if states ratify, and when they ratify) separate, but the models presented later in the chapter combine these two types of variation, and measure the dependent variable in a country-year format.

Figure 2. Delayed Ratification: How many years did states wait to join ICSID?



Source: Author's calculations, using data from ICSID Secretariat.

Figure 2 shows that many states waited decades to ratify: 48 states waited over a decade, and 30 states waited over two decades. Only 46% of states ratified ICSID within the first five years they were eligible to do so. The comparable figure for MIGA was over 90%.⁷⁵⁰ MIGA, the World Bank's insurance arm, is the best comparator, since it shares ICSID's two-step ratification process and general aim of facilitating investment flows.

ICSID membership is not universal. Brazil, Russia, India, Mexico, South Africa, Ethiopia, Thailand and Poland are among 40 member states of the World Bank that remain outside ICSID. Other arms of the World Bank have near universal membership, while ICSID's number of member states is substantially lower. After the admission of South Sudan in 2012, membership stood at 188 countries for IBRD, 184 for IFC, 172 for IDA, 176 for MIGA, and 148 for ICSID.⁷⁵¹

⁷⁵⁰ For ICSID, 64 out of 137 states. The count is 137 because I dropped Seychelles and Switzerland. For MIGA, it is around 162 states out of 179.

⁷⁵¹ "South Sudan Joins the World Bank Group." 2012.

7.2 Theory

The analytical narrative in previous chapters advanced an argument that the World Bank's strategy was the primary force behind ICSID's creation and development. The World Bank relied on its power to persuade, and not its power to compel, to spread the idea of ICSID. Ratifying ICSID became best practice. The power to persuade can be difficult to evaluate empirically. To do so, I identify states that should be less susceptible to it.

The three sections below identify states that should be more susceptible to the idea of ICSID, based on different theories discussed in chapter 2.5 of the thesis. The first section argues states that lack intrinsic attractiveness to FDI should be more susceptible; the second argues states that lack institutional credibility should be more susceptible; the third argues that coercion makes certain states more susceptible to the idea of ICSID.

7.2.1 Intrinsic Attractiveness to FDI

States with long-standing intrinsic advantages in attracting FDI, due to natural resource deposits or large domestic markets, should be less susceptible to new ideas about foreign investment being disseminated by the World Bank. These states have stronger pre-existing ideas about foreign investment and less need of external advice on how to attract it.

The determinants of investment are complex. The purpose here is to illuminate that states with a long-standing advantage in attracting FDI are less likely to ratify ICSID, *ceteris paribus*. Therefore, I select two types of state with a well-established ability to attract investment—natural resource exporters and states with large domestic markets—and develop hypotheses that they should be less likely to ratify ICSID. I add a third hypothesis to capture short-term dynamics, GDP growth rate, since Simmons (2014) argues business cycles can add to explanations of state behavior with regard to investment treaties. I illustrate each argument with a paired comparison, before articulating its logic.

Mozambique and Angola gained independence from Portugal in 1975, and independence was followed in both states by civil conflict. Today, both states have populations around 20 million, are experiencing sustained economic growth, and are SADC members. Mozambique joined MIGA in 1994 and ICSID in 1995, shortly after civil conflict died down. Angola joined MIGA in 1989, but never joined ICSID.

The overriding difference between the two states is that Angola's economy has been dominated by natural resource exports, while Mozambique's resource exports have been much smaller. Angola is one of the largest oil producers in the world, and also has considerable diamond and natural gas resources. In 2005, oil accounted for more than 52% of GDP, 78% of government revenues, and 93% of exports.⁷⁵² A state-owned entity, Group Sonangol, is the main facilitator of oil and gas production in Angola. Since independence, Group Sonangol has been "the key domestic actor in the economy, an island of competence thriving in tandem with the implosion of most other Angolan state institutions."⁷⁵³ Although there have been attempts to strengthen domestic legal frameworks in Angola, for the most part, Group Sonangol operates in parallel to domestic frameworks, not within them.⁷⁵⁴ Angola's institutions are weak.

Group Sonangol is the pivotal actor in the Angolan oil economy, and is in a position of negotiating strength vis-à-vis other parts of the Angolan government. Sonangol manages Angola's reputation for property rights with Western banks and oil companies. Sonangol has consistently delivered the predictability that foreign investors seek. This supports the conclusion that the Angolan government, under advisement of Sonangol officials, decided against ratifying ICSID because they provided security to investors in other ways, and did not expect investment in Angolan natural resource industries to be affected. In Mozambique, this process was absent.

⁷⁵² African Economic Outlook 2006: 108.

⁷⁵³ Soares de Oliveira 2007: 595.

⁷⁵⁴ Anderson 1993: 300.

The comparison of Angola and Mozambique suggests a few reasons why natural resource exporters should be less likely to ratify ICSID. The first is greater awareness. Oil and gas is the sector with the most experience of investor-state arbitration. It is also more institutionalized. The ECT is the world's only non-regional, multilateral treaty that refers disputes to ICSID.

States with large natural resource deposits are often in a stronger bargaining position with regard to investors than other types of states. Oil-rich states have less need to make assurances to investors—they remain attractive destinations for investment regardless.

The oil and gas industry is especially vulnerable to property rights violations, and is often considered a classic example of the obsolescing bargaining problem.⁷⁵⁵ Although many investment deals do not obsolesce in the way this bargaining theory predicts, its framing and parsimony still usefully illuminates certain characteristics of long-term investments. The characteristic relevant to my argument is that states with existing large, long-term investments are in a different position than states without such investments.

Major natural resource exporting states also have sophisticated strategies regarding investor-state arbitration. For instance, Iran has unparalleled experience with arbitration from the US-Iran Claims Tribunal.⁷⁵⁶ Yet Iran remains outside ICSID. This is not due to a strained relationship with the World Bank; Iran joined MIGA in 2003. Similarly, Iraq joined MIGA in 2007, but remains outside ICSID.

My first hypothesis is that natural resource exporters should be systematically less likely to join ICSID.

Large Domestic Markets

Bolivia and Brazil were both consistent in rejecting the idea of ICSID during the 1960s and 1970s. As chapter four noted, the Brazilian representative observed that the draft Convention

⁷⁵⁵ Vernon 1971. See Section 2.5.

⁷⁵⁶ The Iran-US Claims Tribunal was established in 1981, and has finalized over 3,900 cases.

raised “flagrant” constitutional problems during the Santiago consultative conference.⁷⁵⁷

During the 1990s, the idea of joining ICSID was brought up in both Bolivia and Brazil.

Bolivia signed in 1991 and ratified in 1995. Brazil did neither.

Reforms to attract foreign investors began in the early 1990s in Brazil. The government of Fernando Collor de Mello embarked on domestic liberalization, and took steps at the international level to raise investor confidence, including joining MIGA in 1990. Between 1994 and 1999, Brazil concluded 14 BITs. Investment arbitration, which had been included in the negotiated BITs, was a flashpoint in domestic ratification debates.⁷⁵⁸ There was concentrated ideological opposition in the Brazilian Congress to BITs. None of the BITs were ever ratified, and they were formally withdrawn from the Brazilian Congress in 2002.

During this time Brazil’s regional neighbors joined ICSID. Argentina, Brazil’s main competitor in South America, signed 57 BITs between 1990 and 2001, and signed the ICSID Convention in 1991. This competitive pressure motivated Brazilian policymakers to discuss BITs and ICSID, but was not enough to make them ratify. Although the issue was thoroughly discussed, the Brazilian legislature remained unconvinced that the benefits BITs might bring would outweigh their costs. Brazil’s executive was even more skeptical: “the lack of resolve in the executive branch with respect to the desirability of these treaties proved even more determinant of non-ratification than barriers faced in the legislative [branch].”⁷⁵⁹ The government—particularly the executive—found they were able to address investors’ demands through other channels, like domestic regulation. The Brazilian executive decided they had no need of BITs or ICSID.

The comparison of Bolivia with Brazil suggests larger capital-importing states are less likely to ratify the ICSID Convention. Yet the comparison does not identify a singular reason why that might be the case—it suggests many reasons. Intrinsic attractiveness to investors, credible commitment and coercion are all affected by size and mettle. Economic might and relative

⁷⁵⁷ ICSID 1970: 306.

⁷⁵⁸ Lemos and Campello 2011: 29.

⁷⁵⁹ Lemos and Campello 2011: 4.

power status suffuse through the decision making of larger states, making them less susceptible to external influences.

What is responsible for non-ratification—the large domestic market, the increased bureaucratic capacity or institutional credibility, or the increased ability to withstand coercion? The available indicators are not sensitive enough to provide a definitive answer. Tellingly, however, relatively high-capacity but smaller states do ratify. For instance, Chile ratified while Brazil has not. Sri Lanka ratified, while India has not. Estonia and the Czech Republic ratified, while Poland has not. Botswana ratified, while South Africa has not. The smaller state in each comparison had equivalent or superior institutional quality to the larger state.

The large domestic markets in regional powers tend to make them inherently more desirable for investment. They are more likely to be long-established gateways for foreign investment in the region, and have deeper capital markets and more advanced standard setting than other states in the region. These traits may insulate them from competitive pressures to a certain extent. Like natural resource exporting states, states with large domestic markets have less need for added credibility, and therefore are less willing to commit themselves by ratifying ICSID.

My second hypothesis is that capital importing states' likelihood of ratification should decrease as GDP increases.

GDP Growth Rate

Short-term advantages in attracting FDI might also affect ICSID ratification. GDP growth is a well-established determinant of foreign investment.⁷⁶⁰ Simmons' recent study emphasized that business cycles may explain the timing of BIT ratifications, or explain why states make concessions. She connected these short-term factors to credible commitments:

The literature shows theoretically and empirically that the need to make credible commitments in the context of bilateral negotiations has led to a competitive ratification dynamic. Power

⁷⁶⁰ Blonigen and Piger 2011.

asymmetries imply pressures on developing countries to make concessions to powerful exporting countries, and I show that business cycles contribute to patterns in concession making as well.⁷⁶¹

Credible commitment theory is not necessarily what connects low GDP growth rates to BIT ratification, or in this case, ICSID ratification. A government may want to be seen to be taking action, to send a message, but not necessarily consider their actions to be credible commitments.

For instance, a government might be engaged in negotiations to secure long-term loans for infrastructure projects. Then low GDP growth figures are released, and the government is concerned this will make the consortium of lenders pause. The government wants to be seen to be taking positive action to show their state is an investment-friendly jurisdiction. Since the consortium includes the IFC, the government wonders if ratifying ICSID—which the World Bank Guidelines (co-authored by the IFC) suggest is best practice—might be a feasible, fast, visible action that would impress the consortium. The ICSID Convention comes with no upfront costs, and the government downplays the risks of future claims, because the immediate payoff to ratification seems more important. Credibility does not necessarily enter into the calculation. Nor is the government sending a reliable signal in this hypothetical situation: the action is merely an attempt at messaging.

My third hypothesis is that capital importing states' likelihood of ratification should decrease as GDP growth increases.

7.2.2 Institutional Credibility

Ratifying ICSID, like ratifying BITs, is often viewed as a way states can bolster their credibility. States commit to the ICSID Convention in order to bolster their credibility, which in turn helps them gain competitive advantage in attracting investment. The logic of institutional credibility was set out in chapter 2.5 above. It is the dispute resolution provisions in BITs that make the promised standards credible. Access to an investor-state arbitration

⁷⁶¹ Simmons 2014: 40.

body raises the reputational and material costs of violating treaty commitments. Out of the options for investor-state arbitration, provisions that provide a pre-consent to ICSID are considered the most credible.⁷⁶²

In this approach, states with the most severe credibility problems are likeliest to tie their hands by ratifying ICSID. The likelihood of hands-tying actions corresponds to the severity of the credibility problem.⁷⁶³

Therefore, my fourth hypothesis is that capital importing states' likelihood of ratification should decrease as their institutional quality increases.

7.2.3 Coercion

Several existing accounts of the international investment regime emphasize bargaining power, as section 2.5 documented. Powerful states or international organizations are able to compel other states to accept particular arrangements. Capital-exporting states and the World Bank are the two actors who would be most likely to coerce states into ratifying the ICSID Convention. The moment at which coercion by capital-exporting states would be most likely to take place would be during BIT negotiations. The moment at which coercion by the World Bank would be most likely to take place would be during loan approvals. These arguments lead to my fifth and sixth hypotheses.

My fifth hypothesis is that capital-importing states' ratification should be associated with BIT negotiations with a major capital-exporter. To evaluate this hypothesis, I first consider descriptive statistical evidence, to see if there is an association between BIT negotiations with capital-exporting states and ratification.

⁷⁶² Allee and Peinhardt 2010: 2.

⁷⁶³ Allee and Peinhardt 2014: 60.

The foregoing chapters provide evidence of capital exporting states' preference for ICSID. Despite this preference, capital-exporting states did not take actions that strongly supported ICSID. Capital-exporting states were slow to incorporate ICSID into their bilateral investment treaties, and did not incorporate ICSID into the activities of their national insurance agencies. This ambivalence suggests that capital-exporting states did not insist their bilateral investment treaty partners join ICSID.

To evaluate this question systematically, I compiled data on the BITs of four major capital-exporters that led the BIT movement. The four states—Germany, the Netherlands, the United Kingdom, and the United States—are all consistent supporters of ICSID. To create the table below, I collected data on ICSID ratification and BIT ratification from the ICSID Secretariat, crosschecking information with UNCTAD where necessary. I moved chronologically through the BITs of each capital-exporting state, coding if their negotiating partner had been an ICSID member at the time the treaty came into force.⁷⁶⁴

The table below shows what percentage of their negotiating partners were members of ICSID when the BIT came into force. Given the asymmetric context of these BIT negotiations, we should expect these percentages to be close to 100%.

⁷⁶⁴ I flagged instances in which the negotiating partner joined ICSID between the BIT signing date and the date the BIT came into force. Many of these instances were US negotiations.

Table 6: *BITs Signed with ICSID Members, 1959-2010, inclusive*⁷⁶⁵

Capital-Exporting State	Number of BITs signed with ICSID members	Total Number of BITs Signed	BITs signed with ICSID members, as a Percent of Total BITs
Germany	61	132	46%
France	53	93	56%
The Netherlands	48	93	52%
United Kingdom	52	90	58%
United States	29	41	71%

All data from ICSID. This includes both the date of ICSID ratification for all states, as well as BIT data, which is reported to ICSID by member states. Accessed 31 August 2013.

The relatively low percentages demonstrate that capital-exporting states did not insist on ICSID membership. Perhaps, however, these results can be explained by the time period. Existing studies, including Allee and Peinhardt (2014) argue that capital-exporting states have a revealed preference for ICSID access, since their model BITs specify ICSID. As section 5.2.4 illustrated, many capital-exporting states incorporated ICSID access into their treaty practice slowly and somewhat haphazardly. For instance, Germany signed 51 bilateral investment treaties between 1959 and 1981. Only three of them included ICSID clauses. Yet after 1981, the German government included ICSID clauses in almost every BIT they signed. Perhaps the explanation for the low percentages in the table is that early BITs distort the results.

The table below presents the same information, limited to the years 1980–1995. By 1980, ICSID clauses were the preferred (and in some cases the only) dispute resolution option in the model BITs of the capital-exporters listed in the table.⁷⁶⁶ During these years, the drying up of debt financing and the end of the Cold War shifted the terms of most BIT negotiations even more in the favour of these four capital exporters. In many BIT negotiations during this era,

⁷⁶⁵ The figures in the table were calculated using the measure *BITs in force*. There is an alternate measure, *BITs signed*, which includes BITs that were successfully negotiated but were never ratified by one or both states. BITs that never came into force may be more likely to be signed with states that are not members of ICSID. Using the *BITs signed* measure does not affect any of the percentages by more than 5% either direction.

⁷⁶⁶ *Germany*: ICSID was the only option from 1980-2008. *The Netherlands*: preference from 1979, only option 1993 onward. *UK*: only option 1972-83, preference 1983-present. *US*: ICSID preference from 1982.

their model treaties were adopted without any changes. In other words, the states below could name their terms.

Therefore, we expect the percentages to be near 100%. Yet the figures in the table remain relatively low; they hover around 50%. Descriptive statistics strongly suggest that these four capital-exporting states did not insist their BIT partners join ICSID during this era.

Table 7: BITs Signed with ICSID Members, 1980-1995, inclusive

Capital-Exporting State	Number of BITs signed with ICSID members	Total Number of BITs Signed	BITs signed with ICSID members, as a Percent of Total BITs
Germany	30	56	53%
France	17	30	56%
The Netherlands	19	39	48%
United Kingdom	38	70	54%
United States	22	33	63%

All data from ICSID. This includes both the date of ICSID ratification for all states, as well as BIT data, which is reported to ICSID by member states. Accessed 31 August 2013.

Oral history evidence suggests certain ratifications were attributable to pressure, but there is not a general pattern of coercion. France may have pressured its West African colonies to join ICSID in the mid-1960s,⁷⁶⁷ and the US may have pressured Argentina, Turkey, and Russia to join ICSID in the early 1990s.⁷⁶⁸ The general pattern, however, is that ICSID membership was not required, even in profoundly asymmetric negotiations. The US negotiated BITs with

⁷⁶⁷ Georges Delaume led the translation of the Convention into French, and was often called upon for Bank missions to West Africa, as one of the Bank's few native French speaking staff at the time. In an oral history years later, he was asked about ICSID ratification by West African states.

Interviewer: "my impression is that initially a number of African countries, former colonial countries or countries in transition, did join ICSID early on."

Delaume: "Yes. They were pushed by the French." Delaume 2004: 13.

⁷⁶⁸ In off-the-record interviews, former officials suggested to me that a US BIT for these states was made conditional on ICSID membership. Validating this empirically is difficult, but the timing of their ratifications, and existing archival records do support this assertion. Argentina, Turkey, and Russia all waited to ratify ICSID until after their BITs had passed the US Senate (or in Russia's case, its BIT did not pass out of the Senate and they did not ratify ICSID.) Furthermore, archival materials contain suggestive exchanges. For instance, in a private meeting in 1990, the Argentine foreign minister announced that Argentina desired a BIT with the United States. The American Ambassador to Argentina responded:

"We can have a [bilateral investment] treaty any time if we solve one problem—the 'fork in the road.' We believe that our investors must be able to make a choice at the beginning of an investment dispute of whether to seek redress in local courts or through international arbitration." "Ambassador Todman to Minister Cavallo December 5, 1990."

Panama and Grenada in the 1980s. The Panama BIT came into force after the US military action against Noriega.⁷⁶⁹ The BIT with Grenada was negotiated three years after US military action in that country. The BIT negotiations took under an hour, were conducted in a Washington DC hospital, and the Grenada BIT is identical to the US Model.⁷⁷⁰ Yet neither state joined ICSID.

The evidence presented in the two tables above suggests that capital-exporting states did not pressure their BIT negotiating partners to join ICSID. Capital-exporters acted on their preference for ICSID by joining it themselves, thus endorsing it as the best practice for dispute resolution, but did not pressure their BIT negotiating partners to join.⁷⁷¹

World Bank Lending

The evidence in the preceding chapters demonstrates that the World Bank relied on its power to persuade, and not its power to impel a state to act a particular way by making a loan conditional on that action. There is no archival evidence to suggest the Bank used its leverage as a lending body to induce states to join ICSID. Instead, records show Bank officials explaining why they could not compel states to join. In 1970, Paul Szasz explained how he responded to American investors who asked him if Latin American states were members of ICSID, and hearing no, asked why the Bank could not induce them to join. Szasz was firm: “The Bank is precluded by its Articles of Agreement from exerting any political pressure on its members.”⁷⁷² While this principle may have become weaker in the McNamara and post-McNamara eras, it still seems unlikely, and ill advised, for the Bank to pressure states into joining ICSID. The idea of removing force and political pressure has long been at the center of ICSID’s appeal, and compelling states to join would undermine ICSID’s institutional legitimacy.

⁷⁶⁹ The BIT was negotiated and signed in 1982, before the deterioration of relations with General Noriega and five years before the American military action, but did not come into force until five years after.

⁷⁷⁰ Vandevelde 1992: 38.

⁷⁷¹ Pressuring states to join ICSID would damage the institutional legitimacy of ICSID. This is not in the long-term interests of capital-exporting states.

⁷⁷² Szasz 1970: 259.

ICSID membership has never been a condition of receiving a loan from IDA or IBRD. Yet, there is still a possibility that lending and ratification may overlap in practice, or be associated. State policymakers seeking to persuade Bank officials to lend might have pre-emptively joined ICSID. This leads to a sixth hypothesis, that ICSID ratification in capital-importing states is associated with negotiations preceding World Bank loans. In the models reported below, I use an aggregate measure, but in the robustness checks, I report models with IMF lending and IBRD lending individually.

7.2.4 Capital-Exporters and New York Convention Signatories

I expect to find strong empirical support for the argument that capital-exporting states are more likely to join ICSID than capital-importing states. The descriptive evidence in earlier chapters supports this hypothesis, and its logic operates in accordance with the ideational explanation. In the models below, I use two indicators for capital-exporting states: OECD membership and capital outflows.

I also expect to find strong support for the argument that ICSID ratification is associated with ratification of the New York Convention. Being a member of the New York Convention is a way that states show their acceptance of the idea of commercial arbitration. Commercial arbitration does not bring with it the sovereignty costs of investor-state arbitration, and is less controversial for governments. A strong association between the New York Convention and the ICSID Convention supports the ideational explanation advanced in the earlier chapters.

7.3 Empirical Methods and Data

I use event history analysis to estimate the time to ratification for the ICSID Convention. My analysis begins in 1965, the year the ICSID Convention opened for ratification. A state enters the population in 1965, or in the year it joins the World Bank, if after 1965. A state leaves the population when it ratifies the ICSID Convention. The last year for which I have data is 2010. The 40 states in my population that did not ratify before 2010 are right censored. Event history models deal well with right censoring, which is one of the reasons they are the most

appropriate technique for my data. I use a Cox proportional hazard model, because I do not have strong assumptions about the effect of time on the baseline hazard.

Since the focus of the analysis is a state's likelihood to ratify ICSID in a given year, the appropriate unit of analysis is the country-year. This means that for a state like Brazil, which was eligible to ratify from 1965–2010, I have 46 years of data, while for a state like Albania, which joined the Bank in 1991 and ratified ICSID in 1991, I only have one year of data. I account for this characteristic of the data with a cluster command.

Data

My dependent variable is the year a state ratifies ICSID. I described the patterns of ratification (and in particular resistance) earlier in the chapter. The dependent variable takes one of two forms: 0 if a state does not ratify the ICSID Convention in that year, 1 if a state does ratify in that year. After a state ratifies, it drops out of the population.

Fuel Exporters Indicator: There is a vibrant debate on how to properly measure natural resource endowments. Many projects use data on natural resource exports as a percent of GDP, or a percentage of merchandise exports.⁷⁷³ I use the percent of total exports that are fuel exports. Although exports data is imperfect, by narrowing my focus to fuel exports only, I was able to review the data to ensure that transit countries were not being counted as exporters. As a robustness check, I use natural resource exports as a binary variable, just as Elkins, Guzman, and Simmons did.⁷⁷⁴

Large GDP Indicator: There are three indicators commonly used to measure the attractiveness of a domestic market: GDP, GDP per capita, and population. Two questions guide market-seeking investment: are there lots of people to buy my products, and do they have the ability to buy them? I use GDP as my primary indicator, and population as a robustness check. I use the logged form of both GDP and population.

⁷⁷³ Ross (2006) is critical of this operationalization. Notably, where resource dependence is measured as a percentage of GDP, poor countries are more likely to be coded as resource dependent.

⁷⁷⁴ Elkins, Guzman Simmons (2006: 838) found “in every version of the model, a higher proportion of extractive industries in exports reduced the likelihood of a BIT.”

Institutional Quality Indicators: I follow the BIT literature, and employ four different indicators of institutional quality. The most important measure is the ICRG property rights variable. I also use executive constraints, polity 2 scores measuring democracy, and regime durability variables, from the PRS group.

BIT Negotiation Indicators: Using UNCTAD data, I coded BITs with Germany, the Netherlands, the UK, and the US. Since BIT negotiations are often relatively short, unlike trade negotiations, I did not lag this variable—I assumed the negotiation and the BIT signing took place in the same year. I coded the year a BIT was signed, but only coded BITs that eventually came into force.

World Bank Lending Indicators: Using data from the World Bank, I coded IBRD lending, IDA lending, and IMF lending, and created a composite indicator. The composite indicator is reported in the main models, and the IBRD and IMF indicators reported as robustness checks.

The tables below summarize the variables and their source.

Table 8: Theory Driven Variables

Type	Variable	Data Source
Dep.	Ratification	ICSID
H1	Fuel Exports	World Bank
H1	Market Size (Log GDP)	World Bank databank
H1	GDP Growth	World Bank databank
H2	Property Right Strength	ICRG, only available 1984-2010
H2	Polity2 Score	Polity IV
H2	Regime Durability	Polity IV
H2	Executive Constraints	Polity IV
H3	BIT with Germany	UNCTAD

H3	BIT with The Netherlands	UNCTAD
H3	BIT with UK	UNCTAD
H3	BIT with US	UNCTAD
H3	World Bank Lending	World Bank
C1	Capital-Exporting	OECD (alternate: capital inflows)
C2	New York Convention	UNCITRAL

Table 9: Control Variables and Variables Used in Robustness Checks

Variable	Data Source
Financial Liberalization	Chinn and Ito
Banking Crises	Laeven and Valencia (2012) Table A1.
IDA Lending	World Bank
IMF Lending	World Bank
Investment Inflows	UNCTAD and World Bank
Investment Inflows as a percent of GDP	UNCTAD and World Bank
Natural Resources (binary, 25% of exports, and continuous)	World Bank
Outflows	UNCTAD and World Bank
Outflows as a Percent of GDP	UNCTAD and World Bank
Population	World Bank
Region	World Bank
Sign (not ratify)	ICSID
Years since Independence	Central Intelligence Agency

7.4 Results

I report 13 different models, because I test the three main hypotheses (intrinsic determinants, institutional quality, and coercion) individually and report the results in dedicated tables. A

further 43 models are reported in Appendix 2, using alternate variables, additional year specifications, and other robustness checks.

The first table below, Table 10, reports the results for intrinsic determinants alone. Outflows as a percentage of GDP and Fuel Exports are consistently significant. The GDP variable is only weakly significant, and only once the New York Convention and OECD membership have been added to the model. Interestingly, the outflows variable remains significant once the OECD variable is added to the model. These results provide strong support for the Natural Resource hypothesis, and minimal support for the other two hypotheses about intrinsic determinants.

Table 10: Results for Intrinsic Determinants

	Model 1	Model 2	Model 3
Outflows	1.139**	1.134**	1.116**
(as a % of GDP)	(3.28)	(3.10)	(2.74)
Fuel Exports	1.002***	1.002***	1.001**
	(3.97)	(3.85)	(3.10)
GDP (logged)	0.974	0.962	0.882*
	(-0.50)	(-0.74)	(-2.01)
GDP Growth		1.024	
		(1.46)	
NY Convention			1.752*
			(2.48)
OECD			1.840*
			(2.25)
Number of observations	1496	1427	1496

*Hazard ratios; t statistics in parentheses * $p < 0.05$*

The next table, Table 11, shows the results for the institutional quality measures. Many of these indicators only go back to the 1980s, so these tests were run with fewer observations. Notably, none of these models provides support for the institutional quality variables. These variables are not systematically associated with ICSID ratification.

Table 11: Results for Institutional Quality

	Model 4	Model 5	Model 6
Property Rights	1.032 (0.29)	1.006 (0.05)	1.039 (0.48)
Polity2 (Democracy)	0.945 (-0.74)	0.939 (-0.80)	
Durability	0.992 (-0.93)	0.990 (-1.12)	
Executive Constraints	1.337 (1.18)	1.285 (0.97)	
NY Convention		1.801 (1.42)	2.140* (2.09)
OECD		1.496 (0.50)	1.010 (0.01)
Number of observations	832	832	919

*Hazard Ratios; t statistics in parentheses * $p < 0.05$*

The third results table, Table 12, presents the results of the coercion hypotheses. Model 7 and 9 test the aggregate BIT variable—which is a count variable that takes a value between 0 and 4, depending on the number of BITs the state had ratified with Germany, the Netherlands, the US, or the UK. Model 8 tests BITS with each one of these states independently. Interestingly, the association between German BITs and ICSID ratification is significant. This significance does not translate into substantive importance, however. The German BIT variable is significant because Germany’s BIT coverage was nearly universal—not because the German government insisted on ICSID membership for its negotiating partners. The descriptive statistics presented in section 7.2.3, tables 6 and 7, make it clear that Germany did not insist on ICSID membership.

Table 12: Results for Coercion

	Model 7	Model 8	Model 9
BIT	1.248 (1.24)		1.076 (0.39)
World Bank loan	1.095 (0.19)	1.009 (0.02)	1.239 (0.45)
BIT with Germany		1.989*** (3.34)	
BIT with the Netherlands		0.787 (-1.00)	
BIT with the UK		1.067 (0.21)	
BIT with the US		1.033 (0.10)	
OECD			2.357*** (3.45)
NY Convention			1.430* (1.99)
Number of Observations	2652	2671	2652
<i>Hazard ratios; t statistics in parentheses * p<0.05 ** p<0.01 *** p<0.001</i>			

The final table, Table 13, reports combined models with control variables. Fuel exports continues to be consistently significant. This provides robust evidence that fuel exporters are less likely to ratify ICSID. The GDP variable performs more strongly in these combined models: it is significant in all four models. Outflows and the New York Convention are both significant, as expected. Notably, outflows are still significant even with OECD membership added as an additional variable. GDP growth rate is not significant in any of the models. Similarly, GDP per capita, executive constraints, and polity 2 scores are not significant and do not change the results of other variables.

Table 13: Results for Combined Models, with Controls

	Model 10	Model 11	Model 12	Model 13
Fuel Exports	1.001** (2.95)	1.001** (2.94)	1.001** (2.78)	1.001** (2.78)
GDP (logged)	0.850* (-2.33)	0.851* (-2.32)	0.773** (-3.15)	0.776** (-3.10)
Outflows (as a % of GDP)	1.099* (2.25)	1.101* (2.28)	1.075* (2.03)	1.081* (2.12)
BIT	1.481 (1.32)	1.489 (1.32)	1.610 (1.48)	1.598 (1.43)
NY Convention	1.789* (2.52)	1.790* (2.52)	1.929** (2.91)	1.872** (2.76)
OECD	1.873* (2.23)	1.893* (2.35)	2.508*** (3.41)	2.600*** (3.49)
GDP Growth Rate	1.030 (1.57)	1.030 (1.57)	1.026 (1.24)	1.026 (1.26)
GDP per capita		1.000 (-0.13)	1.000 (-0.31)	1.000 (-0.36)
Executive Constraints			0.957 (-1.00)	1.093 (0.66)
Polity2				0.956 (-1.10)
Number of Observations	1412	1412	1220	1220

Hazard ratios; *t* statistics in parentheses **p*<0.05 ***p*<0.01 ****p*<0.001

Additional tables are provided in appendix 2, along with tests of the proportional hazard assumption.

Conclusion

These results support the conclusions reached in the earlier chapters. Capital-importing states that had more experience with FDI have been systematically less likely to ratify or slower to ratify ICSID. The statements of experts in chapter four are borne out statistically. The relationship between BIT ratification and ICSID ratification does not emerge as clearly from aggregate data. While a few BITs may have been made conditional on ICSID membership,

there is not a strong overall association between BITs and ICSID membership. Equally, there is not an association between World Bank lending and ICSID membership—except when the years are narrowed to 1980–1995. During this period, the relationship is very significant. This is outside the scope of the present thesis, but warrants further study.

These models provide a salutary reminder that credibility does not outweigh intrinsic attractiveness to investment. IR scholars often focus on the institutional tools, which might matter at the margin for a few investors, but are not the main story. Institutional tools did not achieve meaningful significance in any of the models. The results in these models suggest that a capital-importing state's intrinsic ability to attract investment is the primary determinant of its receptiveness to the idea of ICSID.

Using ICSID ratification as a dependent variable is a new way of studying what determines investment policymaking. It also provides a way of inverting the existing BIT-FDI literature. The ability of BITs (and related tools like ICSID) to impact investment flows is not often kept in perspective. BITs can, at best, play a limited role in helping to attract FDI. A recent UNCTAD publication reminded observers:

There is not and can never be a mono-causal link between the conclusion of an investment agreement and FDI inflows... Other factors such as the economic attractiveness of a country, its market size, its labour force, or its endowment with natural resources may be much more important.⁷⁷⁵

The models presented here demonstrate that two of these factors—natural resource exports and market size, as measured by GDP—demonstrably affect the likelihood that a state will ratify ICSID. What determines the likelihood that states will sign a BIT? How does intrinsic attractiveness to investment affect the likelihood of a state signing a BIT? Just as BITs (and related tools like ICSID) may impact investment flows, the ability of states to attract investment may impact their policy toward BITs or ICSID. These questions fall outside the scope of the present study, but warrant study in the future.

⁷⁷⁵ UNCTAD 2009: 6.

Conclusion

The introduction posed four questions. What drove ICSID's creation? Why do states join ICSID? How has ICSID influenced the international legal regime on investment? How has ICSID endured in the contentious arena of investment protection? Each of these questions has been explored in turn, in chapters three, four, five, and six. The answers reached and their implications are summarized here, in the first section of this chapter. The second section turns to ICSID's development since 1980, and illustrates how modest multilateralism made possible ICSID's recent growth.

After chapters one and two framed the context and questions, chapter three examined ICSID's genesis. There were many obstacles to the creation of a multilateral organization dedicated to investment, and the birth of such an organization was especially improbable within the World Bank. The Bank's member states were sharply divided on the issue of investment protection, and the small World Bank of the 1960s was hesitant to wade into controversy. Yet the Bank's main business, lending to capital-importing countries, was disrupted by disputes over expropriation, and the Bank's management believed that international machinery to resolve investment disputes was needed.

Chapter three argues that the Bank tactically employed ambiguity to make the proposal for ICSID feasible. The proposal contained no substance—only procedure. When ICSID's framers sensed areas of disagreement, they avoided them. During the drafting committee, a roll call vote was taken to decide if an issue was controversial; if it was, then that issue was removed from discussion. The consultative conferences and drafting committee were designed to prevent opposition to the ICSID Convention from uniting. So, what drove ICSID's creation? A perceived need for dispute resolution machinery motivated ICSID's creation, but ambiguity was what protected the proposal from the political disagreements that otherwise would have defeated it.

Chapter four analyzed initial state responses to the idea of ICSID. Previous attempts to create multilateral organizations on investment failed at the drafting stage, and ICSID's success at

this stage seemed unlikely. The Convention's success rested on the reaction of representatives from capital-importing states, and on the avoidance of politicking by all parties. To elevate the discussions away from politics, the Bank invited states to send legal experts as their representatives, even if these individuals were not government officials. Legal training meant these individuals were familiar with arbitration, more likely to view it as an appropriate method of dispute resolution, and more likely to frame problems and solutions in the same language.

Despite their shared methods and language, representatives expressed a wide variety of views about ICSID during the consultative conferences. Some experts from capital-importing states were convinced by the Bank's argument that joining ICSID would improve their investment climate, but others questioned if joining ICSID could facilitate investment flows. While the Bank argued that ICSID merely institutionalized existing practice, many representatives found the Convention's potential legal implications unsettling. Several representatives expressed concern about the consequences of elevating investors to equal standing with states. Others, especially in the Asian consultative conference, were concerned that the Convention might have public policy implications, and in particular that it might constrain domestic policymaking. Many representatives sought tighter limits on the Convention's jurisdiction, and were dismayed by Broches' refusal to define key terms like investor or investment. The Bank relied on the Convention's double-consent requirement to assuage these concerns.

Why do states join ICSID? While some capital-importing states joined ICSID out of a belief that it would improve their investment climate, most policymakers did not believe this potential benefit justified the potential sovereignty costs associated with joining ICSID. Chapter four argues that the legal expertise-based community of practice that grew during and after ICSID's drafting—embedding ICSID in the international architecture and developing it into best practice—provides the primary explanation for why states join.

Chapter five probed the ICSID Secretariat's promotion of advance consent. Shortly after the Convention came into force, the Secretariat released Model Clauses providing guidance for

states and investors on how to consent to ICSID's jurisdiction. As part of the World Bank, the Secretariat had privileged access to governments, and recommended advance consent with an authority that commercial arbitration institutions could not have matched. At the Secretariat's recommendation, thirteen states enshrined direct access to ICSID in their constitutions—a unilateral ceding of sovereignty. The Secretariat's promotion of advance consent in BITs was even more influential. Following the Secretariat's advice, several European states inserted advance consent clauses in their model BITs, and these clauses subsequently became standard practice for BITs around the world. If ICSID had never been created, advance consent clauses are unlikely to have spread in the manner they did. The ICSID Secretariat played a pivotal role in their initial spread, and the available evidence does not bring forth any other actors that could have played this role.

The advocacy of Secretariat staff in its first years created the conditions for a fundamental redefining of international investment law. The creation of ICSID, a public, inter-state legal organization, gave the idea of investor-state arbitration more credibility than arbitrations organized by commercial organizations like the ICC, or *ad hoc* arbitrations. The Secretariat also encouraged and enabled the growth of precedent, for instance by making the legal reasoning of ICSID cases public, unlike other arbitration institutions. ICSID has always been more than a passive provider of facilities for dispute resolution.

How has ICSID influenced the legal regime on investment? The Convention had little impact initially. Chapter five argues that its influence grew incrementally, as ICSID became embedded in investment agreements through advance consent clauses. The Secretariat established itself as a provider of technical assistance and used its superior access to governments to advance the idea of investor-state arbitration. The Secretariat continues to influence the legal regime on investment today using the same tools. ICSID's Secretary-General recently observed the organization has a “complementary role in disseminating knowledge”⁷⁷⁶ and the Secretariat continues to be a hub of technical expertise.⁷⁷⁷

⁷⁷⁶ Caron 2010: 416.

⁷⁷⁷ For example, Shihata (1993: 104) notes that ICSID staff members were integral in drafting the 1992 World Bank Guidelines on Investment Protection. See also Parra 2012: 207.

Chapter six compares “the ICSID approach” with “the UN approach” to investment law during the 1970s. The structure of ICSID does not create spaces for deliberation, while several UN bodies facilitated vibrant debate during this decade. While the UN General Assembly and subsidiary UN organs are akin to legislative branches of government, ICSID is a judicial branch. This structure means that even when global discussions related to investment protection are afoot, these discussions stay outside ICSID. In the 1970s, the UN CTC began to develop technical assistance to help poor states renegotiate concession contracts, something squarely within ICSID’s remit, yet the Secretariat did not get involved.

During the same years, however, the Secretariat continued to widen access to ICSID through incremental steps. Broches led the creation of the Additional Facility, which enabled states that were not ICSID members to participate in arbitrations organized by ICSID, thereby expanding ICSID’s potential caseload. ICSID’s work also grew as treaties came into force that conferred appointing authority on the ICSID Secretary-General, and after the Secretariat made reciprocal arrangements with new arbitration centers in Kuala Lumpur and Cairo. These arrangements were made not with government representatives, but with commercial legal experts. The Additional Facility, the appointing authority, and the reciprocal arrangements were all part of an incremental, expert-led expansion. These actions spread the idea of investor-state arbitration and embedded ICSID into substantive agreements.

How has ICSID endured in the contentious arena of investment protection? During the 1970s, the Secretariat continued to employ ambiguity, expertise, and incrementalism. This strategy enabled the Secretariat to stay out of high-level political debates and continue expanding through a series of small steps.

Chapter seven tested the conclusions of the previous chapters with statistical methods. Chapter four noted that particular types of states were more likely to ratify, and chapter five explored a relationship between BITs and ICSID ratification. Chapter seven constructed hypotheses to see if these patterns are borne out with statistical evidence. It found that coercion, either from

capital-exporting states or from the World Bank, does not provide a systematic explanation of ICSID ratification. Although coercion from capital-exporting states was present in a few cases, it is not a generalizable explanation of ratification. Chapter seven also developed hypotheses from the existing literature on BITs, but did not find evidence to support them.

Chapter seven found that states' intrinsic ability to attract investment is the primary determinant of their likelihood to ratify ICSID. The event history models strongly support the argument that natural resource exporters are less likely to ratify. The models also support the hypothesis that non-OECD states with large GDPs are less likely to ratify. For instance, Brazil, Russia, India, and South Africa—all the BRIC countries except China—remain outside ICSID. The intrinsic ability of states to attract investment shapes their participation in the international investment regime.

Implications of Modest Multilateralism

This thesis closes in 1980. In the decades since, ICSID's caseload has expanded exponentially and ICSID has become a target for public criticism. In many ways the organization is unrecognizable, yet the principles of modest multilateralism still undergird ICSID's operations.

The separation of procedure and substance in ICSID enables it to withstand the type of public criticism that can prompt redesign of an IO or its disuse by states. ICSID first attracted civil society attention during a case against Bolivia over water privatization in 2001.⁷⁷⁸ Sharp rises in water prices sparked protests in Cochabamba, and the civil unrest led to hundreds of injuries and the death of a teenager. Long feature articles in *Le Monde*, *The New Yorker*, and other newspapers around the world turned *la guerra del agua* (the Water War) into “a *cause célèbre* for the anti-globalist movement.”⁷⁷⁹ It was a “David-versus-Goliath face-off” and ICSID was a part of Goliath.⁷⁸⁰

⁷⁷⁸ *Agua del Tunari, S.A. v Republic of Bolivia* (ICSID).

⁷⁷⁹ De Gramont 2006: 2.

⁷⁸⁰ A front-page article in the *San Francisco Chronicle* began “In a David-versus-Goliath face-off...” to describe Bechtel's case against Bolivia at ICSID. Langman 2002.

ICSID was in the spotlight throughout the 2000s. Fifty cases were registered against Argentina in the wake of an economic crisis, and tribunals came to opposite conclusions on identical facts.⁷⁸¹ Other cases provoked concern that investor-state arbitration would have a chilling effect on environmental protection, after tribunals found domestic environmental legislation violated NAFTA provisions.⁷⁸² Then well-publicized cases filed by a tobacco company led to widespread concerns that investor-state arbitration would have a chilling effect on public health legislation.⁷⁸³ Concerns like these are amplified by the growth in ICSID's caseload: while ICSID registered only 9 cases between 1965 and 1980, it has registered 464 cases since 1980.⁷⁸⁴

Yet ICSID endures. Reform efforts struggle to gain traction because their target is diffuse, reflecting the regime's disaggregated nature. There is no single entity that holds interpretive power. State negotiators hold the power to make the substantive law in the first instance.⁷⁸⁵ Secondly arbitrators hold interpretive power. Yet these groups do not overlap or communicate, nor are they obligated to respond to concerns like those mentioned in the prior paragraph. These concerns and controversies have not yet had a measurable impact on advance consent clauses: negotiators continue to insert ICSID clauses into treaties as the first dispute resolution option.⁷⁸⁶ A recent study commissioned by the OECD Secretariat surveyed 1,660 bilateral investment treaties and found that between 80% and 100% of the treaties signed each year after 1980 mention ICSID.⁷⁸⁷

ICSID is the dominant institution of investor-state arbitration, yet the ICSID Secretariat is constrained in its ability to coordinate solutions to problems that arise. Some critics, like Trakman, do not accept that the ICSID Secretariat lacks culpability:

⁷⁸¹ Waibel 2007.

⁷⁸² Most famously, *Metalclad v Mexico* (ICSID A/F). Expressing concern: Mann and von Moltke 1999; Dodge 2000; Abbott 2000; Cosbey 2003; Tienhaara 2009. Arguing the concerns are overstated: Gudofsky 2000; Park and Alvarez 2003.

⁷⁸³ *Philip Morris v Uruguay* (ICSID), *Philip Morris v Australia* (UNCITRAL), *Ukraine v Australia* (WTO). Expressing concern: Vadi 2009; Lin 2014; Mitchell and Voon 2014.

⁷⁸⁴ As of June 30, 2014, ICSID had registered 473 cases total, under the ICSID Convention and Additional Facility Rules. ICSID (2014-2): 7.

⁷⁸⁵ Roberts (2010) argues that states establish dual roles for themselves as treaty parties and respondents—and could use their interpretive power to greater effect. See also Kulick 2012.

⁷⁸⁶ For example, Article 13 of the China-Mexico BIT (2008), which is a testament to ICSID's acceptance, given China's history of skepticism towards ICSID and Mexico's non-membership.

⁷⁸⁷ Pohl, Mashigo, Nolan 2012: 21.

A contrite and diffident defense of the ICSID is that its problems can be ascribed to the complexity of the multiple layers of investment law, that many of these layers are outside of its control, and that the ICSID has attempted to redress those complexities that are within its control.⁷⁸⁸

Trakman's criticism fails to appreciate the real constraints on the Secretariat. To understand why ICSID has a limited ability to act requires understanding its design, and its design is bound up with its history. The historical account presented in this thesis shows an organization created through a skillful use of ambiguity, which grew through an expert-led, incremental expansion. An organization with these traits is ill equipped to grapple with crisis.

To date, the most serious challenges to investor-state arbitration have appeared during intra-OECD negotiations.⁷⁸⁹ When OECD states become respondents, investor-state arbitration becomes salient in the domestic politics of these states. The US government began to consider itself a respondent with NAFTA. As two US officials write:

US experience in arbitration under NAFTA Chapter 11, beginning in the late 1990s, focused the US Government's attention more sharply on its role as a respondent state in investor-state arbitration.⁷⁹⁰

From that point forward, investor-state arbitration came under intense scrutiny in the US. For many Western European governments, it was the Energy Charter Treaty that focused policymaker minds on the complications of being a respondent.⁷⁹¹ These developments are remarkably recent—for decades, governments in capital-exporting states thought it inconceivable that they might be respondents. As Parra writes:

In the mid-1980s, the Walt Disney Company proposed that France agree to the ICSID arbitral settlement of disputes that might arise between them in relation to the construction of what became Disneyland Paris. A French official was reported to have snapped: "Disney's request for ICSID was shocking and a bit dumb. France is not a banana republic".⁷⁹²

Twenty years on, the French government is taking its decision to provide American investors with access to ICSID (in the TTIP negotiations) very seriously.⁷⁹³

⁷⁸⁸ Trakman 2012: 605.

⁷⁸⁹ Waibel et al (2010: 1) observe, "The Achilles heel of the current investment treaty regime... is a loss of confidence among major developed countries."

⁷⁹⁰ Caplan and Shape 2013: 756. See also Menaker 2004 and Legum 2004.

⁷⁹¹ Most noticeably in *Vattenfall v Germany* (ICSID).

⁷⁹² Parra 2012: 136.

⁷⁹³ Yet even today, there is a lingering belief that ICSID cases are filed against "poor governance" states only. Recently the European Commissioner for Trade Karel De Gucht (2014) told the German Bundesrat that access to investor-state arbitration was included in the TTIP to provide a model for developing states.

In debates over TTIP, investor-state arbitration is portrayed as a corporate tool, but the evidence marshaled in this thesis suggests that ICSID's framers did not set out to advance corporate interests. ICSID was not the craven instrument of investors. It was driven by more noble, interstate, peacekeeping aims. Its framers were all international bureaucrats, and its three primary promoters (Broches, Szasz, and Delaume) all pursued international legal education as refugees from World War II. These individuals believed in the power of law to keep peace: it was the UN Charter, and its aim of removing the force from dispute settlement, which inspired them.

As Secretary-General, Broches believed international law was no longer a tool of the strong against the weak. In a speech to the ILA in 1973, Broches chastised the international community for failing to improve the quality of life in poor states:

We failed to meet adequately the moral obligations accepted in all civilized societies since the beginning of time, the obligations of the strong to help the weak. These moral obligations toward which international law is moving, however slowly and painfully, to recognize as legal obligations, exist not only between rich and poor societies, but also between any given society and its poor members.⁷⁹⁴

Broches challenged his audience: "to help create the conditions for economic and social progress, with dignity and in freedom, remembering that the ultimate object of law is the welfare of mankind."⁷⁹⁵ These were not remorseful comments from a retired man. In 1973, Broches was in his prime, travelling the world asking states to provide advance consent to ICSID, because he believed in the power of law.

Broches viewed advance consent as the advance of law, something that would help prevent the use of force. Broches, Szasz, Delaume, and others believed ICSID was balanced. It was meant to improve the position of host states. Broches argued strongly against characterizations of it as something that unduly favored investors:

The Convention has sometimes been regarded as an instrument for the protection of private foreign investment. This characterization is one-sided and too narrow. The purpose of the Convention is to promote private foreign investment by improving the foreign investment climate for investors and host states alike. The drafters have taken great care to make it a balanced instrument serving the interests of host states as well as investors.⁷⁹⁶

⁷⁹⁴ Broches [1973] 1995: 514.

⁷⁹⁵ Broches [1973] 1995: 516. Emphasis mine.

⁷⁹⁶ Broches [1972] 1995: 197.

Yet by proselytizing the idea of advanced consent, Broches may have unintentionally shifted the balance in favor of investors. He sought to reduce risk and thereby elevate poor countries into a better negotiating position, but direct access to binding arbitration may have the opposite effect in some cases. The Jamaica cases explored in chapter six demonstrate that investors may file cases at ICSID just to strengthen their bargaining positions. Even when disputes are settled “in the shadow of ICSID” without cases being filed, investors may get better settlements because the state seeks to avoid the cost and reputational damage of an ICSID case. Advance consent has helped to create a system in which many argue that foreign investors have greater rights than domestic investors.⁷⁹⁷

Experts, governments, and civil society campaigners today ask questions in a context that Broches and other framers of ICSID could not have anticipated. Yet more often than not, they ask the same question that hounded ICSID’s framers: what law, whose law, should govern international investment? In 1969, Schwarzenberger argued that ICSID’s lack of substance leads right back to debates about substance.

In a circuitous way, the IBRD Convention on Investment Disputes of 1965 led back to the issue the draftsmen of the IBRD Convention had tried hard to evade: the substantive rules of international law governing the protection of foreign property.⁷⁹⁸

ICSID’s development enabled a community of practice to grow around the idea of investor-state arbitration. Despite this community’s growth, and the resilience of the arrangements governing international investment, large questions remain.

⁷⁹⁷ Lowe (2007: 49) notes, “the consequence is plain and inescapable. BITs give foreign investors wider rights than nationals possess.” See also Kleinheisterkamp (forthcoming).

⁷⁹⁸ Schwarzenberger 1969: 153.

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1962, Germany-Cameroon.
1968, Indonesia-Netherlands.
1969, Chad-Italy.
1970, Belgium-Indonesia.
1976, UK-Indonesia.
1980, UK-Phillippines.
1981, Germany-Somalia.
1990, US-Poland.
1994, UK-South Africa (IPPA).
1995, South Africa-Canada.

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Third session: Proceedings of the United Nations Conference on Trade and Development, Third Session, vol. I, Report and Annexes (United Nations publication, Sales No. E.73.II.D.4), annex 1Д, pp. 51-114.)

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Appendix 1: Enforcement Through the New York Convention

The enforcement provisions of the ICSID Convention are one of the primary advantages of ICSID arbitration, compared with the ICSID Additional Facility or other organizations that administer investor-state arbitrations. However, it is possible to create a very similar system of enforcement through the New York Convention. A non-member state may write enforcement provisions that are functionally equivalent to ICSID's enforcement into the text of their BITs.

This was pioneered in the US-Poland BIT of 1990. Poland was not a member of ICSID, and the Sejm (Parliament) was controlled by Solidarity—not the party of the President, Jaruzelski, who had negotiated the BIT. The likelihood of the ICSID Convention being successfully approved was low, and US negotiators believed requiring Polish ratification of ICSID might endanger the entire BIT. The BIT was of geopolitical importance and the US government considered Poland a model for other transition states. Yet US officials were also unwilling to sign a treaty without access to arbitration. Thus, negotiators needed to find a way to provide US investors with the protections of the ICSID Convention, but without requiring Polish ratification of ICSID. Their innovative solution was to take the most important clauses on enforcement from the ICSID Convention and put them into the text of the BIT itself.

The table below compares four enforcement clauses in the ICSID Convention and corresponding clauses in the US-Poland BIT. They are: automatic enforcement, final and binding awards, obligation to comply, and enforcement in its territory.

Table A1. Crafting the Ironclad Dispute Resolution Clause: an Article-by-Article Comparison of the ICSID Convention and the US-Poland BIT

Concept	Clause in the ICSID Convention (1965)	Clause in the US-Poland BIT (1990)
Automatic Enforcement	Article 54 (1) Each Contracting 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. ⁷⁹⁹	Article IX (3) (d) The place of any arbitration conducted under this Article shall be a country which is a party to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
Awards are Final and Binding	Article 53 (1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.	Article IX (2) Any dispute-settlement procedures, including those relating to expropriation, specified in the investment agreement shall remain binding and shall be enforceable in accordance with ... applicable international agreements regarding enforcement of arbitral awards.
Obligation to comply with awards	Article 53 (1) Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.	Article IX (3) (e) Each Party undertakes to carry out without delay the provisions of any award resulting from an arbitration held in accordance with this Article.
Enforcement in its territory	Article 54 (2 and 3) (2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. (3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.	Article IX (3) (e) Further, each Party shall provide for the enforcement in its territory of such arbitral awards.

All data from the ICSID Convention and the US-Poland Bilateral Investment Treaty. Corroborated with Schreuer 2001 and Vandevelde 1993.

⁷⁹⁹ Originally, the ICSID Convention relied on the New York Convention for enforcement, but Broches successfully argued against this, and ICSID has automatic enforcement written into Article 54 (1). Schreuer 2001: 1118.

These ICSID-inspired enforcement clauses were not in the text of the model BIT at the time. The negotiators were innovating in response to Poland's political constraints. In 1993, Vandeveld, by then not working in the US government, wrote about the Polish treaty:

US BIT negotiators sought to ensure that investors who selected an arbitral mechanism not subject to the ICSID Convention would have a final, enforceable award. They did this by incorporating counterparts to the ICSID clauses into BIT provisions.⁸⁰⁰

Subsequently, these ICSID-inspired enforcement provisions became common. They were added to the US Model BIT in 1992, and the NAFTA agreement included them.⁸⁰¹

⁸⁰⁰ Vandeveld 1993: 29. Interpretation corroborated in Kinnear and Hansen 2005.

⁸⁰¹ Notably, neither Canada nor Mexico, the two NAFTA parties, was an ICSID member during NAFTA's first decade. ICSID membership might have been more of a sticking point in NAFTA negotiations, if these clauses were not pioneered in earlier US BITs.

Appendix 2: Robustness Tests and Meeting the Proportional Hazards Assumption

A. Signing instead of Ratification as Dependent Variable

Table A1: Signing, Results for Intrinsic Determinants

	Model A1	Model A2	Model A3
Outflows (as a % of GDP)	1.024 (0.60)	1.008 (0.20)	0.992 (-0.18)
Fuel Exports	0.996 (-1.16)	0.998 (-0.61)	0.998 (-0.45)
GDP (logged)	0.961 (-0.70)	0.958 (-0.73)	0.876 (-1.74)
GDP Growth		1.032 (1.55)	
NY Convention			1.745* (2.09)
OECD			1.869 (1.74)
Number of observations	1164	1110	1164

*Hazard ratios; t statistics in parentheses * $p < 0.05$*

Table A2: Signing, Results for Institutional Quality

	Model A4	Model A5	Model A6
Property Rights	1.201 (1.73)	1.224 (1.95)	1.150 (1.80)
Polity2 (Democracy)	1.018 (0.24)	1.034 (0.44)	
Durability	0.988* (-2.08)	0.989 (-1.42)	
Executive Constraints	1.018 (0.07)	0.944 (-0.23)	
NY Convention		1.603 (1.35)	2.057* (2.18)
OECD		0.638 (-0.57)	0.557 (-0.90)
Number of observations	612	612	687

*Hazard Ratios; t statistics in parentheses * $p < 0.05$*

Table A3: Signing, Results for Coercion

	Model A7	Model A8	Model A9
BIT	1.394 (1.75)		1.214 (0.96)
World Bank loan	0.703 (-0.72)	0.738 (-0.64)	0.784 (-0.49)
BIT with Germany		1.900*** (3.04)	
BIT with the Netherlands		0.551* (-2.31)	
BIT with the UK		1.257 (0.76)	
BIT with the US		1.741 (1.85)	
OECD			2.109* (2.19)
NY Convention			1.267* (1.20)
Number of Observations	2198	2199	2198

*Hazard ratios; t statistics in parentheses * p<0.05 ** p<0.01 *** p<0.001*

Table A4: Signing, Results for Combined Models, with Controls

	Model A10	Model A11	Model A12	Model A13
Fuel Exports	0.999 (-0.19)	0.999 (-0.19)	1.001 (0.26)	1.000 (-0.03)
GDP (logged)	0.836* (-2.20)	0.836* (-2.20)	0.728** (-3.08)	0.726** (-3.18)
Outflows (as a % of GDP)	0.957 (-1.08)	0.957 (-1.07)	0.974 (-0.56)	0.985 (-0.30)
BIT	1.901* (1.98)	1.901* (1.97)	1.719 (1.47)	1.703 (1.42)
NY Convention	1.832* (2.12)	1.833* (2.12)	2.125** (2.92)	1.974* (2.50)
OECD	1.771 (1.57)	1.773 (1.51)	2.326* (2.35)	2.444* (2.52)
GDP Growth Rate	1.037 (1.70)	1.037 (1.70)	1.037 (1.51)	1.039 (1.58)
GDP per capita		1.000 (-0.01)	1.000 (-0.17)	1.000 (-0.21)
Executive Constraints			1.040 (0.67)	1.382 (1.81)
Polity2				0.910 (-1.73)

Number of Observations	1110	1110	953	953
<i>Hazard ratios; t statistics in parentheses *p<0.05 **p<0.01 ***p<0.001</i>				

B. Time Confined to 1980-1995

Table A5: 1980-1995, Results for Intrinsic Determinants

	Model A14	Model A15	Model A16
Outflows (as a % of GDP)	1.024 (0.60)	1.008 (0.20)	0.992 (-0.18)
Fuel Exports	0.990 (-1.54)	0.990 (-1.46)	0.992 (-1.13)
GDP (logged)	1.014 (0.19)	1.034 (0.46)	0.940 (-0.66)
GDP Growth		1.016 (0.44)	
NY Convention			1.077 (0.17)
OECD			2.971* (2.03)
Number of observations	492	470	492

*Hazard ratios; t statistics in parentheses *p<0.05*

Table A6: 1980-1995, Results for Institutional Quality

	Model A17	Model A18	Model A19
Property Rights	1.053 (0.39)	1.003 (0.03)	1.000 (-0.01)
Polity2 (Democracy)	0.959 (-0.49)	0.918 (-0.90)	
Durability	0.996 (-0.49)	0.988 (-1.35)	
Executive Constraints	1.322 (1.00)	1.493 (1.33)	
NY Convention		0.782 (-0.49)	0.864 (-0.31)
OECD		4.428* (2.42)	3.209 (1.67)
Number of observations	468	468	522

*Hazard Ratios; t statistics in parentheses *p<0.05*

Table A7: 1980-1995, Results for Coercion

	Model A20	Model A21	Model A22
BIT	1.680 (1.57)		1.773 (1.77)
World Bank loan	9.27e-20*** (.)	9.19e-20*** (.)	5.92e-16*** (-33.62)
BIT with Germany		1.403 (0.81)	
BIT with the Netherlands		1.075 (0.18)	
BIT with the UK		1.459 (0.93)	
BIT with the US		0.852 (-0.31)	
OECD			3.205* (2.29)
NY Convention			0.634 (-1.32)
Number of Observations	986	990	986

Hazard ratios; *t* statistics in parentheses * $p < 0.05$ ** $p < 0.01$ *** $p < 0.001$

Table A8: 1980-1995, Results for Combined Models, with Controls

	Model A23	Model A24	Model A25	Model A26
Fuel Exports	0.990 (-1.40)	0.990 (-1.40)	0.995 (-0.48)	0.994 (-0.55)
GDP (logged)	0.898 (-1.10)	0.899 (-1.09)	0.828 (-1.29)	0.822 (-1.39)
Outflows (as a % of GDP)	0.757 (-1.73)	0.744 (-1.67)	0.816 (-1.63)	0.822 (-1.51)
BIT	2.341* (2.21)	2.328* (2.17)	2.836* (2.11)	2.769* (2.06)
NY Convention	1.083 (0.16)	1.065 (0.12)	1.377 (0.53)	1.370 (0.53)
OECD	3.041* (2.05)	2.765 (1.42)	4.497* (2.07)	4.947* (2.07)
GDP Growth Rate	1.029 (0.73)	1.029 (0.72)	1.036 (0.77)	1.036 (0.78)
GDP per capita		1.000 (0.20)	1.000 (-0.60)	1.000 (-0.61)
Executive Constraints			1.074 (0.55)	1.367 (0.95)
Polity2				0.919

				(-0.81)
Number of Observations	470	470	403	403
<i>Hazard ratios; t statistics in parentheses *p<0.05 **p<0.01 ***p<0.001</i>				

C. Disaggregated into IMF and IBRD

Table A9: World Bank Disaggregated, Results for Coercion

	Model A27	Model A28	Model A29	Model A30
BIT	1.248 (1.24)	1.689* (2.06)	1.865* (2.20)	1.800 (1.95)
World Bank loan	1.095 (0.19)			
IMF		1.00 (-0.38)		1.000 (-0.42)
IBRD			1.000 (1.70)	1.000 (1.25)
OECD				1.964 (0.85)
NY Convention				1.135 (0.42)
Number of Observations	2652	1516	1281	1281
<i>Hazard ratios; t statistics in parentheses *p<0.05 **p<0.01 ***p<0.001</i>				

Table A10: World Bank Disaggregated, 1980-1995, Results for Coercion

	Model A31	Model A32	Model A33	Model A34
BIT	1.680 (1.57)	1.639 (1.06)	1.303 (0.59)	1.945 (1.51)
World Bank loan	9.27e-20*** (.)	9.19e-20*** (.)	5.92e-16*** (-33.62)	5.92e-16*** (-33.62)
IMF		3.00 (-0.53)		1.000 (-1.05)
IBRD			1.000*** (3.45)	1.000*** (5.95)
OECD				0.0333** (-2.80)
NY Convention				0.529 (-1.37)
Number of Observations	986	734	716	716
<i>Hazard ratios; t statistics in parentheses *p<0.05 **p<0.01 ***p<0.001</i>				

D. With One-Year Lags

Table A11: Combined Models, with Controls and One-Year Lag on Outflows and GDP Growth Rate

	Model A35	Model A36	Model A37	Model A38	Model A39
Fuel Exports	1.001** (3.11)	1.001** (3.00)	1.001** (3.01)	1.001** (2.79)	1.001** (2.78)
GDP (logged)	0.873* (-2.07)	0.887 (-1.75)	0.886 (-1.77)	0.805** (-2.68)	0.809** (-2.60)
Outflows (as a % of GDP)	0.940 (-1.06)	0.923 (-1.05)	0.918 (-1.07)	0.950 (-0.98)	0.952 (-0.93)
BIT	1.347 (1.07)	1.450 (1.21)	1.435 (1.16)	1.525 (1.21)	1.511 (1.16)
NY Convention	1.720* (2.44)	1.684* (2.34)	1.681* (2.31)	1.872** (2.76)	1.833** (2.65)
OECD	1.952* (2.54)	1.868* (2.24)	1.828* (2.16)	2.412** (3.20)	2.486** (3.26)
GDP Growth Rate		0.991 (-0.53)	0.991 (-0.54)	0.986 (-0.77)	0.986 (-0.76)
GDP per capita			1.000 (0.27)	1.000 (-0.05)	1.000 (-0.09)
Executive Constraints				0.955 (-0.99)	1.1046 (0.33)
Polity2					0.969 (-0.74)
Number of Observations	1481	1403	1403	1212	1212

E. Replacing Fuel Exports and GDP

Table A12: Results for Combined Models, with Controls (Natural Resources as a Binary, Following Simmons, Elkins, Guzman (2006) instead of Fuel Exports)

	Model A40	Model A41	Model A42	Model A43
Natural Resources (Binary 25% of exports)	1.482 (0.78)	1.486 (0.78)	1.409 (0.66)	1.417 (0.67)
GDP (logged)	0.964 (-0.71)	0.964 (-0.70)	0.846* (-2.50)	0.846* (-2.52)
Outflows (as a % of GDP)	1.128** (3.18)	1.130** (3.28)	1.077* (2.20)	1.076* (2.14)
BIT	1.072 (0.30)	1.073 (0.31)	1.070 (0.28)	1.063 (0.25)
NY Convention	1.530* (2.02)	1.541* (2.03)	1.709* (2.38)	1.713* (2.38)
OECD	2.248** (2.99)	2.280** (3.11)	2.610*** (3.63)	2.572*** (3.54)
GDP Growth Rate	1.017 (1.92)	1.017 (1.92)	1.014 (1.49)	1.014 (1.51)
GDP per capita		1.000 (-0.18)	1.000 (1.34)	1.000 (1.35)
Executive Constraints			0.984 (-0.35)	0.949 (-0.42)
Polity2				1.012 (0.32)
Number of Observations	2170	2170	1747	1747

*Hazard ratios; t statistics in parentheses *p<0.05 **p<0.01 ***p<0.001*

Table A13: Results for Combined Models, with Controls (Population controlled for GDP per capita instead of GDP)

	Model A44	Model A45	Model A46	Model A47
Fuel Exports	1.001** (3.09)	1.001** (3.04)	1.001** (2.87)	1.001** (2.85)
Population	0.922 (-1.26)	0.917 (-1.30)	0.831* (-2.14)	0.829* (-2.21)
Outflows (as a % of GDP)	1.097* (2.09)	1.105* (2.33)	1.079* (2.18)	1.086* (2.31)
BIT	1.260 (0.80)	1.309 (0.92)	1.396 (1.06)	1.386 (1.01)
NY Convention	1.621* (2.12)	1.625* (2.11)	1.778* (2.48)	1.727* (2.32)
OECD	1.375 (1.12)	1.472 (1.52)	1.882* (2.54)	1.998** (2.72)
GDP Growth Rate	1.030 (1.62)	1.030 (1.60)	1.027 (1.25)	1.027 (1.26)
GDP per capita		1.000 (-0.60)	1.000 (-1.12)	1.000 (-1.19)
Executive Constraints			0.932 (-1.56)	1.098 (0.68)
Polity2				0.946 (-1.34)
Number of Observations	1426	1412	1220	1220

*Hazard ratios; t statistics in parentheses *p<0.05 **p<0.01 ***p<0.001*

F. Robustness Checks: Test of Proportional Hazards Assumption based on Re-estimation (Link Test)

_t	Coefficient	Standard Error	Z score	P> z
_hat	1.013089	.6606069	1.53	.125
_hatsquare	.0027911	.1332682	.02	.983

G. Robustness Checks: Test of Proportional Hazards Assumption (PH Test based on Shoenfeld residenuals)

Variable	Rho	Chi2	Degrees of Freedom	Probability>Chi2
Fuel Exports	.02531	.04	1	.8489
GDP (log)	.08568	.54	1	.4638
Outflows GDP	.04020	.09	1	.7685
BIT	.09603	.69	1	.4061
New York Convention	.02112	.04	1	.8360
OECD	-.13494	1.14	1	.2850
GDP Growth Rate	-.01127	.01	1	.9188
GDP Per Capita	-.10841	.98	1	.3219
Global Test		3.47	8	.9013

