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REFORMING WORLD BANK DISPUTE RESOLUTION: ICSID IN CONTEXT

Susan Franck*

ABSTRACT

During a tumultuous moment in history with shifts in power and politics, international dispute settlement stands at a crossroads. In theory, international dispute settlement should not institutionalize abuses of power, rely upon a monolithic one-size-fits-all model, or be a waste of resources, which will inevitably generate stakeholder dissatisfaction. Rather, dispute resolution should reflect both a commitment to the rule of law and equal treatment that sustains nuanced, fair, and just procedures most likely to provide results of substantive quality. Against this backdrop and with the major reforms concluded in July 2022, this article explores the reality of dispute resolution at the World Bank's International Centre for Settlement of Investment Disputes ("ICSID") using an evidence-based, historical lens. Rather than distort ICSID's past to offer cognitive ease, this article uses primary sources to understand dispute resolution at the World Bank and the broader implications for international dispute settlement and alternative dispute resolution. Using an evidence-based, historical lens to promote an accurate understanding of procedural and substantive distinctions, international investment law and international dispute resolution can facilitate accurate, useful, and responsive reform, rather than letting myopia, manipulation, and mismanaged expectations control the future of international dispute settlement.

* Professor of Law, American University, Washington College of Law. The author is grateful for the review, comments, and recommendations of Meg Kinnear, Secretary General of International Centre for Settlement of Investment Disputes, Jill M. Fraley, José E. Alvarez, G. Mitu Gulati, Toby Landau KC, and Lewis Grossman. Special thanks go to Anna Isemia Dahlgren, Shannon Jackenthal, Abby Raines, and Bailey Roe for their comments and editorial assistance.

INTRODUCTION

We live in a world where conflicts involving States arise at the local,¹ national, and international levels.² On the international plane, some conflicts are resolved by war, leaving the destruction of property and human life in their wake. Other conflicts are resolved by the exercise of political power or the repression of rights, which can lead those with viable claims to abandon their potential actions. Other conflicts are resolved through adjudication, using rule of law values to apply the applicable law to the relevant facts and produce a reasoned decision.³ When a State's authority and political power are reviewed, dispute resolution can be particularly challenging⁴ given its unique capacity to act both as a market participant and a market regulator.⁵

Imagine a simple situation where a government is involved in a commercial contract. Once a dispute arises, States have tools—deriving from their governmental authority—that impact their dispute resolution arsenal. Beyond the unique right of States to invoke sovereign immunity to prevent

¹ This Article uses the term State to denote a country, rather than a political subdivision within a country.

² Disputes involving States are varied. Some involve direct State to State conflicts; some involve intra-governmental conflicts within a State; some involve conflicts between a State and a private actor, whether a person or a corporate entity. *See, e.g.*, INTERNATIONAL INVESTMENT LAW AND THE LAW OF ARMED CONFLICT (Katia Fach Gómez, Anasios Gourgourinis, & Catharine Titi eds. 2019). There is a long tradition of disputes involving private commercial parties, which touch and concern States, that lead to public international law disputes, including classic cases like *Tinoco* and *ELSI*. *See, e.g.*, *Tinoco* (Gr. Brit. v. Costa Rica), 1 R.I.A.A. 371, 376 (1923); *Case Concerning Elettronica Sicula S.p.A. ("ELSI")* (U.S. v. Italy), Judgment, 1989 I.C.J. 15, reprinted in 28 I.L.M. 1109; Lee C. Buchheit, G. Mitu Gulati, & Robert B. Thompson, *The Dilemma of Odious Debts*, 56 DUKE L.J. 1201, 1216–20 (2007) (discussing *Tinoco*); Sean D. Murphy, *The ELSI Case: An Investment Dispute at the International Court of Justice*, 16 YALE J. INT'L L. 391, 392–93, 399–406, 417–23 (1991) (discussing *ELSI* and another classic dispute, *Barcelona Traction*); Joseph Blocher, G. Mitu Gulati, & Kim Oosterlinck, *King Leopold's Bonds and the Odious Debts Mystery*, 60 VA. J. INT'L L. 487, 492–94, 504, 528 (2020) (discussing *Tinoco* and other similar disputes).

³ *See, e.g.*, Susan Franck & Lindsey E. Wylie, *Predicting Outcomes in Investment Treaty Arbitration*, 65 DUKE L.J. 459, 472–75 (2015); SUSAN FRANCK, *ARBITRATION COSTS: MYTHS AND REALITIES IN INVESTMENT TREATY ARBITRATION* 10–14 (2019) (discussing the matrix of dispute resolution options).

⁴ *See, e.g.*, Mariana Hernandez-Crespo Gonstead, *Beyond Investor-State Disputes: Intercultural Capacity Building to Optimize Negotiation, Mediation, and Conflict Management*, 17 U. SAINT THOMAS L.J. 251, 253–57 (2021) (discussing challenges with and alternatives to investor-State arbitration). Human conflict is inevitable, and there is a core distinction between conflicts and disputes. *See* CATHY COSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS*, at xvi, xii, 3 (1996) (exploring the nature of conflict and dispute resolution); CARRIE J. MENKEL-MEADOW, LELA PORTER LOVE, JEAN R. STERNLIGHT, & ANDREA K. SCHNEIDER, *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* 1–11 (3d ed. 2019) (same); Laura J. Cooper, Jonathan L. Entin, Douglas E. Ray, & Robert N. Strassfeld, *Tribute to Calvin William Sharpe*, 64 CASE W. RESV. L. REV. 1, 13 (2013) (“All of these works also share a recognition that conflict is inevitable, but a hopeful belief that conflict can be productively managed in the interest of peaceful resolution of disputes.”).

⁵ *See* Robert Stumberg, *Sovereignty by Subtraction: The Multilateral Agreement on Investment*, 31 CORNELL INT'L L.J. 491, 501 (1998) (noting the distinction “when states act as market participants, rather than market regulators”); David A. Brittenham, *Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach*, 83 COLUM. L. REV. 1440, 1487, 1503–04, 1507 (1983) (identifying challenges resulting from when a State also acts as a market participant).

adjudication or enforcement of judgments,⁶ States have other powers that are inaccessible to private parties. States can, for example, pass legislation to create a favorable playing field for themselves, promulgate administrative regulations and executive orders to aid their position, or pressure domestic judges who may be sensitive to lawsuits involving their home country.⁷ For some foreign investors—namely those with the standing to pursue rights granted in investment treaties, including the right to direct dispute resolution with a State—a private entity can subject a State’s domestic government action to external review. With State responsibility and sovereign policy choices involved, complex issues affecting international relations, economics, politics, and civil society inevitably arise.⁸

Despite the challenges, having a peaceful and neutral method for resolving international disputes involving sovereign rights and responsibilities is more important than ever. The reforms that the World Bank completed in July 2022—systemically revising dispute resolution between States and investors (whether those investors are human beings or corporate entities)⁹—have been vital.¹⁰ Unfortunately, reform of dispute resolution suffers from modern myopia, with skewed conversations

⁶ See generally HAZEL FOX & PHILLIPA WEBB, *THE LAW OF STATE IMMUNITY* 73–98 (3d ed. 2013) (discussing sovereign immunity); XIAODONG YANG, *STATE IMMUNITY IN INTERNATIONAL LAW* 1–27, 34–58 (2012) (same).

⁷ There are various challenges, whether perceived or actual, when addressing adjudicative integrity. See, e.g., Cassandra Burke Robertson, *Judicial Impartiality in a Partisan Era*, 70 FLA. L. REV. 739, 771–72 (2018).

⁸ See generally THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (Peter Muchlinski, Federico Ortino, & Christoph Schreuer eds., 2008); Edward Guntrip, *Self-Determination and Foreign Direct Investment: Remaining Sovereignty in International Investment Law*, 65 INT’L & COMP. L.Q. 829 (2016); Jorge E. Viñuales, *Sovereignty in Foreign Investment Law*, in THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 317 (Zachary Douglas, Joost Pauwelyn, & Jorge E. Viñuales eds., 2014).

⁹ One of ICSID’s core objectives was equality of treatment between parties, irrespective of whether those parties are State actors, private entities, or human beings. See Damon Vis-Dunbar, *ICSID Under the New Rules: A Conversation with Meg Kinnear, ICSID Secretary-General*, 31 AM. REV. INT’L ARB. 21, 36 (2020) (“[T]he number one mantra out of these rule reforms has been balance between investors and States.”).

¹⁰ There have been debates, whether at the European Union or United Nations Commission on International Trade Law (“UNCITRAL”) Working Group III, about whether to abolish existing dispute resolution structures and, instead, replace them with courts. See, e.g., Anthea Roberts & Taylor St. John, *Complex Designers and Emergent Design: Reforming the Investment Treaty System*, 116 AM. J. INT’L L. 96, 97–98 (2022). In a blunt post expressing the hidden assumption not normally stated in scholarly discourse, Professor Rogers observed: “It is often assumed that standing international courts are inherently more legitimate than arbitral tribunals. This assumption has led some to argue that investment arbitration should be replaced by a standing investment court.” Catherine A. Rogers, LINKEDIN (July 3, 2022), http://www.linkedin.com/posts/catherine-rogers-25aa5a50_it-is-often-assumed-that-standing-international-activity-6949298506817802240-h96C (last visited Feb. 19, 2023) [hereinafter Rogers, LINKEDIN]. Noting the legitimacy crisis both at the World Trade Organization’s Appellate Body and U.S. Supreme Court, Professor Rogers instead suggested: “These examples should prompt us to reconsider the traditional assessment: STANDING COURT = GOOD/LEGITIMATE[; and] ISDS = BAD/ILLEGITIMATE.” *Id.*; see also Catherine A. Rogers, *Reconceptualizing the Party-Appointed Arbitrator*, HARV. INT’L L.J. (forthcoming 2023), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=4154481 (exploring similar issues).

about the operation of investor-State disputes,¹¹ sensationalist caricatures suggesting that investor-State dispute settlement (“ISDS”) is a “monster” or the equivalent of being “sued by the devil in hell,”¹² conflation of distinct legal concepts, and little appreciation of historical context.

While reform efforts are ongoing, particularly with United Nations Commission on International Trade Law (“UNCITRAL”) Working Group 3, the World Bank’s reform of its International Center for Settlement of Investment Disputes (“ICSID”) provides a window into the challenges to, and importance of, proper reform. Irrespective of the disregard for data in our dystopian era of “alternative facts,”¹³ key failings exist in understanding how ICSID functions, its purpose, and its limitations. There is an ongoing insensitivity to history and legal doctrine, with negationism¹⁴ that distorts the historical record by ignoring or inflating historical context, as well as cultural distortions¹⁵ that facilitate dialogues reflecting the intellectual tribalism of the modern era.¹⁶

Yet, this should be unsurprising. Quality discourse and intra-generational knowledge transfer in an era of Twitter, Instagram, other social media platforms, and truthiness¹⁷ are endemic to the modern zeitgeist. This, in turn, makes ensuring doctrinal accuracy, promoting critical

¹¹ Compare Charles N. Brower & Jawad Ahmad, *Why the “Demolition Derby” that Seeks to Destroy Investor-State Arbitration?*, 91 S. CAL. L. REV. 1139 (2018), with Anthea Roberts, *Incremental, Systemic, and Pragmatic Reform of Investor-State Arbitration*, 112 AM. J. INT’L L. 410 (2018).

¹² See Franck & Wylie, *supra* note 3, at 475–76 (providing an overview of the literature critiquing investment treaty arbitration, including references to a public exorcism and claims that investor-State dispute settlement is a “monster” or a “zombie”); see also Charles N. Brower & Sadie Blanchard, *What’s in a Meme? The Truth About Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States*, 52 COLUM. J. TRANSNAT’L L. 689, 691, 700–01, 709–27 (2014) (critiquing the critiques of investor-State dispute settlement); Ylli Dautaj, *Between Backlash and the Re-Emerging “Calvo Doctrine”: Investor-State Dispute Settlement in an Era of Socialism, Protectionism, and Nationalism*, 41 NW. J. INT’L L. & BUS. 273, 276–80 (2021) (identifying challenges from the “backlash” against investment treaty arbitration and ICSID); Susan Franck, *The ICSID Effect: Considering Potential Variations in Arbitration Awards*, 51 VA. J. INT’L L. 825, 828–29, 841–48, 859–60, 873–74, 888, 893, 898–900 (2011) (discussing the critiques directed at ICSID and providing empirical analysis disrupting several claims).

¹³ S.I. Strong, *Truth in a Post-Truth Society: How Sticky Defaults, Status Quo Bias, and the Sovereign Prerogative Influence the Perceived Legitimacy of International Arbitration*, 2018 U. ILL. L. REV. 533, 533; see also Rogers, LINKEDIN, *supra* note 10; Frédéric Gilles Sourgens, *Truths in Translation*, 44 FORD. INT’L L.J. 101, 102–05; FRANCK, *supra* note 3, at 18–22, 33–55.

¹⁴ See, e.g., Steven L. Winter, *The Cognitive Dimension of the Agony Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2249, 2254–55 (1989) (acknowledging how historical narratives can distort the understanding of history particularly in international capital markets). See generally JOHN TOSH, *THE PURSUIT OF HISTORY: AIMS, METHODS AND NEW DIRECTIONS IN THE STUDY OF HISTORY* (6th ed. 2015) (discussing the importance of history and identifying challenges in interpreting history).

¹⁵ See generally MICHAEL KAMMEN, *IN THE PAST LANE: HISTORICAL PERSPECTIVES ON AMERICAN CULTURE* (1999) (describing cultural distortions and the impact upon the proper understanding of history).

¹⁶ See Alexandre de Gramont, *The Costs of Investment of Investment Treaty Arbitration in the Age of Social Media, Fake News, and the Emergency of a New Nationalism*, 2020 ICC DISP. RESOL. BULL. 135; Susan Franck, *The, Past, Present, and Future of Investment Treaty Conflict Management and Dispute Systems Design*, 17 U. ST. THOMAS L.J. 345, 353 (2021).

¹⁷ See generally FARHAD MANJOO, *TRUE ENOUGH: LEARNING TO LIVE IN A POST-FACT SOCIETY* (2008).

analysis, and fostering rule of law more important than ever.¹⁸ This article serves as a partial antidote to the soundbites permeating current conversations about international investment dispute resolution,¹⁹ particularly those skewing the context to support purely intuitive, yet human, predispositions and preferences.²⁰ As such, it attempts to ground these conversations in accurate legal analysis and supports an evidence-based understanding of the law and history of international dispute settlement.

The article undertakes this project by using the history of the World Bank's ICSID as a prism through which to understand the past, present, and future of international investment dispute resolution. It seeks to remind younger generations, those entering the field, and existing stakeholders about the origin of World Bank dispute settlement. The objective is to ensure that, when assessing, demonizing, or reforming investment treaty arbitration ("ITA")—which is *only one form* of ISDS—critiques derive from fact, rather than emotive caricatures that improperly skew public understanding and the relative value of normative reforms. Without a proper appreciation of the distinct history of the World Bank's procedures, reform efforts risk creating wrong-headed solutions that promulgate problems and exacerbate existing dissatisfaction, rather than solving real problems in international investment dispute settlement.

This article first explores international investment involving States, conflicts deriving from those activities, and traditional methods of resolving those disputes. Second, it identifies the legal doctrine of international arbitration, a methodology historically used for resolving international disputes among private parties and sometimes involving States. Third, the article dives into the history of ICSID, focusing upon the creation of the ICSID Convention. Fourth, it explores the July 2022 ICSID reforms and offers a perspective using ICSID's history to understand the modern framework and its adaptability to shifting stakeholder needs.

Offering a reality check for commentators, policy makers, and the public, this article ultimately argues for the use of slow, analytical analysis to promote a proper understanding of history. This, in turn, enables an accurate understanding of the procedural and substantive distinctions in international investment law and dispute resolution to facilitate change that properly recognizes the area's promises, perils, and pitfalls. Providing a proper primer aids critical analysis, public discourse, and constructive reform of international dispute settlement by focusing on the real area of

¹⁸ See, e.g., TOM NICHOLS, THE DEATH OF EXPERTISE: THE CAMPAIGN AGAINST ESTABLISHED KNOWLEDGE AND WHY IT MATTERS 110–15, 159–66, 223–35 (2017).

¹⁹ The European Union's International Trade Department promulgated various cartoons containing cherry-picked, skewed information about arbitration law to support its proposed alternatives to international arbitration. See EU Trade (@Trade_EU), TWITTER (Mar. 1, 2016), http://twitter.com/Trade_EU/status/704672205607673856 (last visited Feb. 19, 2023); Simon Lester, *A Graphic Depiction of CETA ISIS*, INT'L ECON. L. & POL'Y BLOG (Mar. 2, 2016), <http://ielp.worldtradelaw.net/2016/03/a-graphic-depiction-of-ceta-isds.html> (noting the EU cartoon depicting a permanent court is "[n]ot surprisingly . . . getting rave reviews on twitter!"); EU TTIP Team (@EU_TTIP_team), TWITTER (Sept. 16, 2015), http://twitter.com/EU_TTIP_team/status/644110990242639873 (offering a similar cartoon).

²⁰ See FRANCK, *supra* note 3, at 25–66 (describing how cognitive illusions affect debates about investment treaty arbitration).

discontent, namely the substantive standards in treaties that provide the applicable law that must be used in any adjudication. Having a deeper appreciation of history also creates opportunities to learn from the challenges of the past to create meaningful improvement in the future of international dispute settlement.

I. STATES, INVESTMENT, AND INTERNATIONAL DISPUTE RESOLUTION

Commerce has crossed borders for centuries.²¹ States have been involved in trade and investment activities for hundreds of years as well.²² This section first explores models of State international commercial activity and then considers the implications for dispute settlement.²³

A. Models of State Economic Activity

Many “western,”²⁴ democratic countries leave commercial activity and investment—which provides core infrastructure and services—to private parties and the marketplace.²⁵ This might, for example, involve private entities that build and operate an airport where people buy goods and take airline flights, provide internet services, or create a power plant to generate and distribute electricity. This model involves private ordering and risk taking, rather than governmental direction, to promote innovation and flexibility that provides the public with value, using local or international capital resources and know-how. As a pure *laissez-faire* market is theoretical, a realistic market-driven model of State action typically involves government regulation that permits a broad range of acceptable commercial activity and polices its outer boundaries. With minimal direct State participation in the commercial marketplace, there is decreased risk of derivative investment conflicts involving States.

Other States play a more proactive role in economic activity, which creates unique fiscal risk. Both historically and today, some States actively

²¹ See, e.g., ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Roy Hutcheson Campbell & Andrew S. Skinner eds., Liberty Fund 1981) (1776); DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (Ronald M. Hartwell ed., Penguin Books 1971) (1819); cf. Emily Kadens, *The Myth of the Customary Law Merchant*, 90 TEX. L. REV. 1153 (2012) (acknowledging international trade has been ongoing for centuries but observing private trading requires some public regulation).

²² MICHAEL J. TREBILCOCK & ROBERT HOUSE, THE REGULATION OF INTERNATIONAL TRADE 23–25 (3d. ed. 2005).

²³ See, e.g., JESWALD W. SALACUSE, THE THREE LAWS OF INTERNATIONAL INVESTMENT: NATIONAL, CONTRACTUAL, AND INTERNATIONAL FRAMEWORKS FOR FOREIGN CAPITAL (2013) (describing “Model 1” and “Model 2” of State investment paradigms, which roughly parallels market and non-market-based economies, and discussing hybrid models).

²⁴ See, e.g., JOSEPH HENRICH, THE WEIRDEST PEOPLE IN THE WORLD: HOW THE WEST BECAME PSYCHOLOGICALLY PECULIAR AND PARTICULARLY PROSPEROUS (2020).

²⁵ See Kenneth J. Vandavelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 COLUM. J. TRANSNAT’L L. 501, 502–06 (1998) (exploring market liberalization and the rejection of State-directed central planning).

direct international commercial and investment activities.²⁶ This model often involves a central government (and its agents or instrumentalities) from a non-market economy controlling the commercial marketplace.²⁷ With a State-planned economy, it is normal for a centralized bureaucracy (rather than market-based supply and demand) to set policies that determine prices, wages, and production schedules, often with State-owned enterprises (“SOEs”) bringing goods and services to citizens.²⁸

States, however, rarely exhibit a pure *laissez-faire* or State-planned model. Most governments are hybrids, operating between these two poles, engaging in some market-driven and State planned or regulated economic activity. Often a question of degree, some States have more State-centric control, while others place more emphasis on global capital markets. As an example of more commercially focused State activity, a State (or a subdivision) may procure commercial services for itself in the private sector. Other hybrids might involve a State issuing sovereign debt (or trading in sovereign debt markets) to generate revenue for public projects and government services.²⁹

Hybrid models likewise involve strategic government choices to enter a particular marketplace. It is typical, for example, for States to exercise more direct control over specific economic sectors like the provision of energy or control over natural resources. Such activity can involve procuring commercial projects to benefit the public, including building infrastructure and setting rates for the State-supported services.³⁰ Reflecting the importance of State-driven commercial activities, a 2012 report from *The Economist* estimated that state-backed companies accounted for eighty percent of the value of China’s stock market and sixty-two percent of Russia’s.³¹ Irrespective of the balance between market and government

²⁶ See, e.g., SALACUSE, *supra* note 23; Amy J. Cohen, *Thinking with Culture in Law and Development*, 57 BUFF. L. REV. 511, 547 (2009) (noting “tensions between socialist and capitalist models of development and, more recently, the ideological shift from state-led to market-led planning”).

²⁷ During the 1990s, the explosion of globalization and the fall of the Iron Curtain meant many States transitioned towards a market-based or a hybrid economic model. See, e.g., NINA BANDEL, *FROM COMMUNISTS TO FOREIGN CAPITALISTS: THE SOCIAL FOUNDATIONS OF FOREIGN DIRECT INVESTMENT IN POSTSOCIALIST EUROPE* (2008). The U.S. Department of Commerce now only designates twelve countries as non-market economies. *Countries Currently Designated by Commerce as Non-Market Economy Countries*, U.S. DEP’T OF COM. INT’L TRADE ADMIN., <http://www.trade.gov/nme-countries-list> (last visited Feb. 19, 2023).

²⁸ See, e.g., CENTRAL AND EAST EUROPEAN POLITICS: CHANGES AND CHALLENGES 16–19, 128–38, 217–21 (Zsuzsa Csergő, Daina S. Eglitis, & Paula M. Pickering eds., 5th ed. 2021) (discussing shifts from non-market to market-based economies in Eastern Europe).

²⁹ See Robert B. Ahdieh, *Between Mandate and Market: Contract Transition in the Shadow of the International Order*, 53 EMORY L.J. 691, 693–94, 710–15 (2004) (discussing sovereign debt and negotiating commercial terms with sovereigns when conflict emerges); Stephen J. Choi, G. Mitu Gulati, & Eric Posner, *The Evolution of Contractual Terms in Sovereign Bonds*, 4 J. LEGAL ANALYSIS 131, 132–35 (2012) (explaining different objectives underpinning sovereign debt contracts and State defaults). *But see* Buchheit, Gulati, & Thompson, *supra* note 2, at 1212–14 (identifying distinctions between sovereign debt that finances wars versus commercial activities).

³⁰ See generally SALACUSE, *supra* note 23; LOUIS T. WELLS & RAFIQ AHMED, *MAKING FOREIGN INVESTMENT SAFE: PROPERTY RIGHTS AND NATIONAL SOVEREIGNTY* (2007).

³¹ Adrian Wooldridge, *State Capitalism: The Visible Hand*, THE ECONOMIST, Jan. 21, 2012, at 3; see also MARK SKOUSEN, *ECONOMIC LOGIC* 659 (2013).

control in investment and commercial activity, when a State acts as a market participant, market creator, and/or market regulator, there will be a derivative dispute resolution risk. At a basic level, participation in economic activity creates risk of conflict, which increases the risk of dispute resolution. This means, when States participate in economic activity, they risk dispute resolution. By contrast, when private individuals or entities engage in similar conduct, the dispute resolution risk falls on those actors, rather than the State.

B. *Investment Risk and States: Substance*

With globalization and investment liberalization, the scale of international investment blossomed. The United Nations Conference on Trade and Development (“UNCTAD”) estimated that, in 2010, worldwide foreign direct investment (“FDI”) levels were around \$19–20 trillion U.S. dollars and continued rising to \$31 trillion U.S. dollars (“USD”) by 2017.³² Today, global investment flows continue to be massive. In its 2022 *World Investment Report*, UNCTAD observed, “[g]lobal foreign direct investment (FDI) flows in 2021 [alone] were \$1.58 trillion, up 64 per cent” from the level during the first year of the COVID-19 pandemic, with investment into countries split roughly equally between developed and developing countries.³³

With trillions at stake in capital markets at the macro level, individual investments can be worth hundreds of millions (or billions) of USD. Friction is inevitable when people working with high-value investments have divergent expectations, incentives, cultural values, and personalities. This friction can transform into conflict that escalates to formal investment disputes.³⁴ Humans being human, this remains true irrespective of whether a person represents their own personal interests, a private commercial entity, or a State.³⁵

³² FRANCK, *supra* note 3, at 1–2, 6–7 (discussing foreign direct investment (“FDI”) flows using United Nations Conference on Trade and Development (“UNCTAD”) data).

³³ U.N. CONF. ON TRADE & DEV. [UNCTAD], WORLD INVESTMENT REPORT 2022: INTERNATIONAL TAX REFORMS AND SUSTAINABLE DEVELOPMENT 1, U.N. Doc. UCTAD/WIR/2022, U.N. Sales No. E.22.II.D.20 (2022), http://unctad.org/system/files/official-document/wir2022_en.pdf [hereinafter UNCTAD, WORLD INVESTMENT REPORT 2022].

³⁴ See, e.g., Mariana Hernandez-Crespo Gonstead, *Remedy Without Diagnosis: How to Optimize Results by Leveraging the Appropriate Dispute Resolution and Shared Decision-Making Process*, 88 FORD. L. REV. 2165 (2020); FRANCK, *supra* note 3, at 9–12; Susan Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161, 173–94 (discussing conflict management and dispute resolution); Andrea Kupfer Schneider, *Using Dispute System Design to Add More Process Choices to Investment Treaty Disputes*, in 2 INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION 93, U.N. DOC. UNCTAD/WEB/DIAE/IA/2010/8 (Susan Franck & Anna Joubin-Bret, eds. 2011), https://unctad.org/system/files/official-document/webdiaeia20108_en.pdf (last visited Apr. 30, 2023); Andrea Kupfer Schneider, *How Does DSD Help Teach Us About Community Conflict (and How Can Community Conflict Help Illustrate DSD)?*, 13 U. SAINT THOMAS L.J. 370, 371–74 (2017) (same).

³⁵ See *supra* note 4 and accompanying text (identifying the inevitability of human conflict); DOUGLAS STONE, BRUCE PATTON, & SHEILA HEEN, *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* (2000) (exploring various challenges and conflict management tools arising from human interaction).

While conflict is unavoidable, the power dynamics and risk vary depending upon whether a State is involved.³⁶ Historically, international law rarely offered private investors a remedy for State action that damaged investments made abroad.³⁷ While countries sometimes enumerated substantive rights for investors in treaties of Friendship, Navigation, and Commerce (“FNCs”), there was no forum for dispute resolution or enforcement, making those rights “ghostly,” rather than real.³⁸ The historical framework meant that there were few realistic methods for redressing harm caused by State action.

Given that vacuum, there were limited options for controlling investment risk. One option, which occurs on an investment-by-investment basis, involves a State (or a subdivision, agency, or instrumentality) negotiating and finalizing a specific contract with a foreign investor, often governed by the State’s internal domestic law.³⁹ Alternatively, a State’s domestic law may provide investors with a theoretical local remedy to redress improper State conduct, which usually involves adjudication by the judiciary of the State being sued.⁴⁰ Another substantive barrier involves the doctrine of sovereign immunity, which can make States immune from either being sued or preventing enforcement of a judgment.⁴¹ Assuming

³⁶ See, e.g., Adam L. Masser, *The Nexus of Public and Private in Foreign Direct Investment: An Analysis of IFC, MIGA, and OPIC*, 32 FORD. INT’L L.J. 1698, 1703–06 (2009).

³⁷ See, e.g., JAN OLE VOSS, THE IMPACT OF INVESTMENT TREATIES ON CONTRACTS BETWEEN HOST STATES AND FOREIGN INVESTORS 1–12 (2010); Stephan W. Schill, *Enhancing International Investment Law’s Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT’L L. 57, 74–75 (2011) (“Although traditional international law contained rules concerning the protection of foreign investment as part of the customary international law minimum standard and of diplomatic protection, it remained a law governing the relations between states. Disputes about the limits of a state’s power over foreign investors were first a matter for the domestic courts of that state, and only subsequently a matter for interstate dispute resolution . . . Classical international law, therefore, did not directly affect the relations between foreign investors and host states.”) (footnotes omitted).

³⁸ FRANCK, *supra* note 3, at 12; see also *Western Maid v. Thompson*, 257 U.S. 419, 433 (1922) (“Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp.”); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1244 (1931) (noting law’s fundamental value quality is not just the right but “what can be done: Not only ‘no remedy, no right’ but ‘precisely as much right as remedy’”); Frederick Pollock, *The Continuity of the Common Law*, 11 HARV. L. REV. 423, 424 (1898) (“Our modern maxim ‘No right without a remedy’ assumes the benevolent and irresistible power of the modern lawgiver.”).

³⁹ See, e.g., SALACUSE, *supra* note 23; Gary Born & Cem Kalelioglu, *Choice-of-Law Agreements in International Contracts*, 50 GA. J. INT’L & COMP. L. 44, 48–49 (2021); John P. Bowman, *Risk Mitigation in International Petroleum Contracts*, 50 GEO. J. INT’L L. 745, 748–53 (2019) (discussing applicable law and risk mitigation). *But see* Stephan W. Schill, *Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties*, 18 MINN. J. INT’L L. 1, 28 n.68 (2009) (suggesting, in the case of sovereign debt investments, “a foreign law is often used . . . where States regularly subject bonds to one of the laws in force at the locations of the principle financial centers, such as New York, London, Frankfurt, or Paris”).

⁴⁰ VOSS, *supra* note 37, at 1–3, 7–9; see also Schill, *supra* note 37, at 73–74 (“Disputes about the limits of a state’s power over foreign investors were first a matter for the domestic courts of that state, and only subsequently a matter for interstate dispute resolution, either before an international court or by means of interstate arbitration.”).

⁴¹ Phoebe D. Winch, *State Immunity and the Execution of Investment Arbitration Awards*, in PUBLIC ACTORS IN INTERNATIONAL INVESTMENT LAW, EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW SPECIAL ISSUE 57, 58–65 (Catharine Titi ed., 2021); see also *supra* notes 6–7 (discussing sovereign immunity); *infra* note 130 (same).

lawsuits are even possible, disputes with States retain unique risks, like a State's sovereign prerogative to change its domestic law to facilitate a specific substantive outcome.⁴²

To redress those challenges, protect a State's own investors who put their capital at risk in a foreign country, and ensure that States' international law commitments were not merely hortatory, countries began creating investment treaties.⁴³ These treaties provided substantive rights to protect foreign investment and—for the first time in history⁴⁴—gave private parties direct access to international dispute resolution for alleged violations of a State's substantive treaty promises. While these investment treaties neither eliminate commercial risk nor guarantee success when investing abroad, the substantive⁴⁵ and procedural⁴⁶ rights provide a legal

⁴² When investors have a direct investment contract or guarantee with a State or State-related entity, they can attempt to negotiate a “stabilization clause.” See, e.g., SALACUSE, *supra* note 23, at 153–55. These clauses identify and freeze the applicable substantive law of the State on the date the contract is finalized to prevent subsequent revision by a State. Abdallah Abuefutih Ali, *Taking Stock of the Validity and Legal Impact of Traditional Stabilization Clauses in International Investment Law*, 32 AM. REV. INT'L ARB. 119, 124, 130–31 (2021); Erin O'Hara O'Connor & Susan Franck, *Foreign Investments and the Market for Law*, 2014 U. ILL. L. REV. 1617, 1631; Thomas W. Waelde & George Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation*, 31 TEX. INT'L L.J. 215, 220–23 (1996). Without the protection of contract law, an investor suing a State under domestic administrative, constitutional, or property law for abuse of administrative authority or regulatory overreach cannot prevent the State from changing its internal law.

⁴³ See RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* (1996); see also *infra* notes 48–49, 125–130, 150–151, 201–203 (discussing the temporal promulgation of investment treaties).

⁴⁴ See *infra* Parts I.C and II.A (discussing historical dispute resolution options for resolving international investment disputes); FRANCK, *supra* note 3, at 10–14 (same); Schill, *supra* note 37, at 74 (“Classical international law, therefore, did not directly affect the relations between foreign investors and host states.”).

⁴⁵ Substantively, investment treaties “involve state promises that foreign investors will receive certain basic treatment, including the right to freedom from expropriation without proper compensation, the right to freedom from discrimination, and guarantees of fair and equitable treatment. These rights are similar to some, but not all, constitutional rights.” Franck & Wylie, *supra* note 3, at 470; see also BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID (Meg Kinnear, Geraldine R. Fischer, Jara Mínguez Almeida, Luisa Fernanda Torres Arias, & Mairée Uran Bidegain, eds., 2016) (providing chapters discussing the minimum standards of treatment (Chapter 19), fair and equitable treatment (Chapter 20), denial of justice (Chapter 21), arbitrary and discriminatory treatment (Chapter 22), full protection and security (Chapter 23), expropriation (Chapter 24), indirect expropriation (Chapter 25), umbrella clauses (Chapter 27), national treatment (Chapter 28), most favored nation (Chapters 18 and 29), and performance obligations (Chapter 30)); Susan Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 337, 342–44 (2007) (discussing the substantive and procedural rights in investment treaties). Multiple books have been devoted to investment treaty rights and the substantive law they provide. INTERNATIONAL INVESTMENT LAW AND INVESTOR-STATE DISPUTES IN CENTRAL ASIA: EMERGING ISSUES (Kiran Nasir Gore, Elijah Putilin, Kabir A.N. Duggal, & Crina Baltag, eds. 2022); CAMPBELL MCLACHLAN, LAURENCE SHORE, & MATTHEW WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* (2017); ANDREW PAUL NEWCOMBE & LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* (2009).

⁴⁶ Procedural rights involve the access to dispute resolution contained in investment treaties. Treaties typically contain a variety of procedural mechanisms to engage in risk management, including both State to State and investor-State dispute settlement. These procedural rights may

framework to redress risk, particularly the political risk from interacting with States.⁴⁷

The growth in international commerce and investment as well as the number of investment treaties since the 1990s⁴⁸—with roughly 2,000–2,500 treaties in force today⁴⁹—mean these treaties are a core (but not exclusive) method to manage State-related investment conflict. Using UNCTAD data, one estimate suggests investment treaties could cover around sixty-eight percent of foreign investment. Put differently, investment treaties protect roughly \$15.6 trillion USD of worldwide foreign investments.⁵⁰

include a reference to pre-conditions to adjudication and identify specific ways to adjudicate claims, whether in national courts, ICSID arbitration, or some other arbitration venue. See Franck & Wylie, *supra* note 3, at 470 (discussing the procedural rights available to investors in investment treaties); Susan Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435, 442 (2009). *But see* Sungjoon Cho & Jürgen Kurtz, *Legalizing the ASEAN Way: Adapting and Reimagining the ASEAN Investment Regime*, 66 AM. J. COMPAR. L. 233, 242 (2018) (suggesting that, in the ASEAN context, “state-to-state” dispute resolution can be limited). *See generally* Anthea Roberts, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, 55 HARV. INT'L L.J. 1, 21 (2014) (exploring State to State investment dispute settlement); Sonia E. Rolland, *The Return of State Remedies in Investor-State Dispute Settlement: Trends in Developing Countries*, 49 LOY. CHI. L.J. 387 (2017) (discussing investor-State disputes).

⁴⁷ Having clear and constructive dispute resolution processes can minimize, control, and aid risk management of commercial and investment activities. *See* Gerry Lagerberg, *International Arbitration: Corporate Attitudes and Practices – The Business Rationale*, 19 AM. REV. INT'L ARB. 455–57 (2008); Nadja Alexander, *The Singapore Convention: What Happens After the Ink Has Dried?*, 30 AM. REV. INT'L ARB. 235, 237–38 (2019); Schill, *supra* note 37, at 58–59, 68–69.

⁴⁸ *See* UNCTAD, BILATERAL INVESTMENT TREATIES 1959-1999 1, U.N. Doc. UNCTAD/ITE/IIA/2 (2000) [hereinafter UNCTAD, BITs] (providing information about the initial round of investment treaties before 2000); UNCTAD, WORLD INVESTMENT REPORT 2022, *supra* note 33, at 65–66 (identifying that, with newly signed treaties and treaties being terminated, in 2021, there were roughly 3,300 international investment treaties); UNCTAD, WORLD INVESTMENT REPORT 2018: INVESTMENT AND NEW INDUSTRIAL POLICIES 88 (2018) (observing that roughly eighteen new treaties brought the investment treaties universe to 3,322 treaties).

⁴⁹ Challenges identifying the investment treaties in force derives from two aspects. First, simply signing a treaty does not mean that the treaty is in force or has any legal effect. Second, when counting investment treaties, organizations have not necessarily been precise in defining an “investment treaty.” *Compare* U.N. Comm'n on Int'l Trade Law [UNCITRAL], Rep. of Working Group II (Arbitration and Conciliation) on the Work of Its Fifty-Third Session, at 20, U.N. Doc. A/CN.9/712 (Oct. 20, 2010) (referring to “more than 2,500 investment treaties in force”), and UNCTAD, WORLD INVESTMENT REPORT 2022, *supra* note 33, at 65 (defining a “TIP” as a “treaty with investment protection” and stating the total number of treaties in force was “at least 2,558 by the end of the year” 2021), with Catherine M. Amirfar & Elyse M. Dreyer, *Thirteen Years of NAFTAs Chapter 11*, 20 N.Y. INT'L L. REV. 39, 39 (2007) (indicating over 2,000 investment treaties are in effect), and ORG. FOR ECON. COOPERATION & DEV. [OECD], INTERNATIONAL INVESTMENT PERSPECTIVES: 2006, at 144 (2006) (suggesting only 1700 investment treaties were in force), and Strong, *supra* note 13, at 534 (noting “approximately 93% of the 3,000–5,000 investment treaties now in effect” contain arbitration provisions and citing to a 2012 Organization for Economic Cooperation and Development (“OECD”) report but failing to observe the report only referred to “93% of the treaties [surveyed] contain language on ISDS”). UNCTAD, for example, has grouped together bilateral investment treaties, multilateral investment treaties, and tax treaties which may not have investment rights or related dispute resolution, calling the group International Investment Agreements (“IIAs”). *See* UNCTAD, WORLD INVESTMENT REPORT 2022, *supra* note 33, at 54, 90, 155.

⁵⁰ FRANCK, *supra* note 3, at 6–7.

C. Dispute Resolution Involving States: Procedure

To understand ongoing reform and the World Bank's efforts, history provides a vital framework for the modern understanding of managing investment treaty conflict. In the past, foreign investors were caught between a rock and a hard place when seeking redress for State activity that arguably harmed their investments. While there have been options involving both adjudicative and non-adjudicative dispute resolution, there are material limitations.⁵¹

On the adjudicative side, there have been two primary options.⁵² One involves a standing international court, namely the International Court of Justice ("ICJ"),⁵³ while the other requires the creation of *ad hoc* tribunals.⁵⁴ These adjudicative options are only available, however, when a State deigns to provide them to a non-State actor. As a practical matter, a State's grappling with the choice to politicize an economic dispute is arduous.⁵⁵ Presuming a State made the rare choice to exercise its political clout and expend the time, energy, and money to pursue the dispute,

⁵¹ See, e.g., Stratos Pahis, *BITs & Bonds: The International Law and Economics of Sovereign Debt*, 115 AM. J. INT'L L. 242, 236–54 (2021).

⁵² Theoretically, two States could agree to direct State-to-State dispute resolution. This is quite rare in practice. Roberts, *supra* note 46, at 6–10.

⁵³ The ICJ adjudicates disputes involving foreign investments, but only when a State "espouses" a claim against another country on behalf of its own citizen, which requires States to determine if it is politically prudent to transform an investment dispute into a public inter-State dispute. States have, historically, rarely elected to support their investors in this manner. Even if the claim is brought and is successful, the ICJ does not normally award monetary damages, and because a State is the claimant, monetary awards go to the successful State—not the harmed investor. Moreover, should a State fail to comply with the monetary award of the ICJ, the United Nations Security Council is the body responsible for enforcing ICJ judgments. See FRANCK, *supra* note 3, 12–13; VOSS, *supra* note 37, at 1–3; Lawrence Jahoon Lee, *Barcelona Traction in the 21st Century: Revisiting Its Customary and Policy Underpinnings 35 Years Later*, 42 STAN. J. INT'L L. 237, 239–44 (2006).

⁵⁴ Beyond the *ad hoc* State-to-State tribunal discussed in note 52, over time there have been Mixed Claims Commissions ("MCCs") addressing commercial harm to individuals or investments. States often created MCCs in the fall-out of a massive political event with large scale economic consequences, like the end of the American Revolution (Jay Treaty), the bombing of the U.S.S. Lusitania during World War II, disputes involving U.S. and Mexican nationals deriving from the Mexican Revolution (American-Mexican Claims Commission), disputes from the Iranian revolution and hostage crisis (Iran-U.S. Claims Tribunal), or the invasion of Kuwait (United Nations Claims Commission). See, e.g., FRANCK, *supra* note 3, at 12; David J. Bederman, *The United Nations Compensation Commission and the Tradition of International Claims Settlement*, 27 N.Y.U. J. INT'L L. & POL. 1, 2–10 (1994); see also Sergio Puig, *No Right Without A Remedy: Foundations of Investor-State Arbitration*, 35 U. PA. J. INT'L L. 829, 836 (2014); Sergio Puig, *Recasting ICSID's Legitimacy Debate: Towards a Goal-Based Empirical Agenda*, 36 FORDHAM INT'L L.J. 465, 476 (2013).

⁵⁵ See, e.g., Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 VA. J. INT'L L. 809, 822–23 (2005) (noting the U.S. State Department's "decision with respect to espousal is likely to be influenced, not only by the merits of the case, but by the Department's concern for offending a foreign state and creating a potential irritant in its dealings with that state" and explaining "even if a claimant met all other criteria, a state might still decide not to espouse the claim"); Kenneth J. Vandavelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 158–70 (2005) (discussing the evolution of investment dispute resolution in public international law).

history demonstrates that the process was dissatisfying. Cases were lost,⁵⁶ fiscal damage awards were rare (and took decades to secure even partial enforcement),⁵⁷ and an investor's home State had no obligation to provide any funds to its own investor, permitting States to retain damages as it wished.⁵⁸

On the non-adjudicative side, there were other options. At one end of the dispute resolution continuum,⁵⁹ conflict resolution could involve an investor simply doing nothing. This method functionally involves investors ignoring conflicts, absorbing the cost of harm caused by others, and/or seeking ways to pass on the commercial cost of that risk, whether by pricing capital or the products and services deriving from the commercial activity.⁶⁰

At the other end of the continuum, a State has unique powers to defend its own actions or the rights of its citizens. War, for example, is a form of dispute resolution.⁶¹ Another method unique to States involves a form of

⁵⁶ See Lee, *supra* note 53 (discussing the loss in *Barcelona Traction*); Murphy, *supra* note 2 (discussing the loss in *ELSI*). See generally Julian Arato, *The Elastic Corporate Form in International Law*, 62 VA. J. INT'L L. 383, 394–96 (2022); Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 NW. J. INT'L L. & BUS. 327, 347–53 (1994) (discussing ICJ espousal, *Barcelona Traction*, and *ELSI*).

⁵⁷ In its history, the ICJ has only awarded monetary damages in two cases, including *Diallo*. Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 2012 I.C.J. 324 (June 19). The only other case was *Corfu Channel*, decided nearly seventy years ago, and “full” compliance only occurred after fifty-seven years and after a discount. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9); see also David M. Reilly & Sarita Ordonez, *Effect of the Jurisprudence of the International Court of Justice on National Courts*, 28 N.Y.U. J. INT'L L. & POL. 435, 460 n.101 (1996) (discussing efforts to enforce *Corfu Channel*); FRANCK, *supra* note 3, at 12–13 (discussing challenges related to ICJ enforcement).

⁵⁸ See Franck & Wylie, *supra* note 3, at 471–72; Puig, *Recasting*, *supra* note 54, at 471–75.

⁵⁹ See, e.g., MENKEL-MEADOW, LOVE, STERNLIGHT, & SCHNEIDER, *supra* note 4 (discussing non-adjudicative dispute resolution options); see also Roberto Ehandi, *Complementing Investor-State Dispute Resolution: A Conceptual Framework for Investor-State Conflict Management*, in PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY 270, 389–91 (Roberto Ehandi & Pierre Sauvé eds., 2013); Ian R. Scott, *The Courts and Alternative Dispute Resolution*, in ADR ARBITRATION, AND MEDIATION: A COLLECTION OF ESSAYS 64, 74–76 (Julio C. Betancourt & Jason A. Crook eds., 2014); Nancy A. Welsh & Andrea K. Schneider, *The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration*, 18 HARV. NEGOT. L. REV. 71, 109 n.133, 117 (2013).

⁶⁰ For example, investors could increase the cost of their investments and overprice portions to leverage subsequent risk, meaning investors might extract higher prices at the start of an investment, passing the cost of political instability and improper government conduct onto the market (and the local population) by increasing costs. Alternatively, they may be able to pass on some (but not all) of their risk through insurance, including political risk insurance. Such insurance is not always available, can be quite costly, have limited coverage in types of compensable damage, and may only pay a small portion of the actual value of the investment. See Pahis, *supra* note 51, at 250–52, 255–63; Mark B. Baker, *No Country Left Behind: The Exporting of U.S. Legal Norms Under the Guise of Economic Integration*, 19 EMORY INT'L L. REV. 1321, 1364 (2005) (“[W]hen making investment decisions, rational actors must be assumed to take into account relative disparities in rule of law, just as they would take into account the different prices of capital and labor. Higher risks associated with low ‘rule of law’ or high political instability should transfer into higher expected returns from any particular investment.”).

⁶¹ See Hernandez-Crespo Gonstead, *supra* note 34, at 2175–76 (noting that power is a tool of dispute resolution manifesting itself “by crushing the other (e.g., war, strikes, demonstrations, coups d’état)”); Christopher N. Camponovo, *Dispute Settlement and the OECD Multilateral*

“negotiation” known as “gunboat diplomacy,”⁶² literally arriving in naval warships to resolve economic disputes, like in *Tinoco*.⁶³ Decisions to engage in war or threaten military action as a prelude to war have material ramifications for human life and liberty. Given the sub-optimal implications, the United Nations Charter requires peaceful dispute settlement.⁶⁴

Other more traditional types of negotiation were also available to investors experiencing difficulties with State action. An investor could, for example, seek informal diplomatic protection by entreating their home government (usually through the local embassy) to intervene directly with the local government on their behalf. This option required investors to have the political clout and power to lobby their home country to intervene, potentially disrupting their home country’s international relations objectives, and to have a sufficiently material problem to justify the intervention.⁶⁵ Although investors could try to negotiate directly with a State, securing such participation (let alone meaningful dialogue or securing a change in State behavior) was largely a function of power, politics, and economics.

Other forms of dispute resolution have also been used. Although there was some success resolving factual disputes in public international law among States,⁶⁶ private international investors (as non-State actors) lacked access to this forum.⁶⁷ Perhaps more importantly, structured mediation involving States and investors was historically not even considered.⁶⁸

Agreement on Investment, 1 UCLA J. INT’L L. & FOREIGN AFF. 181, 186 (1996) (noting how Friendship, Commerce, and Navigation treaties (“FCNs”) failed to provide dispute resolution and stating the “primary method of dispute resolution contemplated by these agreements is a mere demand for restitution prior to taking reprisals or declaring war on the other party”) (footnotes omitted).

⁶² See SALACUSE, *supra* note 23, at 312–13; José E. Alvarez, *Contemporary Foreign Investment Law: An “Empire of Law” or the “Law of Empire”?*, 60 ALA. L. REV. 943, 954–55, 971 (2009); Franck, *supra* note 46, at 442 (suggesting the creation of arbitration dispute resolution rights was a “move beyond war, gunboat diplomacy, and politicized forms of dispute resolution to provide a neutral forum”).

⁶³ See *supra* note 2 (discussing *Tinoco*); Dautaj, *supra* note 12, at 292, 295–96; Matthew C. Waxman, *The Power to Threaten War*, 123 YALE L.J. 1626, 1681 n.202 (2014); Jason W. Yackee, *Toward A Minimalist System of International Investment Law?*, 32 SUFFOLK TRANS-NAT’L L. REV. 303, 337 (2009).

⁶⁴ See U.N. Charter art. 2(3) (“All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”).

⁶⁵ In the 1970s, the United Nations identified 875 acts of government takings in sixty-two countries over a period of fourteen years. The U.S. Department of State estimated in 1977 that 102 investment disputes existed between U.S. nationals and foreign governments. Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT’L LAW. 655, 659 n.32 (1990); see also Vandeveld, *supra* note 55, at 160 (“Diplomacy was effective on occasion. The United States, for example, was able during the Nineteenth Century to persuade Latin American countries to agree periodically to the submission of claims of injuries to nationals to arbitration.”).

⁶⁶ See *infra* Part III.D.3 (discussing fact-finding).

⁶⁷ See *supra* notes 38, 50 and accompanying text (identifying the challenges of resolving disputes without available an available forum).

⁶⁸ See *supra* note 34 (gathering sources that discuss mediation and its implications for modern investment disputes); *infra* Part IV.C.3; Andrea Kupfer Schneider & Nancy A. Welsh, *Bargaining in the Shadow of Investor-State Mediation: How the Threat of Mediation Will Improve Parties’ Conflict Management*, 17 U. ST. THOMAS L.J. 373, 379 (2021); Welsh & Schneider, *supra* note 59, at 82–83.

II. INTERNATIONAL ARBITRATION: AN ADJUDICATIVE ALTERNATIVE

One dispute resolution method available to international commercial parties has been international arbitration.⁶⁹ Typically occurring between two private parties, international arbitration is a staple of the modern global economy.⁷⁰ Even today, with pandemic-driven backlogs jamming national courts, the use of international arbitration continues to increase, with data suggesting that parties are filing a record number of cases.⁷¹

To understand the role in international dispute resolution generally and to establish the background necessary for understanding the World Bank's creation of ICSID and its historical evolution, this section explores the history and doctrinal mechanics of international arbitration.

A. History of International Arbitration

With origins in Roman and Greek law,⁷² arbitration has a rich historical pedigree. In the modern era, domestic arbitration⁷³ within a country is not the same as international arbitration.⁷⁴ Historically, international

⁶⁹ Susan Franck, *The Fundamentals of Arbitration*, in OXFORD RESEARCH ENCYCLOPEDIA OF ECONOMICS AND FINANCE (2020), <http://oxfordre.com/economics/view/10.1093/acrefore/9780190625979.001.0001/acrefore-9780190625979-e-369> (last visited Feb. 22, 2023) [hereinafter Franck, *Fundamentals*].

⁷⁰ See, e.g., GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION (3d ed. 2020); see also Christopher R. Drahozal, *Empirical Findings on International Arbitration: An Overview*, in OXFORD HANDBOOK ON INTERNATIONAL ARBITRATION 643, 649 (2020) (exploring the increase in international commercial disputes); Franck & Wylie, *supra* note 3, at 487–89 (exploring the increase in volume and amounts claimed in ITA); Susan Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 44–47 (2007) (same).

⁷¹ See, e.g., Queen Mary Univ. Sch. of Int'l Arb. & White & Case LLP, 2021 International Arbitration Survey: Adapting Arbitration to a Changing World 2 (2021), http://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf; *The Arbitration Solution to COVID-19-Stalled Court Litigation*, AM. ARB. ASS'N, <http://www.adr.org/litigation-to-arbitration> (last visited Feb. 22, 2023); Sarah Reynolds et al., *International Arbitration Experts Discuss the Impact on the Global Economy*, 35 MEALEY'S INT'L ARB. REP. 1, 4 (2020).

⁷² Henry S. Frasier, *Sketch of the History of International Arbitration*, 11 CORNELL L. REV. 179, 185 (1926); Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 88 U. PA. L. REV. 132, 132 (1934); see also Joshua Karton, *International Arbitration as Comparative Law in Action*, 2020 J. DISP. RESOL. 293, 295–96 (discussing historical research and stating “[a]rbitration is as old as human societies, and international arbitration is not much younger”).

⁷³ See, e.g., THOMAS E. CARBONNEAU, ARBITRATION IN A NUTSHELL (4th ed. 2017); MAUREEN A. WESTON, KRISTEN M. BLANKLEY, JILL I. GROSS, & STEPHEN HUBER, ARBITRATION: LAW, POLICY AND PRACTICE (2018). In domestic arbitration, the parties and subject matter involve a single country. Domestic arbitration in the U.S. is quite different from domestic arbitration in another country, such as China or France. See, e.g., Franck, *Fundamentals*, *supra* note 69, at 2; LIN YIFEI, JUDICIAL REVIEW OF ARBITRATION: LAW AND PRACTICE IN CHINA (2018). The policy concerns in U.S. domestic arbitration are not shared transnationally, as the underlying contact law which can disenfranchise stakeholders (like employees, consumers, and others without structural power) in dispute resolution, varies substantially. For instance, Europe has far more protective rules on contract law for employees and consumers, which means dispute resolution occurs on a more balanced playing field.

⁷⁴ GUIDITTA CORDERO-MOSS, INTERNATIONAL COMMERCIAL ARBITRATION: DIFFERENT FORMS AND FEATURES (2013); S.I. STRONG, LEGAL REASONING ACROSS COMMERCIAL DISPUTES: COMPARING JUDICIAL AND ARBITRAL ANALYSES 2 (2021); Thomas J. Stipanowich, *Living the Dream of ADR: Reflections on Four Decades of the Quiet Revolution in Dispute Resolution*, 18 CARDOZO J. CONFLICT RESOL. 513 (2017).

arbitration focused on dispute settlement involving transnational parties, activities, subject matter, and laws from multiple countries, with different legal and cultural traditions. Given the broad range of business and investment activities in the global marketplace—and humans with different expectations making errors and generating conflicts—international arbitration resolves a myriad of heterogeneous claims.

Transnational commercial disputes have historically been resolved through International Commercial Arbitration (ICA).⁷⁵ Given its past success and the transnational acceptance of the process, ICA “is generally considered to be one of the great success stories of the procedural realm.”⁷⁶ ICA disputes often involve contract breaches or tort claims, and sometimes claims arising under a domestic statute. This typically means, both now and in the past, that ICA disputes are governed by national law selected by the parties in a choice of law clause.⁷⁷ International law was rarely considered except when seeking enforcement of an arbitration agreement or a derivative arbitration award at a location where assets were available to secure compliance.⁷⁸

Until States began creating treaties that granted investors direct dispute resolution rights, there was no such thing as ITA.⁷⁹ Unlike ICA, ITA

⁷⁵ See BORN, *supra* note 70; Drahozal, *supra* note 70; see also C.J.W. Baaij, *Hiding in Plain Sight: The Power of Public Governance in International Arbitration*, 60 HARV. INT’L L.J. 135 (2019) (describing the evolution of international arbitration institutions over 100 years ago). There are also strong traditions of using arbitration to resolve other issues, including public international law disputes. Crina Baltag & Ylli Dautaj, *Promoting, Regulating, and Enforcing Human Rights Through International Investment Law and ISDS*, 45 FORDHAM INT’L L.J. 1, 2 (2021); Stockholm Chamber of Commerce, *The Quiet Triumph—How Arbitration Changed the World*, VIMEO (Feb. 24, 2017), <http://vimeo.com/205567614>.

⁷⁶ S.I. Strong, *Limits of Procedural Choice of Law*, 39 BROOK. J. INT’L L. 1027, 1086 (2014).

⁷⁷ Yeshnah D. Rampall & Ronán Feehily, *The Sanctity of Party Autonomy and the Powers of Arbitrators to Determine the Applicable Law: The Quest for an Arbitral Equilibrium*, 23 HARV. NEG. L. REV. 345, 367–72 (2018). There are, however, a few times when national law might not apply, such as when the parties expressly choose to proceed on an equitable basis (*ex aequo et bono*), which is not about applying law at all, or in the case of an international convention, that may dictate applicable law. See *id.* at 371–76, 382–84; Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANSN’L L. 1189, 1219 (2003); see also JULIAN D.M. LEW, LOUKAS A. MISTELIS, & STEFAN M. KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* (2003) (providing a comparative perspective on how different national laws manage core issues in international commercial arbitration).

⁷⁸ The New York Convention is the core tool for enforcement of arbitration agreements and derivative awards. It is arguably the single most successful treaty in history and currently has 167 signatory States, which is nearly every country on the planet. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention]; *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, U.N. COMM’N ON INT’L TRADE L., http://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 (last visited Aug. 28, 2022).

⁷⁹ ITA is a *sui generis* hybrid of public and private international law, combining dispute resolution procedures, private international law, and substantive standards from public international law. See, e.g., Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT’L L. 45, 45 (2013); see also Dautaj, *supra* note 12, at 291 (noting a distinction between ICA and ITA but conflating ITA and ISDS, which are doctrinally distinct); Susan Franck, *The Multi-Faceted Legacy of Julian Lew: The Prism of Immunity in International Arbitration*, in LIBER AMICORUM IN HONOUR OF PROFESSOR JULIAN LEW QC (Stavros Brekoulakis & Romesh Weeramantry eds., forthcoming 2023) (discussing the evolution of ITA); *infra* note 83.

permits investors to vindicate substantive international law rights, which States grant to investors through treaties. The claims involve a narrow range of issues, as treaties contain a limited number of enumerated investor rights and State obligations, such as promises involving expropriation or national treatment.⁸⁰ The core claim in such a proceeding is that a State's action violated the substantive rights the treaty granted the investor.⁸¹

B. *The Mechanics of International Arbitration*

International arbitration is a creature of consent. Without all parties' consent to resolve the conflict via arbitration, arbitration cannot proceed.⁸² Parties (whether commercial parties, States, or State-controlled commercial entities) must agree to submit their disputes to binding arbitration. Consent to arbitration typically occurs *ex ante* in a contract (i.e., an arbitration agreement) or *ex post* after a dispute arises (i.e., a submission agreement).⁸³ The lack of a valid and binding agreement to arbitrate means running the risk of parallel lawsuits in multiple countries, as any court in the world capable of exercising personal and subject matter jurisdiction can resolve the dispute.⁸⁴ By contrast, a valid arbitration agreement—where both parties agree to resolve disputes through arbitration—creates a single, clear, predictable forum for resolving transnational conflicts.⁸⁵

⁸⁰ See, e.g., DOLZER & STEVENS, *supra* note 43; Stefan D. Amarasinha & Juliane Kokott, *Multilateral Investment Rules Revisited*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (Peter Muchlinski, Federico Ortino, & Christoph Schreuer eds., 2008); see also *supra* note 45 and accompanying text.

⁸¹ JOSÉ ALVAREZ, THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT 36–38 (2011); KRISTA NADAKAVUKAREN SCHEFER, INTERNATIONAL INVESTMENT LAW: TEXT, CASES AND MATERIALS 370 (2013); see also Susan Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1529–31 (2005) (providing an overview of ITA).

⁸² Like federal courts assessing their own subject matter jurisdiction, arbitration tribunals have the power to decide whether they have jurisdiction over a case. Tribunals do not always retain jurisdiction, instead creating a final award that reflects that there is no jurisdiction over the matter and requiring disputes to be adjudicated elsewhere. In ITA, roughly 25% of tribunals make a finding of a lack of jurisdiction. FRANCK, *supra* note 3, at 151–54.

⁸³ NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN, & MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION (6th ed. 2015) [hereinafter REDFERN & HUNTER]; Franck, *Fundamentals*, *supra* note 69, at 6. In ITA, party consent to arbitration involves: (a) a unilateral offer by a State that grants a foreign investor the right to initiate arbitration against that State for the violation of an investor's treaty rights, and (b) a foreign investor's acceptance of the offer by initiating arbitration under the terms of the treaty. Franck & Wylie, *supra* note 3, at 469–74.

⁸⁴ As a basic matter, for institutional arbitration, even if a name suggests the presence of a court (i.e., the London Court of International Arbitration), those bodies are *not* courts making decisions about the merits of a dispute. BORN, *supra* note 70, § 1.06. Instead, institutions manage the cases that arbitrators adjudicate. *But see* Pamela K. Bookman, *The Adjudication Business*, 45 YALE J. INT'L L. 227 (2020) (discussing how, in contrast to international arbitration, the rise of specialized courts adjudicating private international law commercial disputes, involves the institutionalized national courts directly administering disputes).

⁸⁵ See Franck, *Fundamentals*, *supra* note 69.

The objective of international arbitration is to permit parties, through counsel, to present their case,⁸⁶ to use facts and arguments that enable the tribunal to adjudicate those claims and defenses using the applicable substantive law, and to do so with impartiality and independence. The parties' agreement, procedural rules, and consideration of due process of equality of arms helps tribunals render awards that are enforceable worldwide.⁸⁷

This means the parties, their counsel, and the tribunal must conduct the arbitration proceedings in accordance with the parties' arbitration agreement and applicable substantive law. Meanwhile, the procedural rules provide default standards for arbitration mechanics.

Procedural rules derive from party agreement, whether as a function of their: (1) specific agreement, (2) adoption of pre-existing ad hoc rules promulgated by bodies like UNCITRAL or the International Bar Association (IBA), or (3) consent to arbitrate at an established arbitration institution, like the International Chamber of Commerce ("ICC").⁸⁸ Subject to party agreement to the contrary, rules typically provide guidance about basic matters, such as: how to start an arbitration, how to make defenses and counterclaims, how to respond to counterclaims, and how to appoint or remove arbitrators. Rules also identify the tribunal's powers over the proceedings (i.e., setting the procedural timetable), how to

⁸⁶ One firm explains the core processes are: "Claimant's Request for Arbitration, including at least a summary of the claims[;] Respondent's Answer, which will indicate any counterclaims to be made[;] Claimant's Reply to Counterclaim (if appropriate)[;] Appointment of the tribunal[;] Procedural hearing setting the steps and timetable for the arbitration[;] Claimant's full Statement of Case (if not served with the Request for Arbitration)[;] Respondent's full Defence and Counterclaim (if not served with the Answer)[;] Claimant's Reply and Defence to Counterclaim[;] Disclosure of the documents relied upon or of the (often very limited) categories of documents requested by the other party[;] Exchange of witness statements (sometimes followed by rebuttal statements)[;] Exchange of expert reports (sometimes followed by rebuttal reports)[;] Meeting of experts to narrow issues and joint statement of matters agreed/in dispute[;] Exchange of pre-hearing submissions[;] Hearing[;] Post-hearing submissions[;] and] Award." LATHAM & WATKINS, GUIDE TO INTERNATIONAL ARBITRATION 24–25 (2014), <http://www.lw.com/admin/Upload/Documents/Guide-to-International-Arbitration-May-2014.pdf> (last visited Apr. 30, 2023).

⁸⁷ Susan Franck, *The Nature and Enforcement of Investor Rights under Investment Treaties: Do Investment Treaties Have a Bright Future*, 12 U.C. DAVIS J. INT'L L. & POL'Y 47, 86–87 (2005); William W. Park, *Equality of Arms in Arbitration: Costs and Benefits*, in MÉLANGES EN L'HONNEUR DE PIERRE MAYER 643 (2015); Ilias Banetekas, *Equal Treatment of Parties in International Commercial Arbitration*, 69 INT'L & COMP. L.Q. 991, 992, 998 (2020); Thomas W. Wälde, "Equality of Arms" in *Investment Arbitration: Procedural Challenges*, in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 161, 161–62 (Katia Yannaca-Small ed., 2010); see Herman Verbist, *Challenges on Grounds of Due Process Pursuant to Article V(1)(B) of the New York Convention*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS (Emmanuel Gaillard & Domenico De Pietro eds., 2008) (exploring the due process considerations that impact both court vacatur and enforcement of arbitration awards); THOMAS E. CARBONNEAU & JEANETTE A. JAGGI, AAA HANDBOOK ON INTERNATIONAL ARBITRATION AND ADR 171 (2006) (describing due process obligations from article V(1)(b) of the New York Convention and how US courts address those challenges); Franck, *Fundamentals*, *supra* note 69 (discussing post-award activity and enforceability under international treaties); see also S.I. Strong, *Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?*, 31 VAND. J. TRANSN'T'L L. 915, 955, 987 (1998) (discussing due process concerns in international arbitration); ALBERT JAN VAN DEN BERG, THE NEW YORK CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION (1981).

⁸⁸ See, e.g., REDFERN & HUNTER, *supra* note 83, §§ 1.140–1.181, 2.01–2.12, 3.01–3.197 (discussing the agreement to arbitrate and applicable law).

establish the facts and gather evidence,⁸⁹ a tribunal's authority to order interim relief, tribunal capacity (if any) to consolidate and/or join related disputes, and arbitrator obligations in making awards.⁹⁰

III. THE WORLD BANK'S ICSID: STRUCTURING DISPUTE RESOLUTION

This part offers a foundational example of international dispute settlement and explores lessons for the future by charting the specific history of ICSID, with a focus on the creation of the ICSID Convention and its initial dispute resolution procedures.

To do so, this part first identifies the importance of history in properly appreciating international dispute settlement given the recent observations of a prominent practitioner that, “[t]he past informs the future. We hear and read a lot about the future of arbitration[,] but do we really know its (modern) past?”⁹¹ It then turns to a review of the World Bank's creation of ICSID and the object and purpose behind the negotiation of the ICSID Convention, which includes extensive consideration of the drafting history and *travaux préparatoires*. Finally, it explores the core international dispute resolution options available at ICSID.

A. The Importance of History and the Problems of Ignoring the Past

In an era of polarized media outlets and “alternative facts,”⁹² newcomers to international dispute settlement can lack proper information about ICSID's origin, purpose, and history. While practitioners, arbitrators, and others involved with ICSID on a daily basis may appreciate the context, they are not the only stakeholders in debates about the utility and evolution of ICSID. As globalization, investment, and supply chains expand across cultures and countries—and governments wrestle with economic and political conflicts—newcomers enter the field of investment dispute settlement and narratives proliferate, whether involving public

⁸⁹ The wide variation in evidence collection in national courts can affect parties' (and counsels') assumptions about the proper scope of compelled evidence exchange, privilege, and the role of witnesses. See, e.g., Susan Franck, *International Arbitration and Attorney-Client Privilege—A Conflict of Laws Approach*, 51 ARIZ. ST. L.J. 935, 936–41 (2019); Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT'L L. 1313, 1325–30 (2003). Given common and civil law divides, the International Bar Association created guidelines to manage expectations and practice in international arbitration. INT'L BAR ASS'N, IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (2020), <http://www.ibanet.org/Media-Handler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b> (last visited Apr. 30, 2023).

⁹⁰ See Franck, *Fundamentals*, *supra* note 69.

⁹¹ International Council for Commercial Arbitration, *Meet the Speakers: ICCA Edinburgh 2022, Arbitration's Age of Enlightenment?*, LINKEDIN (Aug. 17, 2022), http://www.linkedin.com/posts/international-council-for-commercial-arbitration_iccaedinburgh2022-icca-activity-6965614073698734080-aLwi (last visited Apr. 30, 2023).

⁹² Susan Franck, *The Promise and Peril of Empiricism and International Investment Law Disputes*, in CAMBRIDGE COMPENDIUM OF INTERNATIONAL COMMERCIAL AND INVESTMENT ARBITRATION 1855, 1879 (Andrea K. Bjorklund, Federal Ferrari, & Stefan Kröll eds., 2022); S.I. Strong, *Alternative Facts and the Post-Truth Society: Meeting the Challenge*, 165 U. PA. L. REV. ONLINE 137 (2017), http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1193&context=penn_law_review_online (last visited Apr. 30, 2023).

exorcisms,⁹³ or reporters donning Halloween costumes to demonize international investment dispute resolution or ICSID.⁹⁴

It has become disturbingly normal to find people whose understanding of ICSID includes skewed perceptions, legally erroneous understandings and expectations or opinions that derive from unrepresentative experiences, manipulated information, or factual errors.⁹⁵ Perhaps this simply mirrors modern reality, where knowledge is condensed into blog posts, tweets, and Tik-Tok videos that facilitate consumption of information without reference to primary authority or careful, independent research.⁹⁶

Between cognitive exhaustion and the intuitive (and human) practice of seeking information that generates mental ease by fitting into a pre-existing framework, “fast” intuition, rather than slow and logical deliberation, often shapes expectations.⁹⁷ This facilitates cognitive leaps and situational blindness about ICSID’s purpose in the settlement of international disputes. Yet, ICSID’s historic and current mandate involves resolving transnational disputes involving international investment with one governmental party in a practical, balanced way. With State responsibility, sovereignty, and international rule of law at stake, intuitive leaps are problematic, risky, and imprudent. A more sensible approach entails exploring ICSID’s history before making assumptions, rationally assessing how ICSID has functioned, and considering future change in a balanced manner.

⁹³ See Franck & Wylie, *supra* note 3, at 476 (discussing public exorcisms and other public outcries involving investment dispute resolution).

⁹⁴ Susan Franck, *International Arbitration—Between Myth and Reality: The 9th John E.C. Brierley Memorial Lecture*, 5 MCGILL J. DISP. RESOL. 5, 8–9 (2018); see Leon E. Trakman, *The ICSID Under Siege*, 45 CORNELL INT’L L.J. 603, 608–09 (2012) (exploring challenges deriving from skewed ideological understandings of ICSID); see also José Carlos Bernal Rivera & Mauricio Viscarra Azuga, *Life After ICSID: 10th Anniversary of Bolivia’s Withdrawal from ICSID*, KLUWER ARB. BLOG (Aug. 12, 2017), <http://arbitrationblog.kluwerarbitration.com/2017/08/12/life-icsid-10th-anniversary-bolivia-withdrawal-icsid> (last visited Apr. 30, 2023) (observing that denunciation of the ICSID “is not an immediate escape valve” for perceived problems in investment dispute resolution).

⁹⁵ See, e.g., Franck, *supra* note 92; Strong, *supra* note 92, at 137.

⁹⁶ See, e.g., NICHOLS, *supra* note 18, at 110–15, 159–66, 223–35; see also FRANCK, *supra* note 3, at 25–66 (noting cognitive illusions impact debates about and decision making in investment dispute settlement).

⁹⁷ See MANJOO, *supra* note 17, at 198 (discussing truthiness). See generally DANIEL KAHNEMAN, THINKING, FAST AND SLOW 40–49, 59–70 (2011) (discussing cognitive ease and how even seemingly rational cognition facilitates “lazy” thinking).

The importance of eradicating the blind spot bias involving ICSID's history is critical. Scholarship by Professors Mortenson,⁹⁸ Puig,⁹⁹ and others has demonstrated that ignorance of history¹⁰⁰—particularly for ICSID—generates unnecessary misunderstandings and doctrinal confusion.

Unfortunately, institutional memory is being lost in favor of splashy soundbites and social media quips. The founding actors that negotiated ICSID's creation in the 1960s—including major figures at the World Bank like Aron Broches and Ibrahim Shihata,¹⁰¹ as well as State delegates involved in drafting the ICSID Convention like Andreas Lowenfeld and others—are no longer with us.¹⁰² Even with vital contributions from deeply embedded individuals who carry ICSID's institutional memory, like Antonio Parra,¹⁰³ compelling first-person accounts from those who

⁹⁸ Julian D. Mortenson, *The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law*, 51 HARV. INT'L L.J. 257 (2010); see also 1 ICSID, HISTORY OF THE ICSID CONVENTION 116 (1970), <http://icsid.worldbank.org/resources/publications/the-history-of-the-icsid-convention> (defining "investment" in the first draft in article 30(i), which was a definition that was subsequently omitted from the Convention) [hereinafter ICSID, HISTORY, VOLUME I]; 2(1) ICSID, HISTORY OF THE ICSID CONVENTION 1–43 (1968), <https://icsid.worldbank.org/resources/publications/the-history-of-the-icsid-convention> (providing part of the negotiating history, or *travaux*, in English) [hereinafter ICSID, HISTORY, VOLUME II-1]; 2(2) ICSID, HISTORY OF THE ICSID CONVENTION 44–146 (1968), <https://icsid.worldbank.org/resources/publications/the-history-of-the-icsid-convention> (providing more *travaux* in English) [hereinafter ICSID, HISTORY, VOLUME II-2].

⁹⁹ Sergio Puig, *Emergence & Dynamism in International Organizations: ICSID, Investor-State Arbitration & International Investment Law*, 44 GEO. J. INT'L L. 531, 536–37 (2013).

¹⁰⁰ Tai-Heng Cheng, *The Role of Justice in Annulling Investor-State Arbitration Awards*, 31 BERKELEY J. INT'L L. 236 (2013); Christopher J. Thomas & Harpreet K. Dhillon, *The Foundations of Investment Treaty Arbitration: The ICSID Convention, Investment Treaties and the Review of Arbitration Awards*, 32 ICSID REV. 459 (2017).

¹⁰¹ ARON BROCHES, SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW (1995); see also Antonio R. Parra, *Establishing ICSID: An Idea That Was 'In the Air'*, OUPBLOG (Sept. 8, 2015), <http://blog.oup.com/2015/09/history-of-icsid-law>; Ibrahim F.I. Shihata, *The Settlement of Disputes Regarding Foreign Investment: The Role of the World Bank, with Particular Reference to ICSID and MIGA*, 1 AM. U. INT'L L. REV. 97 (1986).

¹⁰² See Andreas F. Lowenfeld, *The ICSID Convention: Origins and Transformation*, 38 GA. J. INT'L & COMP. L. 47, 48 (2009) [hereinafter Lowenfeld, *Origins*] ("I may not be the only surviving founder of the ICSID Convention, but I believe there are not many of us left. In any event, I was 'present at the creation,' . . . and I think it is of interest—not only historical interest—to go back to the period 1963–1965 to look at what was expected, what looked possible, and what has become of the Convention in the intervening decades."); Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLM. J. TRANSNAT'L L. 123, 124–25 (2003) ("Until the ICSID Convention, investor-state arbitration was rare, and generally was not accepted as a component of international law The founding fathers of the ICSID Convention (of whom I was one) were clear that no agreement would have been possible if even a hint of what that international law provided or when it might be applicable made it into the Convention, and they did not even try to introduce such provisions."). While at the State Department, Lowenfeld was one of two delegates to a regional meeting drafting the ICSID Convention. Lord (Lawrence) Collins of Mapesbury, *In Memoriam: Andreas (Andy) Lowenfeld (1930-2014)*, 109 AM. J. INT'L L. 58, 59 (2015).

¹⁰³ See ANTONIO R. PARRA, THE HISTORY OF ICSID (2d ed. 2018); Frank Berman, *Book Report: The History of ICSID by Antonio R Parra*, 28 ICSID REV. 144, 144–46 (2013).

were at the negotiation table are no longer available to inform the students of today.¹⁰⁴

Despite ICSID having a Twitter account,¹⁰⁵ there is no video or audio history that offers primary and memorable narratives that contextualize the politics, economics, and decisions surrounding ICSID's creation and development.¹⁰⁶ This means there are few "sticky" examples to anchor the modern understanding of ICSID's history.¹⁰⁷ The consequence of this

¹⁰⁴ There is a massive four-volume negotiation history available for free on ICSID's own website, which contains materials in English, Spanish, and French. *The History of the ICSID Convention*, ICSID, <http://icsid.worldbank.org/resources/publications/the-history-of-the-icsid-convention> (last accessed Aug. 28, 2022). ICSID has a document retaining much of its institutional memory referred to internally as the "Brown Book," which contains the ICSID Regulations and Rules in effect on January 1, 1968, along with—for each rule—a set of detailed explanatory notes from the ICSID Secretariat. ICSID, ICSID RULES AND REGULATIONS (1975), <http://icsid.worldbank.org/sites/default/files/ICSID%20Regulations%20and%20Rules%201968%20-%20ENG.pdf>; see also Aurélia Antonietti, *The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules*, 21 ICSID REV.—FOREIGN INV. L.J. 427, 428 (2006) (discussing the "Brown Book").

¹⁰⁵ ICSID (@icsid), TWITTER, <http://twitter.com/icsid> (last visited Feb. 28, 2023). Although its Twitter information states that ICSID joined Twitter in February 2016, ICSID's first tweet was on January 4, 2018. ICSID (@icsid), TWITTER (Jan. 4, 2018, 6:49 PM), <http://twitter.com/icsid/status/948959495706816513>. ICSID also has a YouTube channel where it is possible to view past events and hearings at ICSID. ICSID (@internationalcentreforsett919), YOUTUBE, <http://www.youtube.com/@internationalcentreforsett919/videos> (last visited May 1, 2023). The oldest video is from March 1, 2018. ICSID (@internationalcentreforsett919), *Webinar: Making Mediation Work for States and Investors*, YOUTUBE (Mar. 1, 2018), <http://www.youtube.com/watch?v=CBG6hIvQyCQ>.

¹⁰⁶ As the technology of the past was limited, we have few sources for transferring historical knowledge about the evolution of international investment law that resonate with consumers steeped in traditions from modern social media. Parra's fundamental book on ICSID's history, however, has multiple fascinating photographs in black and white that reflect critical moments in ICSID's past. Multiple pictures reflect national diversity. See PARRA, *supra* note 103, at 63, 88, 93, 141, 156, 199. By contrast, while the images suggest much less participation by women in ICSID's formation, the "founding mothers" of ICSID were, quite literally, still in the picture. ICSID's legislative history includes women from three countries who either attended or actively participated in discussions: (1) Miss Brun, who participated in discussions on behalf of "certain Nordic countries," including Denmark and Sweden, (2) Mrs. Villgrattner and Mrs. Maria Pilz who represented Austria, and (3) Miss Gillian M.E. White from the United Kingdom. ICSID, HISTORY, VOLUME II-1, *supra* note 98, at 64, 127–28, 367, 369; ICSID, HISTORY, VOLUME II-2, *supra* note 98, at 690, 740, 747, 762, 767, 787, 803, 809–10, 827. Parra's book also includes a picture of a woman who appears to be the stenographer and who was likely part of the process of creating the valuable, voluminous, and publicly available *travaux*. See PARRA, *supra* note 103, at 84; see also ICSID, HISTORY, VOLUME I, *supra* note 98, at iv (reflecting the value of "preparatory studies by Miss Fre LePoole (Mrs. John Griffiths) and with the able assistance of Mrs. Lyke E. Feeney"). Parra confirmed that one picture includes Ms. Brun. PARRA, *supra* note 103, at 35 (upper row in the middle, sitting next to a man with a moustache). Meg Kinnear's photograph is the only other clear and prominent picture of a woman in Parra's book. *Id.* at 272. "Miss Brun" was not simply a delegate to the ICSID Convention. Rather, Alice A. Brun served as Executive Director of the World Bank from 1962–1964. See *Folder-Alice Brun-Executive Director from Denmark-November 1, 1962–October 31, 1964*, WORLD BANK, <http://archives-oldings.worldbank.org/alice-brun-executive-director-from-denmark-november-1-1962-october-31-1964> (last visited Jan. 11, 2023). A Westlaw search, however, reveals that her name ("Alice Brun," "Miss Brun," or "Ms. Brun") has, thus far, never appeared in a U.S. law review to reflect her professional activities and contributions to international investment law. Similarly, Miss White later became the first female Professor of Law in England and was an expert in international economic law. Iain Scobbie & Jean d'Aspremont, *Remembering Professor Gillian White (1936–2016)*, EJIL:TALK! (Jan. 30, 2017), <http://www.ejiltalk.org/remembering-professor-gillian-white-1936-2016>. Future scholars should consider offering a historical retrospective on women at the World Bank and international investment.

¹⁰⁷ See Strong, *supra* note 13, at 540–41, 556–66.

perfect storm is that ICSID's developmental history and doctrinal constraints can be ignored in public discourse and practice. This translates into core lessons from ICSID's evolution being forgotten or trivialized.¹⁰⁸

As a cautionary note, this article cannot cover all facets of ICSID's history. Rather, the objective is both to disrupt urban legends about ICSID and to encourage those considering ICSID and its new rules to remember the lessons of history and the full range of dispute resolution now available. Forgetting the lessons and hard-earned wisdom of the past hinders the evolution of international dispute settlement.

B. ICSID's Foundation: History in Context

ICSID was created at a unique moment in history. Financial reconstruction was a fundamental part of the post-World War II economic reality, which translated into prioritizing monetary and trade policy—not international investment law.¹⁰⁹ During the Cold War era of ICSID's genesis,¹¹⁰ a core demarcation in international economic law focused on market-based economies (often capital-exporting liberal democracies) and non-market economies (“NMEs”) (often communist or socialist).¹¹¹ Fundamental debates focused on the substantive meaning of expropriation in international law.¹¹² With an emphasis on de-colonialization and the creation of a convention to eliminate racism,¹¹³ many countries advocated for a renewed focus on State sovereignty.¹¹⁴

¹⁰⁸ Even during ICSID's founding, there was a tension between developed States and developing States, with concerns that the ICSID “Convention might undermine a State's sovereignty if disputes over the interpretation of local laws or concerning economic or fiscal policies of the State could be submitted” to ICSID. PARRA, *supra* note 103, at 71–73. Instead, they wished to limit the disputes “to disputes arising out of investment contracts concluded with the host State or guarantee[s]” from only specific investments. *Id.*

¹⁰⁹ See, e.g., THE BRETTON WOODS AGREEMENTS: TOGETHER WITH SCHOLARLY COMMENTARIES AND ESSENTIAL HISTORICAL DOCUMENTS (Naomi Lamoreaux & Ian Shapiro eds., 2019); INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE (Colin B. Picker, Isabella D. Bunn, & Douglas Arner eds., 2008).

¹¹⁰ During this moment of world history, with debates raging between free-market democratic States and communist or socialist States, the core distinction was between free-market and non-market economies (“NMEs”). As Puig noted, the collapse of the Soviet Union in 1991 and liberalization of international investment created major change. Puig, *supra* note 99, at 535, 542, 551, 562.

¹¹¹ See, e.g., DANIEL YERGIN & JOSEPH STANISLAW, THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND THE MARKETPLACE THAT IS REMAKING THE MODERN WORLD (1998); see also Luke P. Bellocchi, *The Effects of and Trends in Executive Policy and Court of International Trade (CIT) Decisions Concerning Antidumping and the Non-Market Economy (NME) of the People's Republic of China*, 10 N.Y. INT'L L. REV. 177, 177 (1997) (“The world economy's change over the last decade has caused communist [NMEs] to abandon their socialist experiment and reform their economies into free market enterprises.”).

¹¹² See, e.g., Alvarez, *supra* note 62, at 945–46; see also Ibironke T. Odumosu, *The Law and Politics of Engaging Resistance in Investment Dispute Settlement*, 26 PA. ST. INT'L L. REV. 251, 251–55 (2007) (exploring the impact of colonialism and post-colonialism on international dispute settlement).

¹¹³ International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195.

¹¹⁴ In more modern terms, these conversations were akin to conversations about State “policy space.” See, e.g., Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. INT'L ECON. L. 1037 (2010).

For foreign investment, State self-determination focused on regaining control over the natural resources often involved in foreign investment.¹¹⁵ States wished to control, free from the constraints of external international legal standards, their substantive obligations to foreigners. Newly independent States, despite appreciating international law, did not wish to be bound by rules that they had no hand in creating and were designed to either subordinate or potentially harm the interests of post-colonial States.¹¹⁶

As Andreas Lowenfeld recalled, “I tell this story [of ICSID’s creation] to recall for the present generation how it was that the ICSID Convention came out as it did . . . [The ICSID Convention] reflected a significant counter-trend to the trend at the United Nations that was moving . . . to the ‘New International Economic Order’, which would have essentially excluded international law from the regulation of foreign investment.”¹¹⁷

Appreciating this zeitgeist, while still offering a procedural structure to manage conflicts, ICSID’s founding documents—and its doctrinal foundation even today—provided no substantive legal standards. Given the failed multi-lateral efforts to set standards for the treatment of foreign investment,¹¹⁸ focusing on procedure—rather than substance—was a sensible and pragmatic choice that permitted States to retain control of substantive policy choices for regulating foreign investors and their investment. To suggest that ICSID was designed to provide the substantive

¹¹⁵ The movement of States, particularly States from the developing world, culminated in the 1974 “New International Economic Order” (“NIEO”). See G.A. Res. 3201 (VI) (May 1, 1974); G.A. Res. 3202 (VI) (May 1, 1974). NIEO gave States freedom to regulate foreign investors only in accordance with their local law, irrespective of constraints in international law, like customary rules of State responsibility to aliens. ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 491–92 (2d ed. 2008); see also José E. Alvarez, *A Bit on Custom*, 42 N.Y.U. J. L. & POL’Y 17 (2009) (exploring customary international law and its application in investment treaty dispute resolution); José E. Alvarez, *The Human Right of Property*, 72 U. MIA. L. REV. 580 (2018) (considering the meaning of property law and discussing linkages to international investment and natural resources).

¹¹⁶ In one exchange, a representative of Ceylon, Mr. Wanasundera, observed, “[t]he newly independent States of Asia and Africa were always willing to accept and abide by the principles of public international law, but were not in favor of expanding the scope of their application” as “some of the principles of international law [] had been created solely to protect the interests of the industrial and colonial powers.” ICSID, *HISTORY*, VOLUME II-2, *supra* note 98, at 802.

¹¹⁷ Lowenfeld, *Origins*, *supra* note 102, at 54–55.

¹¹⁸ The two efforts were the “Draft Convention on Investments Abroad” (led by the Director-General of Deutsche Bank and the UK Attorney General), which generated the “Draft Convention on the Convention on the Protection of Foreign Property” (led by the OECD). Proposed Convention to Protect Private Foreign Investment [Abs-Shawcross Draft Convention], *reprinted in* 9 J. PUB. L. 115 (1960); see also OECD, *Draft Convention on the Protection of Foreign Property: Text with Notes and Comments*, OECD Doc. 15637 (Dec. 1962), <http://www.oecd.org/daf/inv/internationalinvestmentagreements/39286571.pdf> (last visited Apr. 30, 2023); Herman J. Abs & Hartley Shawcross, *Comment on the Draft Convention by Its Authors*, 9 J. PUB. L. 119 (1960); OECD, *Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention*, OECD Doc. 23081 (Oct. 12, 1967), *reprinted in* 7 I.L.M. 117 (1968); OECD, *Fair and Equitable Treatment Standard in International Investment Law (OECD Working Papers on Int’l Inv.*, No. 2004/03, 2004), http://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf (last visited Apr. 30, 2023). While ratified by OECD members with minimal receptivity from the capital-importing countries, it was not until the mid-1990s that the worldwide volume of bilateral investment treaties expanded in a material way. Cree Jones & Weijia Rao, *Sticky BITs*, 61 HARV. J. INT’L L. 357, 357–61 (2020).

meaning of investment law and grounds for legal claims (or defenses) is, therefore, quite wrong. Rather, ICSID provided optional procedures (not an obligatory mandate) for addressing the conflicts that inevitably arise from human interaction.

Given the unique concerns when States and public policy are involved,¹¹⁹ articulating clear procedures *ex ante* that provided a framework for jurisdiction and a potential remedy was a useful way to foster rule of law and minimize interpretive risk for all parties. As Broches explained, providing a forum for the settlement of investment disputes with neutral procedural rules (rather than requiring investors to abandon their dispute resolution rights as a pre-condition to making an investment),¹²⁰ would improve the climate for international investment by reducing the “fear of political risks [which] operate as a deterrent to the flow of private foreign capital.”¹²¹ Nearly sixty years later, political risk continues to affect investment and economic development,¹²² which translates into an ongoing need for high quality and effective dispute resolution rules.

C. ICSID Convention: Original Intent and Structure

The ICSID Convention was ratified in 1966, and the next two years involved organizing ICSID’s core infrastructure at the World Bank.¹²³ During this time, ICSID focused on creating optional dispute resolution methods, to which parties could consent, for investor-State disputes that

¹¹⁹ See *supra* Part I.

¹²⁰ In his 1961 Note to the Executive Directors of the World Bank about settling disputes involving a State, Broches explained that when foreign investors entered a country, it was typical that a State may require that the investor “as a condition of entry, be required to waive diplomatic protection.” Part of the “deal” in creating a foreign investment was for a State to require a foreign investor to give up dispute resolution rights. ICSID, HISTORY, VOLUME II-1, *supra* note 98, at 1; see also Thomas & Dhillon, *supra* note 100, at 463 (discussing Broches’ primary concerns).

¹²¹ Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 RECUEIL DES COURTS 331, 343 (1972); see also Raed M. Fathallah, *Investment Disputes Between States and Private Parties: Enhancing Private Access Through International Arbitration*, in LOOKING AHEAD: INTERNATIONAL LAW IN THE 21ST CENTURY: PROCEEDINGS OF THE 29TH ANNUAL CONFERENCE OF THE CANADIAN COUNCIL ON INTERNATIONAL LAW 72 (2002); Thomas & Dhillon, *supra* note 100.

¹²² See, e.g., WORLD BANK GRP., RETENTION AND EXPANSION OF FOREIGN DIRECT INVESTMENT: POLITICAL RISKS AND POLICY RESPONSES (2019), <http://openknowledge.worldbank.org/bitstream/handle/10986/33082/Political-Risk-and-Policy-Responses.pdf>. It could also impact a State’s reputation, influence foreign investment decisions, or impact the credit rating of sovereign debt. See Sadie Blanchard, *Courts as Information Intermediaries: A Case Study of Sovereign Debt Disputes*, 2018 B.Y.U. L. REV. 497, 515 (2018) (noting a “bad reputation, if spread widely enough, would impose costs by reducing [a State’s] pool of counterparties and permitting them to demand a risk premium”); David Ehmke, *Sovereign Debtors in Distress*, 12 U. ST. THOMAS L.J. 1, 33 (2015) (“[T]he signaling effects of the sovereign debtor’s behavior can be expected to have an impact on the sovereign’s credibility as a ‘host country’ for investments in its national economy (apart from sovereign debt lending.)”); Roderick M. Hills, Jr. & Shitong Qiao, *Binding Leviathan: Credible Commitment in an Authoritarian Regime*, 102 MINN. L. REV. 1591, 1592–93 (2018) (discussing how political and other risks impact the cost of capital and sovereign debt).

¹²³ PARRA, *supra* note 103, at 87–102; Thomas & Dhillon, *supra* note 100, at 461–62; see also Antonio A. Parra, *The 2022 Amendments of the Regulations and Rules of the International Centre for Settlement of Investment Disputes: Change and Continuity*, 23 J. WORLD INV. & TRADE 717, 720–25 (2022) (discussing the history of ICSID rule revision).

arose out of either a State's domestic commercial or foreign investment law—not necessarily creating State liability for international law or treaty breaches.¹²⁴ The focus on domestic law, rather than investment treaties, is unsurprising given the miniscule number of treaties actually in force in the 1960s.

UNCTAD calculated that, by the end of 1969, there was only a maximum of seventy-two *signed* bilateral investment treaties (“BITs”).¹²⁵ A more granular analysis of UNCTAD's data reveals that only a proportion of those treaties were actually in force. Only fifty-eight BITs were *in effect* by the end of 1969,¹²⁶ and only thirty-seven BITs were in effect when the ICSID Convention became effective in 1966. Viewing UNCTAD's data in a different way, there were over 130 countries and territories without a single investment treaty in effect by 1969.¹²⁷ With only a small number of investors and investments with an enforceable legal claim,¹²⁸ the enforcement gap made the theoretical risk of an ICSID treaty claim minimal.¹²⁹

Moreover, at the time of ICSID's creation, there were *no* multi-lateral treaties where a State expressly granted foreign investors a clear and cognizable international law claim with direct access to dispute resolution with the allegedly responsible State. Rather, it took roughly thirty years

¹²⁴ TAYLOR ST. JOHN, *THE RISE OF INVESTOR-STATE ARBITRATION: POLITICS, LAW, AND UNINTENDED CONSEQUENCES* 177–79 (2018) (reflecting that during the US ratification process, there were clear statements that the ICSID “‘Convention does not laydown any substantive rules regarding investment . . . and the like’” but attempting to suggest that the growth of international law would be substantive, rather than procedural).

¹²⁵ UNCTAD, *BITS*, *supra* note 48, at 1. UNCTAD broke down the BIT data by development status and region. In the 1960s, when focusing on development status, of the sixty-eight BITs, sixty-five BITs were with developed countries, and three BITs were between developing countries. *See id.* at 5 (Figure 2). Focusing on the 1960s by region, UNCTAD's figures identify thirty-seven BITs, twenty-five involving African States, ten from “Developing Asia and the Pacific,” and two involving Latin America and the Caribbean. *See id.* at 15 (Figure 4). Looking at the UNCTAD data more granularly, the countries with active treaty programs during the 1960s were Germany, Switzerland, and the Netherlands, often negotiating treaties with African States. There were also treaties during this decade among a variety of Middle East and Northern Africa (“MENA”) States, for example, a treaty between Iraq and Kuwait. *Id.* at 67, 73. Other countries entering the treaty marketplace in the 1970s (with five or more treaties signed) were Egypt, France, Indonesia, the Republic of Korea, Singapore, Sweden, and the United Kingdom. *Id.* at 25–125.

¹²⁶ After analyzing nearly 100 pages of UNCTAD data, I compiled this number by identifying the “Date of entry into force” and coding each treaty in force at any time before January 1, 1970. Although each treaty appeared twice in UNCTAD's materials, I coded each treaty (between country pairs) only once. *Id.* at 25–125; *see also* Annex I (using UNCTAD's data about States, signed treaties, and treaties in effect to compile the list of entities with investment treaties in force prior to 1970).

¹²⁷ *See* Annex II (using UNCTAD's represented data from note 48 about States, signed treaties, and treaties in effect to compile the list of entities without any investment treaties in force before 1970).

¹²⁸ Although BIT signings and entries into force rose slightly during the 1970s, even in the second decade of ICSID, the availability of investment treaty rights was not materially different. By the end of 1979 (and after ICSID created its Additional Facility), there were only 165 total signed BITs, meaning there were only ninety-three new BITs signed during the 1970s. UNCTAD, *BITS*, *supra* note 48, at 1. Analyzing the same information to focus on “Date of entry into force” and counting each treaty only once revealed that during the 1970s, only seventy-seven treaties came into force. *Id.* at 25–125.

¹²⁹ *See also* DOLZER & STEVENS, *supra* note 43, at 2–11 (discussing the history and evolution of investment treaty programs); *supra* notes 33, 48–50 (discussing investment flows and treaty coverage).

after ratification of the ICSID Convention to create the first multi-lateral agreements like the Energy Charter Treaty and NAFTA, which granted foreign investors substantive rights and procedural access to dispute settlement.¹³⁰

1. ICSID: The Procedural “Skeleton”

As a matter of applicable law, the “skeleton” of ICSID’s procedure derived from the international law of the ICSID Convention and derivative rules. Rather than avoiding adjudication by virtue of sovereign immunity,¹³¹ the Convention created clear standards for jurisdiction over disputes with States, and it produced opportunities for recognizing adjudicative outcomes.¹³²

Having access to an international forum, however, is quite different from having a cognizable legal claim arising under the substantive law. While drafting the Convention, Broches made clear distinctions between procedure (i.e., the proposed administrative support at ICSID) and substance (i.e., the substantive rights of either States and/or investors).¹³³

¹³⁰ See Energy Charter Treaty, Dec. 17, 1994, 33 I.L.M. 360; North American Free Trade Agreement, Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 605. The lessons of history are also vital for narratives about the creation of investment treaties, including NAFTA. In the popular press, people blamed the “failing NAFTA” on the Clinton administration. See, e.g., Paul Rosenberg, *Own up to NAFTA, Democrats: Trump Is Right That the Terrible Trade Pact Was Bill Clinton’s Baby*, SALON (Oct. 2, 2016), <http://www.salon.com/2016/10/02/own-up-to-nafta-democrats-trump-is-right-that-the-terrible-trade-pact-was-bill-clintons-baby>. These “alternative facts” ignore the actual history of NAFTA. The general concept of a U.S.-Canada free trade zone derives from the Reagan administration. George H.W. Bush’s administration negotiated, and Bush personally signed, the core NAFTA documents before Clinton’s inauguration. John Whalley & Colleen Hamilton, *The Intellectual Underpinnings of North American Economic Integration*, 4 MINN. J. GLOB. TRADE 43, 54 n.23 (1995). While it is correct that the NAFTA ratification occurred during Clinton’s presidency, it is wrong to suggest his administration drafted it. The suggestion under the Trump administration that NAFTA required revision because it was a by-product of a democratic administration is sophistry or historical revisionism at best. See, e.g., Olivia B. Waxman, *4 Things to Know About the History of NAFTA, as Trump Takes Another Step Toward Replacing It*, TIME (Nov. 30, 2018), <http://time.com/5468175/nafta-history> (providing a fact-based discussion of NAFTA’s evolution and history). See, e.g., MEG N. KINNEAR, ANDREA K. BJORKLUND, & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 (2006); see also Matteo M. Winkler, *Arbitration Without Privity and Russian Oil: The Yukos Case Before the Houston Court*, 17 U. PA. J. INT’L L. 115, 132 (2006) (discussing the evolution of substantive international investment law rights); Vandeveld, *supra* note 55, at 164–75, 177–80 (discussing the same).

¹³¹ Meg Kinneare, *Current Developments in Investor-State Dispute Settlement: An Overview of Substantive and Procedural Change in the Past Fifty Years*, 17 UNIV. ST. THOMAS L.J. 209, 212 (2021) (noting that ICSID’s creation responded to concerns “of absolute State immunity[.] . . . a lack of impartiality of local courts, and inefficiencies that made local courts an ineffective solution”).

¹³² See, e.g., Convention on the Settlement of Investment Disputes Between States and Nationals of Other States arts. 53–55, Mar. 18, 1965, 17 U.S.T. 1270 (providing for recognition of awards but identifying the availability of immunity from execution) [hereinafter ICSID Convention]; Andrea K. Bjorklund, *Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes*, 21 AM. REV. INT’L ARB. 211, 216–17, 220–22 (2010).

¹³³ ICSID, HISTORY, VOLUME II-1, *supra* note 98, at 501–02 (explaining that Broches reminded delegates to “fully take[] into account the distinction between the procedur[e] [sic] and the

In a blunt assessment at the 1963 Addis Ababa meeting of legal experts, Broches explained that “the Convention did not lay down standards for the treatment by States of the property of aliens, nor did it prescribe standards for the conduct of foreign investors in their relations with host States. Accordingly, the Convention would not be concerned with the merits of investment disputes but with the procedures for settling them.”¹³⁴

2. Substantive Claims: Applicable Law – The First 95%

When considering what kind of separate substantive law might generate the body of ICSID-based conflict, the drafters focused primarily on two fundamental sources of law, namely domestic commercial law, and a host State’s foreign investment law.¹³⁵

Much of ICSID’s drafting history focuses on jurisdiction for resolving commercial disputes deriving from specifically negotiated commercial agreements—whether a concession contract, a contract between a State-related entity and private counterparty, or a State as a government guarantor.¹³⁶ Delegates appeared comfortable with permitting ICSID arbitration for specific investment contracts, particularly when “the host State itself, in the exercise of its sovereignty, entered into an investment agreement [directly] with the foreign investor.”¹³⁷ Commercial contracts had two additional benefits. Namely, they were often governed by a host State’s local law, and these contracts permitted any party—whether an investor or State—to initiate dispute resolution.

During the drafting process, Broches had multiple opportunities to opine on ICSID’s anticipated caseload. Commentators have thoughtfully

substantive issues”); *see also id.* at 267 (noting there can be “two separate questions, the one relating to the scope of the dispute to be dealt with by the tribunal, and the other to the applicable law”). Article 42, which provides ICSID tribunals with authority to apply the applicable law, was a hotly debated provision and went through multiple revisions. *See id.* at 157, 267–68, 418–20, 493–502, 504, 570–72; ICSID, HISTORY, VOLUME II-2, *supra* note 98, 800–02, 984.

¹³⁴ ICSID, HISTORY, VOLUME II-1, *supra* note 98, at 242. To make the point, Broches compared the ICSID Convention to the contemporaneous OECD drafting process. He noted the “OECD Convention laid down rules against which the validity of an expropriation and the quantum of compensation . . . and created a system whereby on signature a State would assume certain obligations as to its behavior and undertake to submit disputes to compulsory arbitration” whereas ICSID was “a Center for arbitration and conciliation to which parties to a dispute could have recourse on a purely voluntary basis.” *Id.* at 286–87.

¹³⁵ At several points, Broches focused on applicable law as a horizontal choice of law question, requiring the choice between applying two different national laws. In one instance, Broches explained, “the choice of national law would be a matter for the tribunal to decide in accordance with the appropriate rules of private international law. In most cases, the proper law would indeed be the municipal law of the capital-importing country. However, in certain cases - such as licensing and know-how agreements - there might be a question as to what law applied.” *Id.* at 418; *see also id.* at 506 (“A dispute between a State and an investor might arise out of a licensing or know-how agreement requiring performance both in the host State and in the investor’s national State, and while international law might not be involved at all, the applicable local law would have to be found by the application of normal rules of conflict of laws . . . [and that] would point to that State’s law as the proper law.”).

¹³⁶ *See id.* at 15 (reflecting the observation of an Iranian delegate, Ali Akbar Khosropur, that ICSID’s creation could generate a large caseload “because many foreign investors would insert a clause into their [commercial agreements] providing that disputes should be referred to the Center”).

¹³⁷ *Id.* at 494.

observed, “Broches repeatedly predicted that most of the disputes before [ICSID] tribunals would arise out of” commercial contracts “between investors and host States, typically concession contracts.”¹³⁸ During a 1965 Bangkok meeting, Broches even offered a statistical hunch, reflecting a core objective of the Convention. He noted disputes that “arise out of some contractual relationship between the investor and the host State,” were the “type of case [that] would account for 90-95% of the disputes” at ICSID.¹³⁹ During a spirited debate with the Indian delegate, Mr. Adakar, Broches narrowed the range somewhat, reiterating, if “the Convention were limited to disputes arising out of [commercial] investment agreements with governments [and investors], perhaps 95% of possible dispute[s] would be covered.”¹⁴⁰ This number anchored subsequent dialogue.¹⁴¹

A second category of substantive claims adjudicated at ICSID involved disputes under a State’s own foreign investment law.¹⁴² Under this scenario, the locus of control remained with the State, as national legislatures can exercise sovereignty to create internal law that regulates foreign investment according to domestic policy considerations. This made claims arising under national investment law less controversial.¹⁴³ Together, these two categories of disputes created an initial impression that the substantive legal claims at ICSID would largely derive from national law.

Yet, the ICSID Convention standard for identifying the applicable law of ICSID disputes was quite controversial, with exchanges (and strategic pauses) in the record that fire the imagination.¹⁴⁴

¹³⁸ Thomas & Dhillon, *supra* note 100, at 472.

¹³⁹ ICSID, HISTORY, VOLUME II-1, *supra* note 98, at 495.

¹⁴⁰ *Id.* at 500. Broches stated that most of ICSID’s disputes would derive from “an arbitration clause [incorporated] in an investment agreement. In that event, the scope of any possible arbitration would be clear: it would be limited to disputes arising out of that contract.” *Id.* at 59.

¹⁴¹ Mr. Adakar subsequently “recalled that the Chairman had expressed the view that 95 per cent of the cases intended to be dealt with by the Convention might be covered if it were limited to disputes arising out of investment agreements entered into by host states.” *Id.* at 504; *see also* Thomas & Dhillon, *supra* note 100, at 473 (identifying Broches’ statement about 95%).

¹⁴² *See* Jarrod Hepburn, *Domestic Investment Statutes in International Law*, 112 AM. J. INT’L L. 658 (2018) (discussing domestic investment statutes); Antonio R. Parra, *Principles Governing Foreign Investment, as Reflected in National Investment Codes*, 7 ICSID REV. 428, 436 (1992) (discussing the same).

¹⁴³ ICSID, HISTORY, VOLUME II-1, *supra* note 98, at 506 (noting that while an “arbitration clause in an agreement” was “customary,” a second type of dispute might involve “a unilateral statement by a government in an investment law”); *see also id.* at 267 (“There was no doubt” that it was possible for “the parties to prescribe the law applicable to the dispute . . . in a unilateral offer to all investors, such as might be made through investment legislation.”); *id.* at 59 (noting that “in the legislation approving the convention a government might seek authority in advance to submit particular classes of disputes” to ICSID).

¹⁴⁴ The content of the travaux, the chosen mechanics of voting process in the Legal Committee, including strategic deferrals (including a refusal to defer conversations about the applicable law) and breaks taken by Broches, as well as the subsequent characterization of those conversations, are fascinating. *See, e.g.*, ICSID, HISTORY, VOLUME II-2, *supra* note 98, at 800–04, 984–86. The record reveals multiple proposals for identifying applicable law. *See* ICSID, HISTORY, VOLUME II-1, *supra* note 98, at 157, 630; ICSID, HISTORY, VOLUME II-2, *supra* note 98, at 653, 800–02.

Knowing the delicacy of interpreting domestic law given its potential intersection with international law,¹⁴⁵ the Convention drafters ultimately focused on granting parties control over the substantive law applicable to disputes. In its final iteration, article 42(1) required tribunals first to “decide a dispute in accordance with such rules of law as may be agreed by the parties.” The second sentence added: “In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”¹⁴⁶

At various points in ICSID’s development, Broches reminded delegates that if they wished to avoid the application of substantive international law at ICSID, they could clarify those preferences in an express choice of substantive law. When discussing which law might apply to acts of nationalization with a representative from Cameroon, Broches indicated there was a risk international law could apply “unless parties specifically restricted the tribunal” to “exclude or include particular issues such as the legality of expropriation or nationalization, or to exclude the application of international law.”¹⁴⁷ He otherwise cautioned, “unless the parties had agreed to restrict the competence of the tribunal” to analyzing an “act of expropriation by reference to municipal law,” the tribunal could consider both domestic and international law.¹⁴⁸

Given the divisive debates about the meaning of expropriation under international law, which still occur today, and the lack of clarity about the proper standard of compensation, the concerns over which law applied to a party’s substantive claims were both warranted and a harbinger of things to come. Granting parties power to control the applicable law created two clear pathways. For those governments creating agreements through either a contract or a treaty to exclude liability for expropriation, their dispute resolution risk would be minimized. In contrast, States failing to take

¹⁴⁵ See ICSID, HISTORY, VOLUME II-1, *supra* note 98, at 570–71 (“In some cases the tribunal may be faced with a claim that international law should prevail over national law, e.g., where one of the parties claims that a particular action taken under national law, or a particular provision of national law, violates international law . . . [E]ven an international tribunal would in the first place have to look to national law, since the relationship between the investor and the host State is governed in the first instance by national law, and it would only be in those instances in which national law was in violation of international law that the tribunal would, in the application of international law, set aside national law.”); see also ICSID, HISTORY, VOLUME II-2, *supra* note 98, at 803 (noting that Austrian domestic law incorporates international law).

¹⁴⁶ ICSID Convention, *supra* note 132, art. 42(1). When describing the revised provision in the July 1964 Memorandum to the Committee as a Whole, Broches acknowledged the provision “in fact covers not just a majority but all the cases which may be submitted for arbitration under the auspices of the Center.” ICSID, HISTORY, VOLUME II-1, *supra* note 98, at 571.

¹⁴⁷ ICSID, HISTORY, VOLUME II-1, *supra* note 98, at 267–68. Meeting with developed country representatives in Geneva, Broches noted, “there had been an unwillingness to provide for submission of questions of the legality of certain measures such as nationalization or expropriation (whether under municipal law or international law) to the tribunal, although there was no objection to having the question of compensation freely determined by the tribunal.” *Id.* at 419.

¹⁴⁸ *Id.* at 268. Focusing on jurisdiction (rather than applicable law), Broches explained, “[o]n the question of the substance of the issues involved in a dispute, taxation, social security, [and] labor laws” he believed it “seemed clear” that “unless they had been the subject of an investment agreement, there was no reason why a State should agree to have any such issues submitted to international arbitration . . .” *Id.* at 499.

preventative measures to clarify the applicable law or expressly opting to accept potential State responsibility expanded their dispute resolution risk.

3. Substantive Claims: The Remainder – Investment Treaties

While ICSID's founders projected that disputes requiring the application of a State's national law would account for 95% of claims, that meant that there would be other types of claims on ICSID's docket. At the risk of stating the obvious, this means there must be other cases governed by something other than national law.¹⁴⁹

At various points during the drafting, the role of investment treaties was raised in discussions among Broches, developing country representatives (particularly from Africa),¹⁵⁰ and delegates from developed States (primarily Germany).¹⁵¹ On March 13, 1961, during an early meeting of the Executive Directors to discuss the possibility of creating an entity like ICSID, an Iranian delegate suggested that such an institution "might in practice have a great deal of business, because . . . many governments might insert similar [dispute resolution] clauses in their commercial treaties."¹⁵²

During the core negotiations, Mr. Mallamud, a Ugandan delegate, queried what might occur when "the law applicable to a dispute was specified . . . in some bilateral agreement" between States. Broches explained that there was "no doubt" that it was "open to the parties to prescribe the law applicable to the dispute . . . [which] could be included in a bi-lateral agreement with another State."¹⁵³ Meanwhile, Mr. Tsai, a Chinese delegate, called investment treaty disputes "peculiar,"¹⁵⁴ and Mr. Gould, a South African representative, noted, when it came to applicable law, "[t]here was no doubt that the present situation under bilateral treaties was confused."¹⁵⁵

German representatives, however, secured a unique assurance from Broches, on the record, that investment treaties could provide the

¹⁴⁹ In the author's experience, this is no small matter. Whereas some people might believe that ICSID was created solely to address ITA, others believe ICSID's founders and signatories never contemplated the use of ITA. Both urban legends are wrong.

¹⁵⁰ The proactive intervention of African delegates was sensible. Based upon UNCTAD data, 74.5% of investment treaties in effect during the 1960s had one signatory from an African State. Of the treaties in effect, thirty-eight included a treaty with one African State. Those African States included: Burkina Faso, Cameroon, Central African Republic, Chad, Côte d'Ivoire, Republic of Congo, Egypt, Guinea, Liberia, Madagascar, Morocco, Niger, Rwanda, Sierra Leone, Sudan, Senegal, Tanzania, Togo, Tunisia, and Uganda. UNCTAD, BITS, *supra* note 48, at 25–125; *see also* Annex II.

¹⁵¹ Compared to all other countries, with fifteen investment treaties in force by 1966, Germany had the largest number of treaties in effect when the Convention was negotiated. Switzerland was a close second with fourteen treaties in force by 1966. UNCTAD, BITS, *supra* note 48, at 25–125; *see also* Annex II.

¹⁵² ICSID, HISTORY, VOLUME II-1, *supra* note 98, at 15 (reflecting also Mr. Khosropur's comments about ICSID's potential use for commercial claims of private contracts); *see also* PARRA, *supra* note 103, at 24.

¹⁵³ ICSID, HISTORY, VOLUME II-1, *supra* note 98, at 266–67.

¹⁵⁴ ICSID, HISTORY, VOLUME II-2, *supra* note 98, at 653.

¹⁵⁵ ICSID, HISTORY, VOLUME II-1, *supra* note 98, at 420; *see also* ICSID, HISTORY, VOLUME II-2, *supra* note 98, at 653 (calling investment treaty arbitration "peculiar," primarily given the absence of a direct contractual relationship).

substantive law applied in ICSID disputes.¹⁵⁶ An earlier draft of article 42 included an express reference to the ICJ Statute article 38, to define the applicable international law for the ICSID Convention.¹⁵⁷ Article 38, in turn, defines the binding sources of legal authority in international law, identifying “international conventions,” which include treaties (presumably investment treaties), as binding sources of authority. One of the delegates, Mr. Donner, stated that he “understood the reference in [a]rticle 42(1) to ‘rules of international law’ as including the rules of law set down in bilateral investment treaties.”¹⁵⁸

Troubled that the reference to the ICJ’s article 38 was stripped from the Convention’s text and transferred to a footnote in a draft report,¹⁵⁹ Donner asked Broches for his “assurance” that “there was in fact no doubt” that investment treaties were covered in article 42 of the draft ICSID Convention. Broches responded, “there could be no doubt whatever [sic] that the term ‘international law’ in [a]rticle 42(1) did in fact include rules set out in bilateral agreements between the States concerned.”¹⁶⁰ He further explained that transferring the reference into the report “did not imply any change in the substance of the provision.”¹⁶¹

This exchange solidified ICSID’s modern future. It is also therefore wrong to suggest that investment treaties were *never* considered in drafting the ICSID Convention, when the historic record demonstrates conclusively that those treaties were discussed. Nevertheless, the discussion of applicable law and article 42 should have served as a warning to States then—and now—that if they do not wish to take on international law obligations or otherwise incur dispute resolution risk, then they should focus upon drafting and revising the substantive terms of their investment treaties.

D. *ICSID’s Fundamental Dispute Resolution Procedures*

With the original ICSID Convention, the World Bank created two core dispute resolution modalities, namely: international arbitration and conciliation. These methods, however, were only available to a limited number of parties. As the Convention was an international law instrument that only became applicable if all States involved had signed and ratified the treaty, both the State in the dispute *and* the investor’s home country

¹⁵⁶ Parra recalls the German delegation raising issues about investment treaty interpretation, focusing on investors’ insurance policies, State capacity to indemnify investors, and direct government-to-government subrogation on behalf of German investors. PARRA, *supra* note 103, at 37–38.

¹⁵⁷ ICSID, HISTORY, VOLUME II-2, *supra* note 98, at 802.

¹⁵⁸ *Id.* at 984.

¹⁵⁹ ICSID, HISTORY, VOLUME II-1, *supra* note 98, at 630 (providing the text of draft article 45(1) that stated, “[t]he term ‘international law’ shall be understood in the sense given to it by Article 38 of the Statute of the International Court of Justice”).

¹⁶⁰ ICSID, HISTORY, VOLUME II-2, *supra* note 98, at 984.

¹⁶¹ *Id.*

had to be signatories to the ICSID Convention for ICSID dispute resolution procedures to apply.¹⁶²

Later, in 1978, ICSID's Administrative Council adopted Additional Facility ("AF") protocols.¹⁶³ The AF protocols expanded ICSID's arbitration (under AF Arbitration Rules) and conciliation services (through AF Conciliation Rules). For any of the ICSID's AF rules to be available, at least one party to the dispute had to be a Convention signatory.¹⁶⁴ During the 1978 changes, the World Bank also created a new Fact-Finding procedure.¹⁶⁵ This part explores each method in turn.

1. Arbitration

The mainstay of both the past and present of ICSID's current caseload involves international arbitration, under both the ICSID Convention and ICSID's AF protocols. In its first thirty years, ICSID registered only thirty-five cases.¹⁶⁶ These claims typically involved arbitration under the ICSID Convention, and a contract governed by national commercial law.¹⁶⁷ Put differently, until recently, World Bank dispute resolution accorded with Broches' vision of how ICSID can, would, and should be used.

Much scholarly ink has been spilled exploring ICSID's jurisdiction and procedures.¹⁶⁸ A thorough analysis of ICSID arbitration is beyond the scope of this article. Rather, this article focuses on ICSID's doctrinal foundation to understand the past, appreciate the present, and consider the future evolution of the panoply of dispute resolution options.

Given the historical success of international arbitration,¹⁶⁹ ICSID arbitration procedures generally mirrored those of established international arbitration institutions (including the International Chamber of Commerce) and ad hoc rules from the UNCITRAL. Like the arbitration mechanics described earlier,¹⁷⁰ ICSID arbitration follows procedures that

¹⁶² See, e.g., Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PA. ST. L. REV. 1269, 1271 (2009); Franck, *supra* note 81, at 1547; see also *infra* notes 173–175.

¹⁶³ CHRISTOPH H. SCHREUER, LORETTA MALINTOPPI, AUGUST REINISCH, & ANTHONY SINCLAIR, *THE ICSID CONVENTION: A COMMENTARY* 27 (2d ed. 2009); Antonio R. Parra, *The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes*, 41 INT'L LAW. 47, 48, 52 (2007).

¹⁶⁴ Franck, *supra* note 81, at 1548 n.106; Parra, *supra* note 163, at 48–49, 55.

¹⁶⁵ PARRA, *supra* note 103, at 129–37; see also *A Brief History of Amendment to the ICSID Rules and Regulations*, ICSID: WORLD BANK GRP. (Mar. 10, 2020), <http://icsid.worldbank.org/news-and-events/speeches-articles/brief-history-amendment-icsid-rules-and-regulations>.

¹⁶⁶ Jason W. Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397, 403 (2011).

¹⁶⁷ See PARRA, *supra* note 103, at 109–11, 123–26, 143–46, 150–67, 177–85, 189–93, 202–10 (discussing aspects of ICSID and its caseload during the first three decades).

¹⁶⁸ See, e.g., CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* (2001); see also SCHREUER'S COMMENTARY ON THE ICSID CONVENTION (Stefan W. Schill, Loretta Malintoppi, August Reinisch, Christopher H. Schreuer, & Anthony C. Sinclair eds., 3d ed. 2022); LUCY REED, JAN PAULSSON, & NIGEL BLACKABY, *GUIDE TO ICSID ARBITRATION* (2d ed. 2010); BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID (Meg Kinnear, Geraldine R. Fischer, Jara Minguez Almeida, Luisa Fernanda Torres, & Mairée Uran Bidegain eds., 2016); CRINA BALTAG, *ICSID CONVENTION AFTER 50 YEARS: UNSETTLED ISSUES* (2017).

¹⁶⁹ See *supra* notes 72–78.

¹⁷⁰ See *supra* Part II.B.

may feel familiar to students of civil procedure in the United States. After crafting their complaints into a formal request for arbitration and permitting responsive submissions from the defending party, tribunal selection begins. Thereafter, adjudicators permit parties to gather evidence and witnesses and submit briefs (typically called memorials) on dispositive issues, which may on the surface appear to be less extensive than US-style litigation but far more expansive than litigation in civil law jurisdictions. After hearings and cross-examination of fact and expert witnesses, the tribunal makes decisions deriving from parties' arguments, facts submitted into evidence, and the applicable law.¹⁷¹

Because the arbitration rules for both the ICSID Convention and the AF mirror each other, the mechanics tribunals must engage in to render decisions and generate an award are equivalent. When the tribunal renders its award, however, there are two material differences between the ICSID Convention and AF arbitration, namely: review and enforcement.¹⁷²

Where all parties to the dispute are either signatory States or nationals of signatory States, the ICSID Convention applies, which includes unique review and enforcement provisions. Unlike litigation in national courts, the ICSID Convention contains no "appeal" mechanism.¹⁷³ Rather, there is a self-contained internal "annulment" procedure, wherein parties can apply to change or eradicate the award (or part of it) under the limited principles articulated in the Convention.¹⁷⁴ The Convention likewise has unique rules for enforcement. Rather than making awards subject to independent recognition requiring the assistance of a national court (usually a court where assets are located), ICSID awards are enforceable as if they were already a national court judgment.¹⁷⁵

By contrast, for AF arbitrations—since all parties are *not* Convention signatories—the Convention's legal regime is inapplicable. Instead, review and enforcement of awards occurs pursuant to the New York Convention.¹⁷⁶ Like traditional ICA cases, review of ICSID's AF arbitration awards generally happens pursuant to standards articulated in national arbitration law at the legal place of arbitration (i.e., *vacatur* or set aside

¹⁷¹ Susan Franck, *Conflating Politics and Development? Examining Investment Treaty Arbitration Outcomes*, 55 VA. J. INT'L L. 13, 23 (2014).

¹⁷² Lisa M. Bohmer, *Finality in ICSID Arbitration Revisited*, 31 ICSID REV. — FOREIGN INV. L.J. 236, 237–38 (2016); Ylli Dautaj & Maxime Chevalier, *A Liberal Push and the Sovereign Pull: Recognition, Enforcement, and Execution in the ICSID Convention*, 32 AM. REV. INT'L ARB. 281, 288–98 (2021).

¹⁷³ David D. Caron, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal*, 7 ICSID REV. — FOREIGN INV. L.J. 21, 22 (1992); Juan Fernández-Armesto, *Different Systems for the Annulment of Investment Awards*, 26 ICSID REV. — FOREIGN INV. L.J. 128, 130 (2011); Cheng, *supra* note 100, at 251–55.

¹⁷⁴ See, e.g., SCHREUER, MALINTOPPI, REINISCH, & SINCLAIR, *supra* note 163, at 1096–1185; Katharina Diel-Gligor, *Competing Regimes in International Investment Arbitration: Choice Between the ICSID and Alternative Arbitral Systems*, 22 AM. REV. INT'L ARB. 677, 683–86 (2011).

¹⁷⁵ SCHREUER, MALINTOPPI, REINISCH, & SINCLAIR, *supra* note 163, at 1139–50; Victoria Shannon Sahani, *A Hardy Case Makes Bad Law*, 43 FORDHAM INT'L L.J. 363, 369–70 (2019).

¹⁷⁶ See Frauke Nitschke & Kamel Ait-El-Hadj, *Determining the Place of Arbitration in ICSID Additional Facility Proceedings*, 30 ICSID REV. — FOREIGN INV. L.J. 243, 243–44, 247 (2015) (exploring the New York Convention's role in Additional Facility ("AF") cases); Alan C. Swan, *NAFTA Chapter 11--"Direct Effect and Interpretive Method: Lessons from Methanex v. U.S.*, 64 U. MIAMI L. REV. 21, 22 (2009).

proceedings). By contrast, enforcement can occur worldwide under the New York Convention, which can sometimes also interact with the national arbitration law of a jurisdiction where a party seeks enforcement.¹⁷⁷

2. Conciliation

When contrasted with a larger volume of ICSID arbitrations, conciliation has always been a minor component of ICSID's caseload. Even while drafting the Convention, several individuals stated their expectation—given how States used international law dispute resolution in the past—that conciliation would be less frequently used and effectively operate as a “disguised form of arbitration.”¹⁷⁸

Nevertheless, ICSID conciliation was central to the ICSID Convention's original architecture.¹⁷⁹ From its inception through 2005, however, it was only used five times.¹⁸⁰ During that period, a key ICSID administrator wrote, “the Centre has recently begun to remind parties of the existence of the [conciliation] mechanism.”¹⁸¹ Notwithstanding those reminders, ICSID only registered eight more conciliations between 2006 and 2022.¹⁸² In its nearly fifty-five years of existence, ICSID conciliation protocols have been invoked a grand total of thirteen times.

Perhaps part of the reason for this result is the nature of the legal architecture. Although the word “conciliation” may evoke expectations of facilitated negotiation or the collaboration and consultation familiar to

¹⁷⁷ Michael Faure & Wanli Ma, *Investor-State Arbitration: Economic and Empirical Perspectives*, 41 MICH. J. INT'L L. 1, 16 (2020); see also *supra* note 78.

¹⁷⁸ During 1964 consultative discussions in Geneva, a French delegate suggested that conciliation may not be effective “unless it constituted a disguised form of arbitration.” ICSID, HISTORY, VOLUME II-1, *supra* note 98, at 415. He recalled that in the fifty-five years that had elapsed between the setting up of the Permanent Court of Arbitration (to the Statute of which over sixty States were members) from 1907 to 1962, out of twenty-eight cases submitted to the Court, only four were cases of conciliation, the remaining twenty-four being cases of arbitration.” *Id.* Broches' response was that “he could himself recall a case of conciliation which had constituted a disguised form of arbitration” involving the City of Tokyo. *Id.*

¹⁷⁹ ICSID, HISTORY, VOLUME I, *supra* note 98, at ii, 2–10. The ICSID Convention's Conciliation provisions are provided in Chapter III. See also SCHREUER, MALINTOPPI, REINISCH, & SINCLAIR, *supra* note 163, at 431–54 (discussing ICSID conciliation).

¹⁸⁰ In 2005, ICSID had registered five conciliations: (1) SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H. v. Madagascar (Case No. CONC/82/1), (2) Tesoro Petroleum Corp. v. Trinidad and Tobago (Case No. CONC/83/1), (3) SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie G.m.b.H. v. Madagascar (Case No. CONC/94/1), (4) TG World Petroleum Ltd. v. Niger (Case No. CONC/03/1), and (5) Togo Electricité v. Republic of Togo (Case No. CONC/05/1). *Conciliation Case Search*, ICSID, <http://icsid.worldbank.org/cases/case-database> (filter “Case Type” by selecting Conciliation) (last visited Aug. 28, 2022); see also Franck, *supra* note, at 210–11.

¹⁸¹ Ucheora O. Onwuamaegbu, *The Role of ADR in Investor-State Dispute Settlement: The ICSID Experience*, 2 NEWS FROM ICSID 12, 13 (2005).

¹⁸² Those new conciliations were: (1) Shareholders of SESAM v. Central African Republic (CONC/07/1), (2) RSM Production Corporation v. Republic of Cameroon (CONC/11/1), (3) Hess Equatorial Guinea, Inc. and Tullow Equatorial Guinea Limited v. Republic of Equatorial Guinea (CONC(AF)/12/1), (4) Republic of Equatorial Guinea v. CMS Energy Corporation and others (CONC(AF)/12/2), (5) Xenofon Karagiannis v. Republic of Albania (CONC/16/1), (6) Société d'Énergie et d'Eau du Gabon v. Gabonese Republic (CONC/18/1), (7) La Camerounaise des Eaux v. Republic of Cameroon and Cameroon Water Utilities Cooperation (CONC/19/1), and (8) Barrick (Niugini Limited) v. Independent State of Papua New Guinea (CONC/20/1). See generally *Conciliation Case Search*, *supra* note 180.

scholars of Alternative Dispute Resolution (“ADR”),¹⁸³ ICSID’s conciliation facility is unique and unlike “conciliation” in domestic ADR in the United States.

At ICSID, conciliation largely functions as non-binding arbitration or,¹⁸⁴ at best, a highly formalized, evaluative mediation with an unenforceable outcome.¹⁸⁵ Traditionally, an ICSID Conciliation Commission has the power to: (1) recommend that the parties accept specific terms of settlement and refrain from specific acts that might aggravate the dispute, (2) establish for the parties the arguments in favor of the Commission’s recommendations, (3) request written statements from the parties, (4) rule on its own jurisdiction, (5) rule on requests to disqualify conciliators, (6) hold hearings and take evidence (whether through documents or witness testimony), and (7) issue a Report at the closure of the proceedings.¹⁸⁶ This is distinct from domestic conciliation, which focuses on interest-based conflict resolution, rather than adjudicative procedures and legal rights.¹⁸⁷

One might wonder, given the importance of enforcement, why one would spend significant fiscal resources on a non-binding adjudication,¹⁸⁸ particularly when other informal (and less costly) processes might resolve a dispute more efficiently. ICSID Conciliation, however, can be effective under the right set of circumstances. As demonstrated by *Tesoro v. Trinidad and Tobago*, domestic regime change combined with conciliation procedures can provide States with the domestic political cover necessary to resolve a dispute via conciliation.¹⁸⁹ As some would remind us, dissatisfaction with arbitration “is no reason to oppose the creation of facilities for conciliation . . . of investment disputes to which investors may have access.”¹⁹⁰

¹⁸³ See, e.g., MENKEL-MEADOW, LOVE, STERNLIGHT, & SCHNEIDER, *supra* note 4.

¹⁸⁴ Jeswald W. Salacuse, *Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution*, 31 *FORDHAM INT’L L.J.* 138, 172–73 (2007) (“Conciliation is thus a kind of non-binding arbitration. Its function is predictive. It tends to be rights-based in its approach, affording the parties a third person’s evaluation of their respective rights and obligations.”) (footnote omitted).

¹⁸⁵ See FRANCK & JOUBIN-BRET, *supra* note 34, at xi–xii (providing definitions related to ADR, including conciliation, and noting the unique ICSID context).

¹⁸⁶ See, e.g., ICSID, *ICSID CONVENTION, REGULATIONS AND RULES* 89–98 (2006) <http://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf>.

¹⁸⁷ See, e.g., Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 *PENN ST. L. REV.* 165, 175 (2003) (noting “conciliation [is] aimed at finding a compromise between parties’ positions rather than finding an interest-based resolution of parties’ disputes”).

¹⁸⁸ See, e.g., Linda C. Reif, *Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes*, 14 *FORDHAM INT’L L.J.* 578, 607 (1991) (“Although it is not possible to determine exactly why there has been scant use of the ICSID conciliation facility, the reasons posed range from omission of a conciliation clause in the parties’ initial agreement to the perceived disadvantages of conciliation generally, i.e., its non-binding nature makes it a waste of time and money.”).

¹⁸⁹ Lester Nurick & Steven J. Schnably, *The First ICSID Conciliation: Tesoro Petroleum Corp. v. Trinidad & Tobago*, 1 *ICSID REV. — FOREIGN INV. L.J.* 340 (1986).

¹⁹⁰ Michael M. Moore, *International Arbitration Between States and Foreign Investors - The World Bank Convention*, 18 *STAN. L. REV.* 1359, 1376 (1966) (suggesting a history of dissatisfaction with arbitration “is no reason to oppose the creation of facilities for conciliation . . . of investment disputes to which investors may have access”).

3. Fact-Finding

As lightly used as ICSID conciliation has been, there is an even less frequently used dispute resolution mechanism at ICSID: fact-finding.

Despite deep praise in the *Yale Law Journal* (as early as 1910)¹⁹¹ for an institutionalized fact-finding facility, it took until the creation of the 1978 ICSID AF Rules to generate Fact-Finding protocols.¹⁹² ICSID's Fact-Finding rules, to some extent, mirror services available at the Permanent Court of Arbitration in The Hague.¹⁹³ Despite being available for nearly forty-five years (1978-2022), however, ICSID's Fact-Finding rules remain unused.¹⁹⁴

In theory, either an investor or a government could initiate Fact-Finding to examine and report on facts. Provided both parties consent, a committee of inquiry provides parties with an impartial assessment of facts; and if those facts are accepted by the parties, the committee could examine and report on disputed factual issues.¹⁹⁵ One might hope that, with the new revisions at ICSID that also permit fact-finders to offer recommendations,¹⁹⁶ there might be useful re-consideration of this dispute resolution modality, which has a rich historical pedigree and resulted in

¹⁹¹ James L. Tryon, *The Proposed High Court of Nations*, 19 YALE L.J. 145, 151 (1910) (“The world has never yet had a permanent commission [to promote fact-finding for international disputes]. Provision for it is potentially a great peace measure.”)

¹⁹² Franck, *supra* note 12, at 838; *see also* PARRA, *supra* note 103, at 128–37 (discussing the history of the Additional Facility).

¹⁹³ THE PERMANENT COURT OF ARBITRATION: INTERNATIONAL ARBITRATION AND DISPUTE RESOLUTION, SUMMARIES OF AWARDS, SETTLEMENT AGREEMENTS AND REPORTS, at xiv (Phyllis Hamilton, H.C. Requena, L. van Scheltinga, & B. Shifman eds., 1999); *see also* Permanent Court of Arbitration, PCA Optional Rules for Fact-Finding Commissions of Inquiry (1997), <http://docs.pca-cpa.org/2016/01/Permanent-Court-of-Arbitration-Optional-Rules-for-Fact-finding-Commissions-of-Inquiry.pdf>.

¹⁹⁴ On ICSID's website, the only two options for “Case Type” are “Arbitration” and “Conciliation.” Fact-Finding is never an option. *Cases*, ICSID, <http://icsid.worldbank.org/cases/case-database> (last visited Aug. 28, 2022); *see also* Kinnear, *supra* note 131, at 210, 218 (discussing fact-finding); Franck, *supra* note 34, at 210–11. For a proposal about using ICSID's fact-finding facility more effectively, consider Nicholas W. Jordan, *Using ICSID Fact-Finding Proceedings to Prevent or Resolve International Investment Disputes* (Jan. 8, 2019) (unpublished manuscript, on file with author). A haiku observes, “ICSID Fact-Finding. Never used, untapped value. [In search of an] Appropriate case.” *Id.*

¹⁹⁵ Parra, *supra* note 123, at 732–35.

¹⁹⁶ Under ICSID's 2022 revised rules, fact-finding is available to a broad variety of disputes that only need to relate to an investment, involve a State or Regional Economic Integration Organization (“REIO”), and involve parties' written consent to fact-finding. *Id.* at 732; *see also infra* notes 231–232, 246. The most recent revisions “allow parties to agree that the report of the fact-finding committee may contain a recommendation or be binding on the parties.” Parra, *supra* note 123, at 734. In the past, fact-finding committees were “limited to finding of facts.” *Id.* at 734 n.87 (citing 1978 and 2006 fact-finding rules).

the successful resolution of disputes,¹⁹⁷ including the *Dogger Bank Case*.¹⁹⁸

IV. TRANSITION TO MODERN PRACTICE: ICSID REFORMS

When considering ICSID's history to understand recent reforms, it is vital to note that until 1987, no one had ever even commenced an ITA—at ICSID or elsewhere.¹⁹⁹ This meant, in 1984, when ICSID first revised its arbitration rules,²⁰⁰ the amendments did not focus on adapting the rules to address concerns deriving from the substantive law of investment treaties. For decades, Broches' hypothesis of how ICSID would function was proven correct, as ICSID primarily administered arbitration involving contract claims governed by national law. ITA, with investment treaties providing the substantive law, was the exception. Today, the situation is functionally reversed.²⁰¹

ICSID eventually registered its first ITA case in 1987, with the first final award (and dissenting opinion) rendered in 1990.²⁰² What followed for the next fifteen years was increased global investment flows, increased numbers of investment treaties, and a growth in ITA.²⁰³ In response, ICSID offered incremental reforms in 2003 and 2006,²⁰⁴ including efforts to improve ITA transparency.

By contrast, ICSID's 2022 procedural reform was far more extensive than its previous amendment processes. Recognizing the new reality that

¹⁹⁷ WILLIAM I. SHORE, FACT-FINDING IN THE MAINTENANCE OF INTERNATIONAL PEACE 15–22 (1970); NISSIM BAR-YAACOV, THE HANDLING OF INTERNATIONAL DISPUTES BY MEANS OF INQUIRY 45–70, 142–56, 156–70, 171–79, 192–94 (1974); see also Thomas M. Franck, *Three Major Innovations of International Law in the Twentieth Century*, 17 QUNNIPIAC L. REV. 139, 141–42 (1997) (discussing fact-finding and its success at the United Nations). But see Thomas M. Franck, *Some Psychological Factors in International Third-Party Decision-Making*, 19 STAN. L. REV. 1217, 1217–18 (1967) (identifying challenges with international fact-finding).

¹⁹⁸ Incident in the North Sea (The Dogger Bank Case) (Gr. Brit. v. Russ.), Hague Ct. Rep. (Scott) 403 (Comm'n of Inquiry 1905); see also Jan Martin Lemnitzer, *International Commissions of Inquiry and the North Sea Incident: A Model for MH17 Tribunal?*, 27 EUR. J. INT'L L. 923, 930–39 (2016).

¹⁹⁹ See, e.g., Faure & Ma, *supra* note 177, at 14.

²⁰⁰ Parra, *supra* note 163, at 51. By the 1984 revisions, ICSID had only registered twenty cases. *Id.* at 51, 53.

²⁰¹ See, e.g., Roberto Castro de Figueiredo, *The Investment Requirement of the ICSID Convention and the Role of Investment Treaties*, 26 AM. REV. INT'L ARB. 453, 453 (2015) (suggesting that, in 2014, nearly 75% of ICSID's registered cases involved investment treaty disputes).

²⁰² Asian Agricultural Products Ltd (AAPL) v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/87/3 (June 27, 1990), 30 I.L.M. (1991); see also Jieying Ding, *Enforcement in International Investment and Trade Law: History, Assessment, and Proposed Solutions*, 47 GEO. J. INT'L L. 1137, 1140 (2016) (calling the case of AAPL v. Sri Lanka “revolutionary” and noting “a private investor, for the first time, could sue a sovereign government based on an ex-ante consent the government gave in a Bilateral Investment Treaty (BIT) without parties invoking a contract breach”).

²⁰³ Parra, *supra* note 163, at 52–53, 56; see also *supra* notes 48–50, 118, 126–128, 150–151.

²⁰⁴ Parra, *supra* note 163, at 52–57; see also Meg Kinnear, *Remarks by Meg Kinnear*, 112 AM. SOC'Y INT'L L. PROC. 121, 121–22 (2018) (“The last rule amendments at ICSID were twelve years ago, between 2004–2006. That process led to many innovative provisions that have fundamentally changed investor-state dispute settlement. These include: public access to hearings; public access to case documents; participation by non-disputing parties; mandatory publication of awards or extracts of awards; and early dismissal of cases for manifest lack of legal merit.”).

States exercised sovereignty to create treaties that provide investors' substantive rights and appreciating the value of modernizing rules to reflect current practice, the amendments responded to the lessons derived from the increase of ITA cases.

To understand the 2022 reforms, this part first explores the shift in ICSID's caseload. It then focuses on the lessons from the reforms in the early 2000s, which began to respond to the first growth of ITA disputes and the shifting caseload. ICSID's initial caseload mirrored what Broches had predicted (and what actually occurred), namely that for over thirty years roughly ninety-five percent of disputes derived domestic investment or commercial law. Only in the modern era did those proportions shift, with ninety-five percent of the cases instead arising under international law provided by investment treaties. Finally, it considers the core innovations in ICSID's most recent revisions designed to reflect the changed circumstances.

A. *The Shift in ICSID Caseload*

With the "Velvet Revolution" and the collapse of the Soviet Union,²⁰⁵ two fundamental factors coalesced, namely an increase in foreign investment—as "transition" economies took a larger role on the world stage—and an increase in States negotiating investment treaties. Because these types of investments bring conflict and the law now provided investors with a legal forum for the remedy of harms defined in treaties, ICSID's caseload was primed to expand. Still, a critical element was needed to move from theory to practice.

Jan Paulsson's 1995 article, *Arbitration without Privity*,²⁰⁶ was a core catalyst that led to the expansion of ITA cases at ICSID. Until that time, ICSID had registered only twenty-six arbitration cases, twenty-five of which were *not* ITA disputes.²⁰⁷ As predicted, non-treaty cases at the time were roughly ninety-six percent of all ICSID cases.²⁰⁸ Paulsson's article,

²⁰⁵ See generally William G. Frenkel & Michael Y. Sukham, *New Foreign Investment Regimes of Russia and Other Republics of the Former U.S.S.R.: A Legislative Analysis and Historical Perspective*, 16 B.C. INT'L & COMP. L. REV. 321 (1993).

²⁰⁶ Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. – FOREIGN INV. L.J. 232 (1995).

²⁰⁷ When including the two conciliations before 1990, the percentage of total disputes arising under investment treaties shifted from 96.2% (arbitration only) to 96.4% (conciliation and arbitration). *Cases*, *supra* note 194 (filter "Case Type" by selecting Arbitration and/or Conciliation).

²⁰⁸ From 1966-1995, roughly thirty years, ICSID registered only twenty-six arbitrations: (1) *Holiday Inns S.A. v. Morocco* (Case No. ARB/72/1) (Contract), (2) *Adriano Gardella S.p.A. v. Côte d'Ivoire* (Case No. ARB/74/1) (Contract), (3) *Alcoa Minerals v. Jamaica* (Case No. ARB/74/2) (Contract), (4) *Kaiser Bauxite Co. v. Jamaica* (Case No. ARB/74/3) (Contract), (5) *Reynolds Jamaica Mines Ltd. v. Jamaica* (Case No. ARB/74/4) (Contract), (6) *Gabon v. Société Serete S.A.* (Case No. ARB/76/1) (Contract), (7) *AGIP S.p.A. v. People's Republic of the Congo* (Case No. ARB/77/1) (Contract), (8) *S.A.R.L. v. People's Republic of the Congo* (Case No. ARB/77/2) (Contract), (9) *Guadalupe Gas Products Corp. v. Nigeria* (Case No. ARB/78/1) (Contract), (10) *Amco Asia Corp. v. Indonesia* (Case No. ARB/81/1) (Contract), (11) *Klöckner Industrie-Anlagen GmbH v. Cameroon* (Case No. ARB/81/2) (Contract), (12) *Société Ouest Africaine des Bétons Industriels v. Senegal* (Case No. ARB/82/1) (Contract), (13) *Swiss Aluminium Ltd. v. Iceland* (Case No. ARB/83/1) (Contract), (14) *Liberian Eastern Timber Corp. v.*

however, changed that playing field. It offered a clear intellectual roadmap to justify investors' direct suits against States for violations of the treaty rights that States had granted foreign investors.²⁰⁹ Able to point to *one* concluded case from an investment treaty, *AAPL v. Sri Lanka*,²¹⁰ Paulsson established that textual rights in treaties were not merely theoretical.²¹¹ Rather, he persuasively argued that exploring latent legal rights in treaties was warranted. With the remarkable increase in States granting investors broad new rights, investors eventually began utilizing those rights to diffuse the treaty-based international law innovation.²¹² Around that time in 2002, using treaties for "arbitration without privity" was, as one practitioner observed, the intellectual equivalent of "selling cars to cavemen."

Paulsson observed that investment treaties included a unilateral offer to arbitrate with a State, which investors could accept by consenting to arbitration as permitted by the applicable treaty, and the ICSID Convention (or AF Rules) likewise could permit ICSID to entertain disputes. This meant—presuming there was a qualifying investor, investment, and

Liberia (Case No. ARB/83/2) (Contract), (15) Atlantic Triton Co. v. Guinea (Case No. ARB/84/1) (Contract), (16) Colt Industries v. Republic of Korea (Case No. ARB/84/2) (Contract), (17) Southern Pacific Properties v. Egypt (Case No. ARB/84/3) (Egypt Investment Law), (18) Maritime International v. Guinea (Case No. ARB/84/4) (Contract), (19) Pharaon v. Tunisia (Case No. ARB/86/1) (Contract and Tunisia Investment Law), (20) Société d'Études de Travaux et de Gestion SETIMEG S.A. v. Gabon (Case No. ARB/87/1) (Contract), (21) Mobil Oil v. New Zealand (Case No. ARB/87/2) (Contract), (22) Asian Agricultural Products Ltd. v. Sri Lanka (Case No. ARB/87/3) (UK-Sri Lanka BIT), (23) Occidental v. Pakistan (Case No. ARB/87/4) (Contract), (24) Manufacturers Hanover Trust v. Egypt (Case No. ARB/89/1) (Egypt Investment Law), (25) Vacuum Salt v. Ghana (Case No. ARB/92/1) (Contract), (26) Scimitar Exploration Ltd. v. Bangladesh (Case No. ARB/92/2) (Contract). *Cases, supra* note 194 (filter "Case Type" by selecting Arbitration).

²⁰⁹ Toby Landau KC, one of the world's foremost investment treaty arbitrators, made this point quite clearly in his presentation at the elite International Council for Commercial Arbitration ("ICCA") 2022 conference on September 21, 2022, when he explained that investment treaty arbitration was a "sleeping beauty" and it "may be said that sleeping beauty was actually kissed by Jan Paulsson . . . in his 1995 seminal article, *Arbitration without Privity*." *The Great Debate: "A World Without Investment Arbitration?"*, INT'L COUNCIL COM. ARB., at 14:12–14:26, 15:31–16:40 (Sept. 21, 2022), <http://www.arbitration-icca.org/great-debate-world-without-investment-arbitration> (last visited Jan. 8, 2023). *See also* Todd Allee & Clint Peinhardt, *Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment*, 65 INT'L ORG. 401 (2011); Franck, *supra* note 12, at 839 ("[I]n 1995, Jan Paulsson published his seminal article, *Arbitration Without Privity*, which articulated the doctrinal and policy justification for IIAs to form the basis of ICSID jurisdiction . . . and Paulsson's article offered the intellectual architecture for creative lawyers to pave the way towards ICSID arbitration.").

²¹⁰ The case garnered material attention. *See* Derek Asiedu-Akrofi, *ICSID Arbitral Decision*, 86 AM. J. INT'L L. 371, 371 (1992); Asian Agricultural Products Ltd (AAPL) v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/87/3 (June 27, 1990), 30 I.L.M. (1991).

²¹¹ For example, Lauge Poulsen and Emma Aisbett have suggested that, "while almost every developing country has adopted at least a few [Bilateral Investment Treaties, or] BITs, the question is whether they truly realized that . . . they were exposing themselves to costly litigation."). Lauge N. Skovgaard Poulsen & Emma Aisbett, *When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning*, 65 WORLD POL. 273, 273 (2013); *see also* Cecelia Olivet, *Why did Ecuador Terminate All its Bilateral Investment Treaties?*, TRANSNAT'L INST. (May 17, 2017), <http://www.tni.org/en/article/why-did-ecuador-terminate-all-its-bilateral-investment-treaties> (suggesting that the decision by "three private lawyers under the auspices of the World Bank's arbitration centre" to initiate a claim "shocked the world and the Ecuadorian government").

²¹² *See* FRANCK, *supra* note 3, at 117–19 (discussing diffusion of innovation theory and investment arbitration).

applicable treaty in force—when investors believed State action violated the treaty, direct arbitration with that State was a viable dispute resolution option. This was Paulsson’s “arbitration without privity,” as the treaties granted direct rights and responsibilities among States. Yet, as indirect beneficiaries of those rights and privileges, foreign investors (with qualifying investments) could directly bring treaty-based claims against State signatories despite being non-signatories to the treaty.²¹³

In the late 1990s, as investors opted to take the risk of engaging in a new, potentially costly, and experimental form of dispute resolution, the shift of ICSID’s caseload followed.²¹⁴ Simply put, the growth of the investment treaty network, post-Cold War economic liberalization, and Paulsson’s provocative article changed ICSID’s dynamics.²¹⁵

The Argentine currency crisis crystalized the shift.²¹⁶ In the early 2000s, responding to a national emergency, Argentina enacted currency controls that impacted domestic and international parties. That single event, and derivative government measures, resulted in over forty disputes under different treaties.²¹⁷ Instead of creating a mixed claims commission for consistent adjudication or relying upon national court litigation (which experienced its own unique set of challenges),²¹⁸ the disputes were adjudicated piecemeal, on a case-by-case basis, via ICSID arbitration or other venues.²¹⁹ Over time, several cases settled via negotiation or were

²¹³ See also PARRA, *supra* note 103, at 171–73 (discussing AAPL as a case involving “arbitration without privity”).

²¹⁴ See, e.g., Puig, *supra* note 99, at 580; see also FRANCK, *supra* note 3, at 113–20 (discussing the increased investment treaty caseload for ICSID and other venues).

²¹⁵ Franck, *supra* note 12, at 839. *But see* Puig, *supra* note 99, at 535 (suggesting changes in ICSID’s caseload were driven by institutional figures within the World Bank).

²¹⁶ Puig, *supra* note 99, at 536–37, 580–82.

²¹⁷ Multiple scholars have explored the 2001 Argentine financial crisis and its intersection with investment treaty arbitration. See, e.g., Stephen K. Park & Tim R. Samples, *Tribunalizing Sovereign Debt: Argentina’s Experience with Investor-State Dispute Settlement*, 50 VAND. J. TRANSNAT’L L. 1033, 1043–46 (2017) (describing the various cases related to Argentina’s sovereign debt crisis and identifying 59 cases with Argentina as a respondent State); see also José E. Alvarez, *The Return of the State*, 20 MINN. J. INT’L L. 223, 242–51 (2011) (discussing the cases against Argentina under investment treaties that derived from their sovereign debt crisis); Paolo Di Rosa, *The Recent Wave of Arbitrations against Argentina under Bilateral Investment Treaties: Background and Principal Legal Issues*, 36 U. MIAMI INTER-AM. L. REV. 41, 42 (2004) (noting in 2004, “[t]here are thirty-five ICSID cases pending against Argentina as of this writing”).

²¹⁸ During a previous Argentine debt crisis, arbitration was not available to holders of debt instruments. Rather than relying on diplomatic protection or espousal, some debtors pursued redress through national courts. See *supra* notes 53–56 (illustrating the dispute resolution options available for private investors suing States). In the United States, there were lawsuits under the Foreign Sovereign Immunities Act (“FSIA”), which led to a decision by the U.S. Supreme Court. See *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607 (1992). Not all countries in the world permit private individuals to sue States in domestic courts. This means, in the absence of a judicial forum or the consent to an arbitral forum, there were few rule of law based dispute resolution options available to private investors harmed by State conduct.

²¹⁹ Franck, *supra* note 34, at 184–85.

otherwise discontinued, demonstrating that arbitration is not the only way to resolve investment-related conflict.²²⁰

The 1991 prediction by the *AAPL* tribunal's president, Ahmed El-Koshari, that "recourse to BIT provisions might in the future become the main channel through which ICSID could be seized" has come to pass.²²¹ This prediction notwithstanding, it is critical to recall that ITA can occur irrespective of ICSID's existence. It is the investment treaty—not the ICSID Convention or ICSID rules—that creates the substantive rights and procedural remedies for investors. Without States consenting to derogations of their sovereignty through express treaty language, ICSID's docket would be considerably diminished and could easily revert to the baseline Broches expected when the ICSID Convention was created.

Ultimately, the combined proliferation of treaty rights and investors' newfound willingness to test the boundaries of their new substantive and procedural international law rights meant that, in the adjudication marketplace, innovators and early adopters bore the initial costs (and benefits) of experimenting with pursuing ITA at ICSID.²²² The initial success of investors obtaining *any* enforceable award lowered the opportunity cost for others—including the subsequent majority and laggards—and made ITA part of the new status quo in international dispute resolution.²²³

B. *The Evolution of Rules and Practices*

With the changing reality and increasing caseload, ICSID took a leadership role in trying to minimize risk, increase certainty, and support innovation. In 2006, ICSID made a valiant effort to explore creating an appellate facility and expand transparency while working within the restrictions of its governing Convention.²²⁴

When Meg Kinnear became Secretary General in 2009, ICSID initiated programs designed to improve transparency and to provide public

²²⁰ See, e.g., Park & Samples, *supra* note 217; Arturo C. Porzecanski, *The Origins of Argentina's Litigation and Arbitration Saga, 2002-2016*, 40 *FORDHAM INT'L L.J.* 41, 53–59 (2016); see also ICSID, *SURVEY FOR ICSID MEMBERS ON COMPLIANCE WITH ICSID AWARDS* (2018) <http://icsid.worldbank.org/sites/default/files/publications/Report%20on%20ICSID%20Survey.pdf> (exploring compliance and enforcement of ICSID awards).

²²¹ PARRA, *supra* note 103, at 172.

²²² Andrea K. Bjorklund, *Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals is Not Working*, 59 *HASTINGS L.J.* 241, 251–53 (2007); O'Hara O'Connor & Franck, *supra* note 42, at 1625–30; see also *supra* notes 45–46 (discussing substantive and procedural rights in investment treaties).

²²³ See Strong, *supra* note 13, at 556–66. See generally Gary B. Born, *A New Generation of International Adjudication*, 61 *DUKE L.J.* 775 (2012).

²²⁴ See PARRA, *supra* note 103, at 224–29 (exploring ICSID's 2006 rule revisions); see also James D. Fry & Odysseas G. Repousis, *Towards A New World for Investor-State Arbitration Through Transparency*, 48 *N.Y.U. J. INT'L L. POL.* 795, 822–23 (2016) ("[T]he ICSID Arbitration Rules were amended in 2006 to allow for amicus curiae briefs. However, the 2006 amendment does not provide for extensive publication of documents mainly due to the limitation in the ICSID Convention itself that does not allow for the publication of arbitral awards, without the consent of the parties.") (footnote omitted).

information on cases.²²⁵ Kinnear, in many respects, spearheaded a culture shift by promoting the publication of regular statistical reports with data about ICSID cases, parties, arbitrators, and outcomes.²²⁶ ICSID's recent changes reflect its historical arc of adapting its procedures to stakeholder needs, particularly when the applicable substantive law impacts international law and public policy.²²⁷

C. 2022: ICSID's Core Changes

To appreciate ICSID's modern reality and learn lessons for ongoing reform efforts, it is necessary to explore the fundamental transformations which arise from ICSID's July 2022 amendments. Although there are others,²²⁸ the core contributions of the amendment project involve attempts to create broader access to ICSID's dispute resolution services and make existing services more effective and efficient. This part therefore focuses on ICSID's expanded jurisdictional scope, revisions involving time and costs, and enhancing dispute resolution capacity by introducing—for the first time—ICSID mediation procedures.

1. Expanded Jurisdiction of the Additional Facility

The first material change is the shift in ICSID's jurisdictional mandate. Although ICSID's approach in the 1960s only permitted ICSID arbitration under the ICSID Convention when both the investor's home country and the host State were ICSID Member States, this changed over

²²⁵ Transparency discussions can omit consideration of material constraints within the ICSID Convention on transparency. When originally founded, States found confidentiality desirable. Specifically, the Convention requires ICSID to keep awards confidential and prohibits publication of awards unless *both* parties consent. ICSID Convention, *supra* note 132, art. 48(5) (“The Centre shall not publish the award without the consent of the parties.”). Before the most recent revision of the ICSID Rules, enhanced transparency has been a function of other instruments, like the UNCITRAL Rules on Transparency, which apply to a limited number of ICSID-based disputes. UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration art. 5(1), *in* G.A. Res. 60/109 (Dec. 16, 2013), <http://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf>; *see also* Perry S. Bechky, *Investor-State Arbitrators' Duties to Non-Parties*, 31 DUKE J. COMP. & INT'L L. 221, 241–45 (2021). With the recent revisions, ICSID has improved its transparency, but without violating the obligations established in the Convention.

²²⁶ *See generally* Meg Kinnear, 2019 John E.C. Brierley Memorial Lecture - Continuity and Change in the ICSID System: Challenges and Opportunities in the Search for Consensus (2019), <http://icsid.worldbank.org/news-and-events/speeches-articles/2019-john-ec-brierley-memorial-lecture-continuity-and-change> (last visited Mar. 23, 2023) (discussing the history and innovations of ICSID).

²²⁷ *See generally id.*; *see also* PARRA, *supra* note 103 (discussing ICSID rule changes); Parra, *supra* note 123 (exploring most recent ICSID revisions).

²²⁸ ICSID created other transformations, including rules dealing with the controversial issue of Third-Party Funding (“TPF”), which has become a standard in ITA after 2010. TPF also impacts domestic litigation in the United States. *See, e.g.*, Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. REV. 388 (2016); Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268 (2011); *see also* Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 CARDOZO L. REV. 861, 869–72 (2015); *see also* Press Release, ICSID, ICSID Administrative Council Approves Amendment of ICSID Rules (Mar. 21, 2022), <http://icsid.worldbank.org/news-and-events/communiqués/icsid-administrative-council-approves-amendment-icsid-rules> (identifying the two other areas of major change: greater transparency and TPF); Parra, *supra* note 123, at 728–30 (identifying a variety of other innovations including enhanced transparency, TPF, and expedited rules).

time.²²⁹ As explained earlier, in 1978, the World Bank created the AF to permit parties to consent to ICSID dispute settlement where only *one* party was either a Convention signatory or a national from a country that was a Member State.²³⁰

The 2022 revisions were a transformative expansion of ICSID's AF jurisdiction. Now, both States and investors can access the AF protocols, irrespective of whether either the respondent State or the investor's home jurisdiction is a member of the ICSID Convention. There are also provisions that permit Regional Economic Integration Organizations ("REIOs")—such as the European Union or ASEAN—to become a party to a dispute.²³¹ While parties must still consent to pursue ICSID dispute resolution under the appropriate AF rules,²³² this opens ICSID's gates to these procedures as wide as possible.

It may be that Broches and his contemporaries would be shocked by the breadth of the AF in its new form. Nevertheless, the expansion of jurisdiction is lawful, formalized through ICSID's Administrative Council, and requires proper party consent, which ICSID's Secretary-General must scrutinize before registering a dispute.²³³ ICSID has merely opened a door that was previously inaccessible, and parties can now exert their autonomy by making an informed, unconstrained choice.

2. Time and Costs: Procedural Shifts

There are various changes—particularly in the arbitration and conciliation rules—designed to decrease case length or otherwise streamline proceedings to control costs. Although the author has other commentary on cost-related amendments, given their centrality to ICSID reform,²³⁴ the noteworthy innovations involve creating Expedited Arbitration Rules,²³⁵ continuing to improve transparency,²³⁶ providing for electronic filing,²³⁷

²²⁹ See *supra* notes 162, 164.

²³⁰ See *supra* notes 163–164.

²³¹ ICSID, ADDITIONAL FACILITY RULES AND REGULATIONS, arts. 1–3, ICSID/11/Rev.3 (2022), http://icsid.worldbank.org/sites/default/files/documents/ICSID_Additional_Facility.pdf [hereinafter AF RULES].

²³² This is no different from other ADR mechanisms, such as commercial arbitration, where non-court-based dispute resolution mechanisms are a creature of consent from all parties to the dispute. See *supra* notes 82–85.

²³³ See, e.g., ICSID Convention, *supra* note 132, art. 36(3) (requiring, for both arbitration and conciliation “[t]he Secretary-General shall register the request unless he [or she or they] finds, on the basis of information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre”); see also AF RULES, *supra* note 231, at Conciliation Rule 7(1), Arb. Rule 7(1).

²³⁴ Susan Franck & Bailey Roe, *The Cost Award*, in THE AWARD IN INTERNATIONAL INVESTMENT ARBITRATION (Catharine Titi & Katia Fach Gomez eds., forthcoming Oxford University Press).

²³⁵ ICSID, ICSID CONVENTION, REGULATIONS AND RULES 79–88 (2022), http://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf (last visited Aug. 28, 2022) [hereinafter 2022 ICSID RULES].

²³⁶ *Id.* Arb. Rules 62–68.

²³⁷ *Id.* Arb. Rule 4.

codifying opportunities for bifurcation,²³⁸ as well as setting tighter deadlines for arbitrator appointment and other timesaving methods.²³⁹

One issue involving the effort to contain costs, support strategic dispute settlement, and provide a level playing field for all parties involves the use of a Case Management Conference (“CMC”). CMCs can be used strategically to have parties explore whether other dispute resolution options (like mediation) may be constructive. A CMC can also set timetables that are flexible for the parties, identify document disclosure obligations that are fair and not unduly burdensome to all parties, and raise issues (like consolidation and participation of Non-Disputing Parties) to create efficiency while maintaining a level playing field.²⁴⁰ Notably, in its initial proposal, ICSID only made CMCs permissible, not required.²⁴¹ Yet, in the face of public comments,²⁴² ICSID changed its approach and demonstrated its willingness to adapt. In the final rules, the CMC is now mandatory.²⁴³

The new rules also respond to public requests for clarity on cost justifications, which means arbitrators (particularly in a CMC) could put parties on advance notice about what factors will affect ultimate cost shifting determinations and the derivative efficiency of the proceeding.²⁴⁴ As these cost assessments can, on average, involve fees of over \$11 million USD,²⁴⁵ knowing who will pay those fees (and on what basis) is fundamental to promoting efficient dispute settlement.

3. The New Dispute Resolution Modalities: Mediation

While there have also been core revisions to both the Conciliation and Fact-Finding procedures historically available at ICSID,²⁴⁶ perhaps one of the most important changes involves ICSID’s establishment of entirely new form of dispute resolution—namely the new Mediation Rules.²⁴⁷

²³⁸ *Id.* Arb. Rules 41–42.

²³⁹ *Id.* Arb. Rules 15, 22, 23.

²⁴⁰ *Case Management Conferences - ICSID Convention Arbitration (2022 Rules)*, ICSID, <http://icsid.worldbank.org/procedures/arbitration/convention/case-management-conferences/2022> (last visited Mar. 17, 20223); *see also* FRANCK, *supra* note 3, at 317–36 (discussing case management conferences).

²⁴¹ *See* ICSID SECRETARIAT, 3 PROPOSALS FOR AMENDMENT OF THE ICSID RULES—WORKING PAPER 122 (2018), http://icsid.worldbank.org/sites/default/files/publications/WP1_Amendments_Vol_3_WP-updated-9.17.18.pdf (last visited Mar. 17, 20223) (drafting Rule 14 to provide that “the Tribunal may convene a case management conference”) (emphasis added).

²⁴² *See* ICSID RULE AMENDMENT PROJECT—MEMBER STATE & PUBLIC COMMENTS ON WORKING PAPER #1 OF AUGUST 3, at 120–21, 123–24 (2018), http://icsid.worldbank.org/sites/default/files/amendments/Compendium_Comments_Rule_Amendment_3.15.19.pdf (last visited Mar. 17, 20223) (reflecting stakeholder requests to make CMCs mandatory).

²⁴³ 2022 ICSID RULES, *supra* note 235, at Arb. Rule 31.

²⁴⁴ *Id.* Arb. Rule 52; *see also* FRANCK, *supra* note 3, at 318–19.

²⁴⁵ FRANCK, *supra* note 3, at 200–11.

²⁴⁶ Parra, *supra* note 123, at 732–35.

²⁴⁷ *Mediation*, ICSID, <http://icsid.worldbank.org/rules-regulations/mediation> (last visited Mar. 19, 2023).

Drawing upon nearly fifteen years of effort to develop mediation and capacity for managing investment-treaty conflict,²⁴⁸ whether as a stand-alone process or as a complement to arbitration,²⁴⁹ this development at ICSID is fundamental. Providing a venue for mediation and guidance will grant States—particularly those needing or desiring enhanced control over outcomes—the ability to retain their sovereignty. Likewise, given the time and cost of the average ITA, a mediation procedure—which can precede or work concurrently with arbitration—can prevent parties from waiting multiple years and spending millions of dollars on legal fees.

Provided a submission to mediation is constructed properly in an underlying contract or treaty, using mediation opens the possibility for both innovation and efficiency that permit negotiation that, in theory, may be less motivated by pure legal rights and more focused upon interests and creative problem solving. With the advent of the Singapore convention to enforce mediated settlements,²⁵⁰ and the UNCITRAL process developing models for investor-State mediation agreements,²⁵¹ the time is ripe for investors and States to consider how to avoid the cost, expense, stress, and lost resources they would bear in a lengthy and costly arbitration process.

In the past, without clear mediation protocols, ICSID's mediation efforts were stymied. States can be risk averse to a dispute resolution procedure that has no guiderails and is untested. Without basic protocols, parties and their advocates would be required not only to consent to mediation but also to agree to a mediator and other procedural elements. Such a framework can create a situation where parties (or counsel) may engage in gamesmanship because they believe that making an offer to mediate reflects weakness—when they do not—or otherwise misinterpret the purpose of mediation.²⁵² It can also mean that risk averse States, disinclined to use untested dispute resolution mechanisms, may forgo mediation,

²⁴⁸ Franck, *supra* note 34, at 161; *see also* UNCTAD, *supra* note 33; Anna Joubin-Bret & Barton Legum, *A Set of Rules Dedicated to Investor–State Mediation: The IBA Investor–State Mediation Rules*, 29 ICSID REV. – FOREIGN INV. L.J. 17 (2014); Roberto Echandi & Priyana Kher, *Can International Investor–State Disputes be Prevented? Empirical Evidence from Settlements in ICSID Arbitration*, 29 ICSID REV. – FOREIGN INV. L.J. 41 (2014); Frauke Nitschke, *The IBA's Investor–State Mediation Rules and the ICSID Dispute Settlement Framework*, 29 ICSID REV. – FOREIGN INV. L.J. 112 (2014).

²⁴⁹ *See, e.g.*, Jack J. Coe, Jr., *Toward a Complementary Use of Conciliation in Investor–State Disputes—A Preliminary Sketch*, 12 U.C. DAVIS J. INT'L L. & POL'Y 7 (2005); Salacuse, *supra* note 184.

²⁵⁰ United Nations Convention on International Settlement Agreements Resulting from Mediation, Aug. 7, 2019, U.N. TREATY NO. 56376, http://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf.

²⁵¹ UNCITRAL, Hong Kong Ministry of Justice, & Asian Academy of International Law, *UNCITRAL Working Group III on ISDS Reform: Forum for Further Preparatory Work on Investment Mediation*, ASIAN ACAD. INT'L L. (May 5, 2022), <http://aail.org/past-event-2022-05-uncitral-wgiii-forum> (providing a webinar about UNCITRAL's proposed model mediation clauses for treaties).

²⁵² CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 437–39 (2014).

particularly if it impacts the State's domestic political situation.²⁵³ Moreover, having to create a new dispute resolution modality from scratch means that there would be substantive time, effort, and energy to create procedures when the parties are already in a hot state given the existence of the conflict.²⁵⁴

By providing an *ex ante* framework with opportunities for procedural flexibility, ICSID helped create a space for governments, if they so choose, to exercise greater sovereignty over ultimate outcomes and investors, while streamlining the time and cost of dispute settlement. Rather than subject itself to protracted arbitration and the related costs, in one case, Ukraine opted to negotiate the settlement of a regulatory dispute about a foreign investment in a radio station. By instead offering the investor a new business opportunity, Ukraine both ended the dispute and expanded the entrepreneur's economic investment in the country to include beauty salons honoring Ukrainian Olympic gold medalist Oksana Baiul.²⁵⁵

Perhaps ICSID's most gentle innovation on the mediation front will have a profound and lasting effect. More than just offering balanced protocols to facilitate the mediation process, during the amendment consultation process, ICSID has already made a commitment to training investment mediators.²⁵⁶ For ICSID mediation to be successful, there must be people with the proper capacity to use mediation constructively. This requires, for example, the education of counsel, who will advise clients and prepare for mediation. Mediation training can promote lateral thinking and allow parties to move beyond the limits of an adversarial mindset

²⁵³ See Note, *Mechanisms of Secrecy*, 121 HARV.L. REV. 1556, 1571 (2008) (noting, in the context of transparency innovations that, new procedures "might prevent risk-averse government officials from trying untested but potentially beneficial strategies, for fear of alienating voters wary of new methods"); Barbara Koremenos, *When, What, and Why Do States Choose to Delegate?*, L. & CONTEMP. PROBS., Winter 2008, at 151, 173 (observing that "risk-averse states" are "cautious about delegating, especially delegating important tasks such as monitoring, implementation, and dispute resolution"); Robert A. Kagan & Lawrence M. Friedman, *Do the "Haves" Come Out Ahead? Winning and Losing in State Supreme Courts, 1870-1970*, 21 L. & SOC'Y REV. 403, 445 n.40 (1987) ("For political and institutional reasons, government parties may be more risk averse in [dispute resolution and] litigation than individuals and businesses.").

²⁵⁴ Francesca Berry & Karen Hutchinson, *Mediation Is Not a Sign of Weakness—It Makes Smart Business Sense*, LEXOLOGY (Dec. 5, 2018), <http://www.lexology.com/library/detail.aspx?g=42e3f636-8366-4e7c-b2e3-6b75b74cf6a1> (disrupting the idea that mediation is weak); George Lowenstein, *Emotions in Economic Theory and Economic Behavior*, 90 AM. ECON. REV. 426 (2000) (discussing the impact of "hot states").

²⁵⁵ See also *Lemire v. Ukraine*, ICSID Case No. ARB(AF)98/1 (Sept. 18, 2000), 15 ICSID REV. — FOREIGN INV. L.J. 530, 530–41 (2000), <http://www.italaw.com/sites/default/files/case-documents/ita0452.pdf> (referencing the parties' settlement and the government's proposal for beauty salons); *Biography*, THE EMPRESS OF ICE: OKSANA BAIUL, <http://oksanabaiul.com/biography> (last visited Jan. 13, 2023) (discussing Lemire and the creation of the Oksana Baiul beauty salons); see also Franck, *supra* note 34, at 186, 205–06, 209–10.

²⁵⁶ See, e.g., *Virtual Investor-State Mediation Training: December 01, 2020 - December 03, 2020*, ICSID, <http://icsid.worldbank.org/news-and-events/events/virtual-investor-state-mediation-training> (last visited Mar. 19, 2023); *Investor-State Mediator Training: 19 - 21 January 2022*, ICSID, http://icsid.worldbank.org/sites/default/files/Events/Investor-State_Mediation_course_flyer_final.pdf (last visited Mar. 19, 2023); see also *Mediation*, *supra* note 247.

(while understanding the impact of adjudicative proceedings).²⁵⁷ Learning about mediation and conflict management also permits people to consider how best to extract value from the full range of mediation models—whether evaluative or facilitative.²⁵⁸ Training to develop the appropriate skill set is perhaps even more important for potential third-party neutrals. ICSID mediators will need a deep understanding of public international law (as States are involved), international investment law (as treaty cases are now the core of ICSID's disputes), and conflict management skills. ICSID's ongoing training opportunities provide fundamental support to grow the needed capacity and facilitate constructive use of mediation in real disputes.

V. CONCLUSION: ICSID AND THE FUTURE OF INTERNATIONAL DISPUTE SETTLEMENT

ICSID's recent reform demonstrated a unique willingness to tackle critical issues in a practical way to address stakeholder concerns. Despite the massive shift in ICSID's central activities in the last twenty years, as the substantive law has changed and States have voluntarily granted rights to foreign investors, ICSID has managed to keep a proper focus on its central mandate. By honoring the drafter's original intent to create a clear distinction between substance and procedure, ICSID has provided a practical framework for dispute settlement to maintain international harmony, keep a focus on rule of law, and promote equality of treatment among parties. Although there have been challenges with ICSID's docket flipping from having five to ninety-five percent of ITA cases, growing pains were inevitable. It would be a rare international organization—created and administered by flawed human beings—capable of exhibiting perpetual perfection in changed circumstances. Rather, the sign of a healthy and functional international organization (or person) is being unafraid to evolve, face challenges head-on, recognize their history, and develop thoughtful and practical strategies to carry out their core mandate.

ICSID has worked, over time, to ensure that it accounts for the shifting needs of stakeholders when considering reform. While some innovations may be initially rejected—like ICSID's 2004 efforts to explore the creation of an appellate mechanism or non-adjudicative mechanisms like mediation—as the wheel of time spins, these concepts can return to generate value.²⁵⁹ In its recent revisions, ICSID has made a proper, and concerted, effort to remember that its system must provide both support

²⁵⁷ See generally MENKEL-MEADOW, LOVE, STERNLIGHT, & SCHNEIDER, *supra* note 4 (exploring both ADR and methods for moving beyond the adversarial model to more appropriate forms of dispute resolution); Hernandez-Crespo Gonstead, *supra* note 4 (same).

²⁵⁸ Susan Franck, *Using Investor-State Mediation Rules to Promote Conflict Management: An Introductory Guide*, 29 ICSID REV. — FOREIGN INV. L.J. 66 (2014).

²⁵⁹ ICSID SECRETARIAT, DISCUSSION PAPER: POSSIBLE IMPROVEMENTS FOR THE FRAMEWORK OF ICSID ARBITRATION (2004), <https://icsid.worldbank.org/sites/default/files/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf> (discussing the possibility of an appeals facility and mediation).

for the rule of law and assurance that all parties, whether investors or States, receive equal treatment under the law.

The current amendment process lasted nearly five years,²⁶⁰ included six rounds of working papers, and contained thousands of pages of information.²⁶¹ For the first time in history, more than half of the revision process occurred during a global pandemic—and a war in Ukraine—where States experiencing material disruption were nevertheless active in the ICSID revision process.²⁶² Ultimately, the transparent and broad consultative process, which included both the public and private sectors,²⁶³ was admirable. One might hypothesize that this most recent amendment process has been one of the most (if not the most) broad, varied, and detailed consideration of stakeholder concerns in ICSID’s history, and was certainly conducted under challenging circumstances.

While one might wish for more substantial revisions, ICSID must nevertheless be applauded for its willingness to pursue broad stakeholder engagement and address real problems in a practical way. At every step, rather than falter in the face of challenges, ICSID has been willing to wrestle with thorny issues. It has addressed, rather than avoided, the system’s complexity; and it has been mindful that it cannot control the substance of international investment treaties, but those treaties are now ICSID’s central focus of case administration. This is no small matter given changes in politics, economics, technology, health and safety, and other shifting dynamics. Provided ICSID keeps its focus and remains mindful of its history while adapting to structural shifts and evolving considerations, it can chart a constructive course that aids, rather than hinders, the evolution of international dispute settlement.

Ultimately, it is vital to remember core aspects of ICSID’s founding when exploring the future of international dispute resolution. Rather than making uninformed (and possibly inaccurate) statements about the supposed banality of ICSID,²⁶⁴ cherry picking unrepresentative examples to foment discontent,²⁶⁵ failing to understand the international law

²⁶⁰ *ICSID Rules and Regulations Amendment*, ICSID (July 1, 2022) <http://icsid.worldbank.org/resources/rules-amendments>.

²⁶¹ *See id.* (providing the complete drafting history of the 2022 ICSID amendments).

²⁶² For example, voting on the proposed rules occurred in March 2022, when Russia invaded Ukraine. ICSID asked Ukraine, which has been involved in several ITA cases, to vote on the amendments, despite the ongoing invasion.

²⁶³ *See Parra, supra* note 123, at 726 (“The entire process took much longer than the efforts for the amendments of 1984, 2003, and 2006, none of which lasted more than two years. For the amendments of 2006, the ICSID Secretariat invited comments from the general public as well as Contracting States, though obviously to a more limited extent than the Secretariat was to do for the amendments of 2022. There was no similar openness in respect of the amendments of 1984 and 2003.”) (footnote omitted).

²⁶⁴ *See* David P. Riesenberg, *Fee Shifting in Investor-State Arbitration: Doctrine and Policy Justifying Application of the English Rule*, 60 DUKE L.J. 977, 988 (2011) (“[T]he president of Bolivia and others have accused the dispute-settlement process itself of being biased in favor of investors, alleging that ‘[g]overnments in Latin America . . . never win the cases’ and that the investors ‘always win.’”).

²⁶⁵ One dramatic publication, *Profiting from Injustice*, uses cherry-picked cases, which are statistical outliers, to offer critiques while ignoring a broader range of data. *See* Franck & Wylie, *supra* note 3, at 464, 475–76; *see also* Brower & Blanchard, *supra* note 12, at 691.

constraints under which ICSID operates,²⁶⁶ or blaming ICSID for things that it cannot control,²⁶⁷ the better course is to test urban legends and emotive responses against hard data, evidence from the founders and the original *travaux*, and the drafting history of contemporaneous changes. While there are legitimate areas of critique and room for improvement, it is vital to understand the history and doctrine to make better choices in the future to design effective dispute resolution.²⁶⁸

It is vital to appreciate that the ICSID Convention offers material restrictions on what ICSID can do as regards transparency.²⁶⁹ Accordingly, ICSID has worked within the available legal structure to create more opportunities for public access and intervention. This is preferable to engaging in the laborious process of amending the Convention, which requires the consent of a massive number of States.²⁷⁰

Blaming ICSID for past conduct, when the previous legal context was quite different,²⁷¹ is improper. Instead, the key is to appreciate how ICSID has handled actual cases, addressed real problems with its procedural skeleton, and offered balanced and equitable procedures that promote the peaceful resolution of international disputes involving States.

No system of dispute resolution—particularly one created by flawed human beings with distinct interests, needs, and expectations—can be perfect. The core point is to understand the historic context and the real facts, rather than soundbites or social media that lack primary authority. The historical underpinning in this article (and the historical scholarship of others) is fundamental to enhancing the quality of the public discourse on

²⁶⁶ See *supra* notes 204, 225, 236; see also Tim R. Samples, *Winning and Losing in Investor-State Dispute Settlement*, 56 AM. BUS. L.J. 115, 142 n.185 (2019) (“ICSID Arbitration Rules have been reformed to correct some transparency deficiencies”).

²⁶⁷ As observed multiple times, ICSID does not draft or promulgate substantive legal principles applied in disputes administered there. In the context of ITA cases at ICSID, that means States have drafted and negotiated their own international law obligations as an exercise of State sovereignty, which means they retain the power to alter those international law undertakings.

²⁶⁸ Franck, *supra* note 34.

²⁶⁹ See *supra* notes 204, 224, 225 and accompanying text.

²⁷⁰ ICSID Convention, *supra* note 132, at arts. 65–66; Andrea K. Bjorklund & Bryan H. Druzin, *Institutional Lock-in Within the Field of Investment Arbitration*, 39 U. PA. J. INT’L L. 707, 736–38 (2018); Chiara Giorgetti, *Who Decides Who Decides in International Investment Arbitration?*, 35 U. PA. J. INT’L L. 431, 480 (2013); see also Anna T. Katselas, *Exit, Voice, and Loyalty in Investment Treaty Arbitration*, 93 NEB. L. REV. 313, 353 (2014) (“[I]t is virtually impossible to amend the ICSID Convention.”).

²⁷¹ More than one scholar and commentator has misconstrued the evolution of ICSID. In a prominent example, there was a suggestion that “[t]he decision to create treaty-based ISA [Investor-State Arbitration] in the 1960s is nothing short of astonishing.” Wolfgang Alschner, *The Impact of Investment Arbitration on Investment Treaty Design: Myth Versus Reality*, 42 YALE J. INT’L L. 1, 9–10 (2017). While correctly noting that States have not historically offered direct dispute resolution to private individuals, the author failed to appreciate that the primary objective of ICSID’s procedural architecture was to focus on *national*, rather than treaty-based, legal standards, which States could control directly. Instead, for treaties, States retained the power to exclude international legal standards from ICSID dispute settlement and/or carefully negotiate any treaties that might give foreign investors substantive rights and access to dispute resolution. There was likewise a failure to appreciate the tiny number of treaties in force, and that many were with countries that had recently engaged in regime change and de-colonialization. Perhaps this is unsurprising as the author combines ISA, thereby lumping together ICA and ITA without distinguishing the applicable substantive law. *Id.* at 1.

international dispute resolution and creating sustainable and practical dispute settlement.

ICSID's future can and should include ongoing self-reflection. As argued elsewhere, this function could be undertaken by creating an ongoing consultative body to explore potential rule revisions or opportunities for higher quality dispute settlement. Such a body could include a range of stakeholders and act similarly to the role the U.S. Advisory Committee provides when revising U.S. Federal Rules of Civil Procedure.²⁷² ICSID's efforts at polishing its rules, tackling structural flaws to address concerns of both investors and States, and generating innovation to give parties more control over their own disputes have been vital. These efforts can and should continue. Ultimately, the goal of ICSID investment dispute resolution should involve ensuring the broader system of international dispute settlement is as balanced and equitable as possible. As Eleanor Roosevelt reminded us, "justice cannot be for one side alone, but must be for both."²⁷³

Providing structured rule-of-law based adjudication and alternative forms of dispute resolution, which are effective when parties can then bargain in the shadow of the law,²⁷⁴ is the way forward in international dispute settlement. Peaceful dispute resolution that offers an anti-thesis to abuse of power or bullying is preferable to most dispute resolution options, including war. While dispute resolution should not permit investors to harass States, neither should States who violate their international law commitments be granted a "pass" merely because they are sovereign. The better course is to ensure that States understand the full implications of their international law undertakings, negotiate terms appropriately, and ensure that States are supported in that process to ensure that the treaty negotiation process itself is not a source of manipulation and abuse.

Rather than relying on information inflamed by social media, error, and intellectual tribalism, we are better served by recalling our history and focusing on primary authority and data. Unless we acknowledge our shared past and learn from it, we risk replicating past problems, rather than crafting effective international dispute resolution in the future. If we can learn from that history, we can garner new insights, learn from others, and build international dispute resolution structures for the next generation that are sustainable and fair.

²⁷² FRANCK, *supra* note 3, at 324.

²⁷³ See Garrick Apollon, *The Importance of an ADR Program for the Effective Enforcement of International Human Rights Under the Free Trade Agreement Hope II Between the United States and Haiti*, 25 FLA. J. INT'L L. 117, 146 (2013).

²⁷⁴ Robert Cooter, Stephen Marks, & Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 246–47 (1982); see also Franck & Wylie, *supra* note 3, at 524.

ANNEX I

**States With a Bilateral Investment Treaty in Force
Before 1970 ($n = 58$)²⁷⁵**

1. Belgium/Luxembourg – Tunisia: 1966
2. Belgium/Luxembourg – Morocco: 1967
3. Denmark – Indonesia: 1968
4. Germany – Cameroon: 1963
5. Germany – Central African Republic: 1968
6. Germany – Chad: 1968
7. Germany – Congo: 1967
8. Germany – Côte d’Ivoire: 1968
9. Germany – Ecuador: 1966
10. Germany – Greece: 1963
11. Germany – Guinea: 1965
12. Germany – Islamic Republic of Iran: 1968
13. Germany – Republic of Korea: 1967
14. Germany – Liberia: 1967
15. Germany – Madagascar: 1966
16. Germany – Malaysia: 1963
17. Germany – Morocco: 1967
18. Germany – Niger: 1966
19. Germany – Pakistan: 1962
20. Germany – Rwanda: 1969
21. Germany – Senegal: 1966
22. Germany – Sierra Leone: 1966
23. Germany – Sri Lanka: 1966
24. Germany – Sudan: 1967
25. Germany – United Republic of Tanzania: 1968
26. Germany – Thailand: 1965
27. Germany – Togo: 1964
28. Germany – Tunisia: 1966
29. Germany – Turkey: 1965
30. Germany – Uganda: 1968
31. Italy – Chad: 1969
32. Italy – Guinea: 1964
33. Kuwait – Egypt: 1966
34. Kuwait – Iraq: 1966
35. The Netherlands – Cameroon: 1966
36. The Netherlands – Côte d’Ivoire: 1966
37. The Netherlands – Tunisia: 1964
38. Norway – Madagascar: 1967

²⁷⁵ All information, including designations of countries and information about when the treaty went into force derives from information from the United Nations. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), BILATERAL INVESTMENT TREATIES 1959-1999, UNCTAD/ITE/IIA/2, 1 (2000), available at <https://unctad.org/system/files/official-document/poiteiid2.en.pdf> (last visited Jan. 12, 2023).

39. Sweden - Côte d'Ivoire: 1966
40. Sweden – Madagascar: 1967
41. Sweden – Senegal: 1968
42. Switzerland – Burkina Faso: 1969
43. Switzerland – Cameroon: 1964
44. Switzerland – Chad: 1967
45. Switzerland – Congo: 1964
46. Switzerland – Costa Rica: 1966
47. Switzerland - Côte d'Ivoire: 1962
48. Switzerland – Ecuador: 1969
49. Switzerland – Guinea: 1963
50. Switzerland – Liberia: 1964
51. Switzerland – Madagascar: 1966
52. Switzerland – Malta: 1965
53. Switzerland – Niger: 1962
54. Switzerland – Rwanda: 1963
55. Switzerland – Senegal: 1964
56. Switzerland – United Republic of Tanzania: 1965
57. Switzerland – Togo: 1966
58. Switzerland – Tunisia: 1964

ANNEX II

**States and Regions Without Any
Bilateral Investment Treaties in Force Before 1970 (*n* = 132)²⁷⁶**

Albania	France	Nigeria
Algeria	Gabon	Oman
Angola	Gambia	Palestine Authority
Antigua and Barbuda	Georgia	Panama
Argentina	Ghana	Papua New Guinea
Armenia	Grenada	Paraguay
Australia	Guatemala	Peru
Austria	Guinea-Bissau	Philippines
Azerbaijan	Guyana	Poland
Bahrain	Haiti	Portugal
Bangladesh	Honduras	Qatar
Barbados	Hong Kong, China (SAR)	Romania
Belarus	Hungary	Russian Federation
Belize	Iceland	Saint Lucia
Benin	India	Saint Vincent and the Grenadines
Bolivia	Ireland	Sao Tome and Principe
Bosnia and Herzegovina	Israel	Saudi Arabia
Botswana	Jamaica	Seychelles
Brazil	Japan	Singapore
Brunei Darussalam	Jordan	Slovakia
Bulgaria	Kazakhstan	Slovenia
Burundi	Kenya	Somalia
Cambodia	Democratic People's Republic of Korea	South Africa
Canada	Kyrgyzstan	Spain
Cape Verde	Lao People's Democratic Republic	Suriname
Chile	Latvia	Swaziland
China	Lebanon	Syrian Arab Republic
Columbia	Lesotho	Taiwan Province of China
Comoros	Libyan Arab Jamahiriya	Tajikistan

²⁷⁶ All information, including what entities qualify as States and when investment treaties became effective, derives from UNCTAD's data. *Id.* That publication has detailed information and footnotes about the establishment of States and information about successor states. *See, e.g., id.* at 123.

Democratic Republic of the Congo	Lithuania	Tonja
Croatia	Former Yugoslav Republic of Macedonia	Trinidad and Tobago
Cuba	Malawi	Turkmenistan
Cyprus	Mali	Ukraine
Czech Republic	Mauritania	United Arab Emirates
Czechoslovakia	Mauritius	United Kingdom
Djibouti	Mexico	United States
Dominica	Republic of Moldova	Uruguay
Dominican Republic	Mongolia	Uzbekistan
El Salvador	Mozambique	Venezuela
Equatorial Guinea	Myanmar	Viet Nam
Eritrea	Namibia	Yemen
Estonia	Nepal	Federal Republic of Yugoslavia
Ethiopia	New Zealand	Zambia
Finland	Nicaragua	Zimbabwe

