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Recasting ICSID's Legitimacy Debate-Towards a Goal-Based Empirical Agenda

Sergio Puig*

*Stanford Law School

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* Lecturer in Law and Teaching Fellow in International Legal Studies, Stanford Law School; formerly Counsel at the International Centre for Settlement of Investment Disputes. I would like to thank Negar Katirai, Alvaro Santos, Mark Bravin, Gregory Schaffer, Alan Sykes, Jonathan Greenberg, David Victor, Melissa Waters, David Schneiderman, Loic Coutelier, Noah Kumpf, Joost Pauwelyn, and Damian Chalmers for their helpful criticisms and suggestions on earlier drafts. Thanks also to the staff of the *Fordham International Law Journal* for expert editing and helpful substantive suggestions. Earlier versions of this Article benefited from presentations at the Inaugural Annual Junior Faculty Forum for International Law at New York University School of Law, at the International Conference on Law and Society, and at the Workshop at Stanford Law School Fellow's Program. All errors are mine.

INTRODUCTION

The International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") is one of the five organizations of the World Bank ("WB"), the specialized agency of the United Nations, whose mandate includes promoting development of member states by facilitating the investment of capital for productive purposes.[1] Nearly fifty years ago, the World Bank formulated the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention" or the "Convention") and established the Centre; today, its membership includes 147 states.[2] Obscure to development specialists, ICSID is well known to international law scholars as well as lawyers who practice in the growing field of investor-state arbitration.

The ICSID Convention is best known as an administrative treaty. It establishes ICSID's secretariat and a methodology for appointing decision-makers, contemplates the creation of uniform procedural rules, and provides administrative support for disputes involving investors and states under international investment agreements ("IIAs") and foreign investment laws.[3] The Centre sits in Washington, D.C. and shares administrative resources and infrastructure with the WB. The Administrative Council is the Centre's governing body, and the President of the WB is the ex officio Chairman of the ICSID Administrative

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1. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention]. The five organizations of the World Bank ("WB") group are: International Finance Corporation ("IFC"), Multilateral Investment Guarantee Agency ("MIGA"), International Bank for Reconstruction and Development ("IBRD"), International Development Association ("IDA"), and International Centre for Settlement of Investment Disputes ("ICSID").

2. *List of Contracting States and Other Signatories of the Convention as of July 25, 2012*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, http://icsid.worldbank.org/ICSID (follow "Member States" hyperlink; then follow "List of Contracting States" hyperlink; then follow "English" hyperlink) (last visited Feb. 10, 2013).

3. Antonio Parra, *The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes*, 22 ICSID REV.-FOREIGN INVESTMENT L.J. 1, 55–56 (2007) (describing the creation of ICSID, the drafting of the ICSID Convention, and its rules and regulations).

Council.[4] Until very recently the General Counsel of the WB was also the head or Secretary-General of ICSID.[5]

The signing of the ICSID Convention and the creation of the Centre are important milestones in the development of international law. However, legal scholarship tends to evaluate the organization as an international adjudicatory body ignoring the complexity of its mandate and domain. Not only did the Convention give origin to an international organization specialized in international investment disputes settlement, but it also facilitated the expansion of a formal system of protections for foreign investors based on a remedy for damages directly enforceable by individuals or corporations against states. More importantly, the Convention and the Centre served to promote a particular understanding of the role of foreign direct investment ("FDI") in national economic development, to stabilize a vision of economic cooperation, and to advance—especially, after the Soviet collapse—an idea of the rule of law often embedded in the agenda of the organizations of the WB.[6]

The current academic commentary regarding ICSID focuses on doctrinal and procedural analysis of its arbitration process.[7] While interdisciplinary and empirical scholarship is rapidly emerging, [8] some addressing fundamental issues

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4. *Organizational Structure of ICSID*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, http://icsid.worldbank.org/ICSID (follow "About ICSID" hyperlink; then follow "Organizational Structure" hyperlink) (last visited Oct. 24, 2012).

5. Damon Vis-Dunbar, *Meg Kinnear Elected Secretary-General of ICSID*, INVESTMENT TREATY NEWS (Mar. 3, 2009), http://www.iisd.org/itn/2009/03/03/meg-kinnear-elected-as-secretary-general-of-icsid; *see generally* IBRAHIM F.I. SHIHATA, THE WORLD BANK IN A CHANGING WORLD: SELECTED ESSAYS AND LECTURES (1995).

6. *See generally* Alvaro Santos, *The World Bank's Uses of the "Rule of Law" Promise in Economic Development*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 253, 253–83 (David M. Trubek & Alvaro Santos eds., 2006).

7. *See* Tom Ginsburg, *The Culture of Arbitration*, 36 VAND. J. TRANSNAT'L L. 1335, 1340 (2003) (describing the convergence of various arbitration practices). Professor Ginsburg argues that this may be rooted in the fact that in this field of law, "perhaps more than any other field of law, the line between scholar and practitioner is blurred so that many leading scholars are involved in arbitrations, and many leading arbitrators take the time to write academic articles and books" about investment law and arbitration. *Id.* at 1340.

8. *See, e.g.*, Susan D. Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards*, 51 VA. J. INT'L L. 825, 832 (2011) [hereinafter Franck, *ICSID Effect*] (arguing that ICSID can and should be a model of fairness, efficiency, and justice in

concerning ICSID,[9] this scholarship makes little effort to disentangle the complexity of the institution and the concrete articulation of its different goals.[10] More importantly, no agreement seems to exist among scholars and practitioners on the different baselines that should be used to evaluate ICSID's claimed effectiveness.

This gap is problematic for several reasons. For one, it allows commentators to evaluate ICSID in multiple, frequently incoherent ways. Without a conceptual framework, many assessments of ICSID rely on the concept of "legitimacy" as an organizing principle. In numerous contexts, including when an arbitral tribunal or annulment committee hands down a controversial decision, when a party ignores a decision, or when a recalcitrant country withdraws its consent, ICSID's legitimacy "crisis" is invoked.[11] Multiple shortcomings of ICSID are cited in such evaluations, but the focus is generally on legal legitimacy.[12]

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the field of international economic dispute resolution and that ICSID should minimize concerns about legitimacy and maximize opportunities for equality).

9. Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397, 398 (2010) (questioning whether bilateral investment treaties "work").

10. *See* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1547–48 (2005) [hereinafter Franck, *Legitimacy Crisis*] (noting the possibility of inconsistent ICSID awards).

11. *See, e.g.*, George Kahale III, *Is Investor-State Arbitration Broken?*, 7 TRANSNAT'L DISP. MGMT. (Dec. 2012), *available at* www.transnational-dispute-management.com/article.asp?key=1918 (characterizing ICSID and investment arbitration as a broken system); Gabriel Bottini, *Should Arbitrators Live on Mars? Challenge of Arbitrators in Investment Arbitration*, 32 SUFFOLK TRANSNAT'L L. REV. 341, 341 (2009) ("Legitimacy of investment arbitration is becoming one of the main concerns of all the institutions and persons involved in the process."); W. Mark C. Weidemaier, *Disputing Boilerplate*, 82 TEMP. L. REV. 1, 18–19 (2009) (noting that many governments claim that ICSID has a bias towards foreign investors).

12. *See* David D. Caron, *Investor-State Arbitration: Strategic and Tactical Perspectives on Legitimacy*, 32 SUFFOLK TRANSNAT'L L. REV. 513, 514–15 (2009) (observing that although several critiques relate to concerns of procedural legitimacy, substantive justice is also key); William W. Burke-White, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 199, 222–23 (2008) (suggesting that ICSID's legitimacy depends upon substantive outcomes); William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307, 373–74 (2008) (suggesting that ICSID legitimacy could be enhanced by substantive changes affecting outcome, particularly the incorporation of an interpretive "margin of appreciation"); Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101

Most commonly, the focus on whether ICSID (or the panels constituted under its rules) acted within its original mandate and jurisdictional limit or to what extent state members complied with the Convention.[13]

This treatment of ICSID's assessment as a heated legitimacy debate complicates the analysis and policy recommendations and serves as a distraction from objective evaluations of the different goals of the institution.[14] Regardless of whether scholars are critical or sympathetic towards the institution, because different analyses often entail different conceptual constructions of ICSID's role and functions, the analyses shape contradictory assessments and diverse, often conflicting, policy recommendations. At the same time, the lack of agreement on a framework seems to enable ICSID to ignore important criticism and rely on complacent empirics in its response to the same.[15]

This work sketches a framework for assessing ICSID by asking the following question: how shall scholars assess if ICSID is an effective tool for international governance? It argues that ICSID should not be assessed solely on the basis of effects as an international adjudicatory body. Based on the goals externally defended by the institution, instead, the Article proposes a larger construction of this international organization that leads to three large areas for empirical investigations. For this purpose, the Article uses insights from international law,

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AM. J. INT'L L. 711, 723 (2007) ("Legitimacy of ICSID arbitral awards depends on respecting this adjudicatory mission . . . ."); Johanna Kalb, *Creating an ICSID Appellate Body*, 10 UCLA J. INT'L L. & FOR. AFF. 179, 202 (2005) (cautioning that, even as a matter of substance, there can be legitimacy challenges even if the "right" substantive result is reached through the "wrong" reasoning).

13. Admittedly, this is not unique to ICSID commentary; legal scholars prefer to analyze the fascinating intricacies of a given field's doctrine and hermeneutics or specific norm compliance than to conduct empirical analysis on goal-based effectiveness. *Cf.* Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT'L L. 225, 225–29 (2012) (suggesting questions to be used in assessing the performance of international courts).

14. *See* Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435, 437–38 (2009) (summarizing the legitimacy debate and arguing that legitimacy "concerns are motivated by apprehension about arbitration's potential disparate impact on the developing world and fear that development status might inappropriately affect outcome."); *see generally* Franck, *Legitimacy Crisis*, *supra* note 10 (suggesting methods for promoting legitimacy in international arbitration).

15. *See* ICSID, 2011 ANNUAL REPORT 6 (2011) [hereinafter ICSID 2011 REPORT] (arguing that the institution "takes pride in being a leader in the field").

international organizations, and legal theory and relies on the official writings of Ibrahim F. I. Shihata, the longest-serving Secretary-General (1983–2001) and ICSID's most effective promoter.[16] Shihata's knowledge and understanding of the organization's mandate allowed him to set a programmatic agenda, as well as to propose ways to assess the organization's tridimensional role.[17]

Before proceeding a cautionary note is in order: this Article does not attempt to address the question of what makes ICSID, international organizations, or adjudicative bodies legitimate. Rather, my main interest in this Article is to develop a research agenda for an interdisciplinary approach toward studying ICSID's effectiveness. To achieve a conversation across disciplines, this Article adopts the dominant definition of effectiveness in the social science literature, which offers a straightforward formulation: an organization is effective if it accomplishes its specific objective aims.[18] Consequently, in order to gauge the effectiveness of an institution using this approach one has to identify the organization's origins, goals, and the different criteria to perform the assessment.

Similarly, when relying on the term "legitimacy," in this Article I use the concept of sociological legitimacy and not the traditional concept of legal legitimacy.[19] "Whereas the sociological perspective implies an external [functional] and relational dimension, a legal perspective implies an internal or intra-institutional point of view based on the logical analysis and comparison between . . . rules and the principles that govern

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16. Charles N. Brower, *Ibrahim Shihata and the Resolution of International Investment Disputes: The Masterful Missionary*, 31 STUD. TRASNAT'L LEGAL POL'Y 79, 79 (1999) ("Shihata raised [ICSID] almost from infancy, through adolescence, to its present young, but rapidly maturing, adulthood.").

17. *See* ICSID, 1984 ANNUAL REPORT 8 [hereinafter ICSID 1984 REPORT].

18. *See* JEFFREY PFEFFER, ORGANIZATIONS AND ORGANIZATIONS THEORY 41 (1982); *see also* James L. Price, *The Study of Organizational Effectiveness*, 13 SOC. Q. 3, 3–7 (1972) (describing the "goal approach" as the "traditional way to study effectiveness").

19. For a discussion on the distinctions between legal, sociological, and moral legitimacy see Richard Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1791 (2005) (noting the "increased understanding of constitutional debates, enhanced precision of thought, and the potential for clearer expression"); Craig McEwen & Richard Maiman, *In Search of Legitimacy: Toward an Empirical Analysis*, 8 LAW & POL'Y 257, 257 (1986) (relying on the term legitimacy from a straightforward concept of sociological legitimacy for empirical analysis of courts).

it."[20] The sociological perspective allows us to take ICSID's external goals at face value and to see ICSID as an organization working to pursue a very specific mandate with desired outcomes that it ought to generate.[21] After all, as put simply by ICSID's own Secretary-General, ICSID is an organization "dedicated to serving the public good."[22]

The Article begins with a brief discussion of the intellectual justifications and political, economic and legal ideas behind the creation of ICSID. It continues with a main analysis that unpacks these same three different justifications for the maintenance of the Centre. The Article concludes by surveying the main critiques formulated against ICSID in order to recast a legitimacy debate grounded on the empirically testable underpinnings of the organization's goals. When seen through the lens of the three proposed sources, the evaluation of the effectiveness of the institution reveals important challenges but also enormous possibilities for future research.

I. *ORIGIN: LAW, POLITICS, AND ECONOMICS*

To some extent, most post-World War II economic institutions are the product of a historical convergence of the following types of ideas: post-enlightenment, rationalist, secular, Western, modern, and capitalist.[23] These particular forms of thought are linked to a specific conception of the relationships between "law, politics, and economics."[24] These ideas are

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20. Alba Ruibal, *The Sociological Concept of Judicial Legitimacy: Notes of Latin American Constitutional Courts*, 3 MEX. L. REV. 343, 346 (2010). For an example of an empirical assessment of sociological legitimacy see James L. Gibson & Gregory A. Caldeira, *The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice*, 39 AM. J. POL. SCI. 459, 471–77 (1995) (measuring the legitimacy of the European Court of Justice based on diffuse support, acceptance of court decisions, and perceptions of procedural justice).

21. *Cf.* Ruibal *supra* note 20 at 348–50 (describing criticisms of Weber's theory of legitimacy).

22. ICSID 2011 REPORT, *supra* note 15, at 6.

23. *See* David W. Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 114 (2001) (citing western Enlightenment views that are critical of the human rights movement as including "animal pre-exists the human, faith pre-exists reason, the feudal pre-exists the modern" just as "the economy pre-exists politics, politics pre-exists law, and the private pre-exists the public").

24. While there are of course other analogous forms of thought that form the foundation to similar institutions and their regimes, those are not discussed here

inspired in the Power-Grounded and Natural State theories of Hobbes that see social structures and legal orders as bids to limit pervasive self-help.[25]

The architects of the post-war international economic system set out to establish an ambitious framework for international cooperation.[26] Prospects of peace and prosperity were linked to the success of multilateral organizations that could serve as forums for negotiation, as guardians of the rules governing these interactions, and as an attempt to centralize coercive force.[27] This reflected the perception of the Allied planners of the post-war world as a *post-enlightened* economic community of nations.[28] As explained by Robert Howse, the

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because the focus is on the historical moment in which these post-war institutions were born. *Id.* at 114–15.

25. *See generally* QUENTIN SKINNER, REASON AND RHETORIC IN THE PHILOSOPHY OF THOMAS HOBBES (1996); THOMAS HOBBES, LEVIATHAN pt. 1, ch. 13 (Edwin Curley ed., Hackett Publ'g Co. 1994) (1651); Edwin M. Borchard, *Limitations on Coercive Protection*, 21 AM. J. INT'L L. 303, 303 (1927) (noting that "an injury to a member is an injury to his entire clan").

26. The agreement on the creation of international financial organizations, mainly the International Monetary Fund ("IMF") and the World Bank, was reached on July 1944 at Bretton Woods, New Hampshire. In the trade arena, the General Agreement on Tariffs and Trade ("GATT") was concluded after the failure of the International Trade Organization; it would be fifty years until the international community succeeded in creating the World Trade Organization ("WTO"). In addition, more than 2,600 International Investment Treaties have been concluded since 1945 between developed and developing countries (and between developed countries inter se), mostly similar in content, providing for the security of foreign investment (and generally investment-arbitration dispute resolution mechanisms). *See* Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT'L L. 48, 48 (2008) (noting that in international law, WTO governs trade and investment treaties govern investment).

27. Kathleen R. McNamara, *The Institutional Dilemmas of Market Integration: Compliance and International Regimes for Trade and Finance*, *in* INTERNATIONAL LAW AND ORGANIZATION: CLOSING THE COMPLIANCE GAP 41, 52 (Edward C. Luck & Michael W. Doyle eds., 2004) (characterizing the International Monetary Fund as the "key institution for the regulation of international financial matters."). *See generally* Chris Brummer, *How International Financial Law Works (And How It Doesn't)*, 99 GEO. L.J. 257, 261 (2011) ("In contrast to areas like international trade, financial agreements do not take the form of legally binding treaties. Instead, international financial rules are promulgated mainly through nonbinding agreements. This informal quality helps spur agreement between countries by limiting the risks of often uncertain costs and benefits accompanying the adoption of any regulatory standard.").

28. The architects of the post-war settlement saw the nineteenth century as a time of relatively open trade, and of peace, in contrast to the first half of the twentieth century, which was a time of high tariffs, discriminatory economic arrangements, import quotas, unilateralism and bilateralism. *See* JOHN H. JACKSON, THE WORLD

Bretton Woods System was: "[C]oncerned with the *interdependency* of different states' trade and other economic policies—i.e., managing or constraining the external costs that states impose on other states by virtue of their policies."[29]

The Bretton Woods arrangements embedded the idea of interdependency, integration and macro-economic planning.[30] To achieve this integration—founders argued—the relationship of property with sovereignty should resemble a system in which anybody, whatever her nationality, could participate in transnational economic exchanges. For this to happen it was necessary "[t]o diminish national sovereignty . . . instead of being transferred to a higher political and geographical unit."[31] In this new setting, managing the external costs imposed on states necessitated international rule and decision-making processes.[32]

In addition to the political and economic foundations described briefly above, a dialogue between two distinct legal conceptions riding high at that time also informed the organization's foundations.[33] On the one hand, legal positivism —whose adherents included mostly European civil law scholars—argued for the separation of law and morality and considered the law as being posited by lawmakers.[34] On the

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TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 31–73 (1997).

29. Robert Howse, *From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT'L L. 94, 94–95 (2002) (emphasis in original) (adding that this was the case "to avoid exporting destructive forms of interdependent behavior").

30. *Id.* at 95.

31. Wilhelm Ropke, *Economic Order and International Law*, 86 RECUEIL DES COURS 203, 250 (1954) (describing the diminishment of national sovereignty as "one of the urgent needs of [the] time").

32. Internationalist scholars view deeper delegation as the main feature in the legalization of international economic law. This feature is also sometimes blamed for what it is called a "fragmentation" process of international law. *See generally* Study Grp. of the Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (noting both positive and negative sides of the development of more mechanisms to apply international law).

33. *See* Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 S. ECON. J. 644, 645–47 (1989) (distinguishing between legal positivists, from natural law theorists in the context of understanding the development of commercial law).

34. *See generally* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 599 (1958) (defending legal positivism from critics); Stanley L.

other hand, natural law theory presented in a *secularized* form—whose theorists developed largely out of the common law tradition (which historically resisted the separation of morality and law)—was an eloquent champion of legal processes and institutional order as essential components of a market-based society.[35] Under both traditions, the law serves an important coordinative function by providing a framework against which individuals might orientate actions as well as rationally evaluate interactions with others.[36]

These two conceptions of law (legal positivism and secularized naturalism) dominated Western legal jurisprudence in the 1960s. Inspired by H. L. Hart and the legal philosophy of Lon L. Fuller, and profoundly located within classical liberalism's traditional emphasis of liberty and freedom, these conceptions permeated the creation of modern transnational legal institutions.[37] Among other consequences, legal institutions experienced a process of assimilation of instrumentalism and formalism. In its final analysis it meant that international legal orders were not only the way to subject human conduct to the governance of legitimate rules, but also to limit evil regimes from implementing substantially unjust laws that curtail liberty. Individual rights represented a form of empowerment to liberate the individual from the state's subjugation, as well as to enable direct enforcement of such substantive ends of the law.[38]

Paulson, *Four Phases in Hans Kelsen's Legal Theory? Reflections on a Periodization,* 18 OXFORD J. LEGAL STUD. 153 (1998) (identifying key claims and evolution of legal positivism).

35. *See* LON L. FULLER, THE MORALITY OF LAW 145 (rev. ed. 1969) ("[L]aw [is] . . . a purposeful enterprise, dependent for its success on the energy, insight, intelligence, and conscientiousness of those who conduct it, and fated, because of this dependence, to fall always somewhat short of a full attainment of its goals."); Lon L. Fuller, *Reason and Fiat in Case Law,* 59 HARV. L. REV. 376 (1946).

36. In secularized individualistic societies, certainty, objectivity and neutrality tend to be an important constitutive value. *See* Jeremy Waldron, *The Concept and the Rule of Law,* 43 GA. L. REV. 1, 48 (2008) ("Law in the first sense requires the existence of certain general norms that serve as a basis of orientation for people's behavior, as well as a basis for decision by the courts.").

37. *See* David Kennedy, *Challenging Expert Rule: The Politics of Global Governance,* 27 SYDNEY L. REV. 5, 19–20 (2005) ("Experts argue for their preferred policy or doctrinal choice by reference to broader theories, methods and political commitments which they associate with the doctrine or policy they prefer. For lawyers, these can be theories of law—positivism, naturalism, sociology . . . .").

38. This rhetoric not only makes it hard to assess questions of distribution among favored and less favored rights holders, foreclosing the development of a political

The result of this process of assimilation was the revival of international economic law as a procedural functionalist enterprise with the following features, all of which are embedded in the ICSID system:

> (1) a predominant concern for individual rights and private property;
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> (2) laws enforced by the victims backed by reciprocal agreements;
>
> (3) standard adjudicative procedures established to avoid violence;
>
> (4) offences treated as torts punishable by economic restitution;
>
> (5) strong incentives for the guilty to yield to prescribed punishment due to threat of social ostracism; and
>
> (6) legal change via an evolutionary process of developing customs and norms.[39]

II. *FUNCTION: THREE GOAL-BASED CLAIMS*

ICSID is yet another example, perhaps even the poster-child, of international legalization, a phenomenon salient in international economic relations.[40] As evidenced by the proliferation of judicial and quasi-judicial institutions, and considered a positive development in international law by many legal scholars, such expansion also has been criticized as ideological in character.[41] Without being exhaustive, what

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process for tradeoffs among them, but also the inevitable desideratum of the enterprise of law as coercion: too many regulations would undermine the law. *See* MAX WEBER, LAW IN ECONOMY AND SOCIETY 188–91 (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., 1967) ("The development of legally regulated relationships . . . is usually regarded as signifying a decrease of constraint and an increase of individual freedom.").

39. BRUCE L. BENSON, THE ENTERPRISE OF LAW 21 (1990).

40. For an analysis of the different perspectives on legalization and the theoretical puzzles that legalization poses for international institutions see Judith Goldstein et al., *Introduction: Legalization and World Politics*, 54 INT'L ORG. 385, 386 (2000) ("These actions, taken in the course of a single year, were representative of a longer term trend: some international institutions are becoming increasingly legalized.").

41. For a characterization of this practice as part of a broader event in global legal consciousness, legal reasoning, and legal institutions see Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 253, 253–83 (David M. Trubek & Alvaro Santos

follows is a brief recounting of some legalization efforts prior to the creation of ICSID to contextualize the three justificatory functions claimed by the organization.

A. *Background*

Prior to the establishment of ICSID, international investment dispute settlement looked different, and was heavily dependent on traditionally mercantilist relationships.[42] In other words, in contrast with the current "hybrid," decentralized, and increasingly privatized system enabled by ICSID, international adjudication was built around inter-state relations.[43]

Conflicts over the treatment of property of nationals abroad have existed—at least—since the growing strength of a bourgeois merchant class in England and the Netherlands succeeded in the chartering of trade companies for overseas expansion, in turn giving rise to a mercantilist expansion in the early seventeenth century.[44] Conflicts then were resolved by some of the methods relied upon today (e.g., negotiation, mediation, conciliation, arbitration, and adjudication) as well as some other methods that are no longer permissible under international law (e.g., armed interventions for the collection of debts or private letters of reprisals).[45]

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eds., 2006) (describing a third globalization of legal thought, originating in the United States, with judges and adjudication as a centerpiece).

42. Kenneth J. Vandevelde, *Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 173–75 (2005) (noting that one innovation of ICSID Convention was the possibility of investor-state arbitration).

43. *See generally* Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BRIT. Y.B. INT'L L. 151 (2004) (discussing the choice of law problems related to jurisdictional conflicts between tribunals established by treaties, and those constituted pursuant contract).

44. *See* Anoush Khoshkish, *International Law of Investment: An Overview*, GLOBAL POLITICAL ECON. (2012), http://www.globalpoliticaleconomy.com/art_intlaw.html ("[T]he British East India Company, 1600; the Dutch East India Company, 1602; the United East India Company (Dutch), 1602; the Dutch West India Company, 1621; and a number of others which had varying degrees of success depending on the territories they were targeting.").

45. Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, Oct. 18, 1907, 36 Stat. 2241, 1 Bevans 607, art. 1. This was the first effort to limit the collection of debt by forcible means. While the early twentieth century prohibition on the use of force to collect debts in the Hague Conventions was only partial, it represented an important step towards the eventual prohibition in the United Nations Charter, which is now regarded as a *jus cogens* under

Foreign investments were put to international adjudication—at least—as early as the end of the eighteenth century, when mixed arbitral commissions under Jay's Treaty of 1794 addressed the settlement of debts to British creditors.[46] Since then, Mixed Claims Commissions and ad hoc Tribunals (e.g., France–Venezuela, Iran–United States, United States–Germany, or Mexico–United States) developed as an alternative to a centralized international judicial system. These commissions expanded until the Friendship, Commerce, and Navigation Treaties ("FCNs") started providing for state-to-state dispute resolution by the International Court of Justice after World War II.[47] Provisions in modern IIAs concerning dispute settlement as well as national treatment, most-favored-nation treatment, the minimum standard of treatment, and expropriation each have antecedents in FCNs and nineteenth-century commercial treaties.

International claims commissions and ad hoc tribunals dealing with the property of foreigners are the second cousins of what today is the ICSID system of investment dispute settlement. These commissions were characterized by an essential state-to-state mode of adjudication; [48] the establishment of semi-permanent decision-making bodies with certain levels of "independency" of their members;[49] and consensual third party adjudication, which many times involved contentious (and

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international law. *See* U.N. Charter art. 2, ¶ 4 ("All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

46. Barton Legum, *Federalism, NAFTA Chapter Eleven and the Jay Treaty of 1794*, 95 AM. SOC. INT'L L. PROC. 202 (2001).

47. William S. Dodge, *Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia–United States Free Trade Agreement*, 39 VAND. J. TRANSNAT'L L. 1, 5–8 (2006) (describing the traditional diplomatic protections available to foreign investors harmed by breaches of international law).

48. *See* Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 265 (1988) (describing the 1983 draft's state-to-state dispute provisions); *see also* ROBERT R. WILSON, UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW 104, 104–12 (1960) (discussing property protections in pre-1923 commercial treaties).

49. According to Professors Eric Posner and John Yoo, judges are "independent" when they are appointed in advance of any particular dispute and serve fixed terms. Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1 (2005).

sometimes dramatic) events. Suffice it to say that the latter feature required intense diplomatic efforts or—quite frequently —what was termed as "gunboat diplomacy," a now prohibited manifestation of self-help in international affairs.[50]

Domestic systems also played (and still play) a fundamental role in disputes over foreign investment, in large part because at the core of such disputes tends to be the relationship of property. National authorities have original jurisdiction over this relationship. They may decide any conflicts originating as a consequence of the state's involvement in the recognition, regulation, affectation, extinction, etc. of this relationship, unless the state consents to an international form of dispute settlement. Internationalization was—in part—also a response to demands to complement some of the perceived deficiencies of domestic courts and in some cases the inexistence of judicial systems.[51] Especially in the eyes of capital exporter countries, national courts—particularly in the recently de-colonialized world—raised concerns as to capacity for speedy, neutral, and technical resolution of claims.[52]

Thus, in theory, prior to the ICSID Convention, the cases involving property of aliens abroad were initially treated as domestic conflicts, unless the parties had agreed on compulsory arbitration. Only after spending economic, diplomatic, or

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50. Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 880 (2006) ("[U]nder" traditional state-based principles of international law —i.e., those from the late eighteenth to the early twentieth centuries—the safe conduct promise was enforceable through the offended sovereign's right to make war in the event of a breach."); *see also* Sir James Cable, GUNBOAT DIPLOMACY 1919–1979: POLITICAL APPLICATIONS OF LIMITED NAVAL FORCE 39 (1981).

51. Adjudication was rarely the result of pre-established dispute settlement arrangements, and very often the result of international agreements or compromises entered into by states after the alleged illicit conducts. More than once, those agreements to adjudicate disputes that affected the economic interests of nationals abroad were the product of forcefully negotiated concessions or settlement or peace agreements. *See* Luis M. Drago, *State Loans in their Relation to International Policy*, 1 AM. J. INT'L L. 692 (1907) (describing the "steps taken by England, Germany and Italy in . . . 1902, against Venezuela for the settlement of claims of various sorts"). *But see* MICHAEL TOMZ, REPUTATION AND INTERNATIONAL COOPERATION: SOVEREIGN DEBT ACROSS THREE CENTURIES (2007) (arguing that the use of force to collect Venezuelan debt was exceptional and not motivated solely by default).

52. CRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 5 (2001) ("Rightly or wrongly, the national courts of one of the disputing parties are not perceived as sufficiently impartial.").

military resources could international adjudication follow in a mercantilist (state-to-state) mode. Only states could bring claims following the formal rules derived from general international law, commonly known as exhaustion of local remedies, espousal of claims, and diplomatic protection.[53] Dr. Aron Broches, often referred to as the founding father of ICSID, explains the fundamental change brought by the Convention in the following way:

> From the legal point of view, the most striking feature of the [ICSID] Convention is that it firmly establishes the capacity of a private individual or a corporation to proceed directly against a state in an international forum, thus contributing to the growing recognition of the individual as a subject of international law.[54]

In fact, the private right of action for damages enabled (and pioneered) by ICSID navigates the contours of private and public law, contractual and general rights and obligations, individual and state participation, and national and international law. It does so by borrowing elements from different legal structures, [55] including public and private

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53. Some argue that the exhaustion of local remedies is also a substantive obligation. *See* Andrea K. Bjorklund, *Waiver and the Exhaustion of Local Remedies Rule in Nafta Jurisprudence*, *in* NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS 253 (Todd Weiler ed., 2004) ("[T]he *proceduralists* have won the debate. It is clear that acts outside denials of justice can form the basis for international claims and that state parties can waive the requirement of exhaustion of local remedies. Moreover, in the investment treaty context that fact is explicit—most treaties set forth a list of potential violations, such as a failure to provide national treatment or an expropriation not in accordance with international law. The 'procedure versus substance' distinction nevertheless continues to arise, in NAFTA cases and elsewhere.").

54. Aron Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, *in* SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW 188, 198 (Martinus Nijhoff ed., 1995) [hereinafter Broches, ESSAYS].

55. The ICSID Convention came into force in October 1966. The rules and regulations were modeled on different sources. *See* Parra, *supra* note 3, at 57 ("They also drew inspiration from, among other sources, the Statute and Rules of the World Court, the International Law Commission's 1958 Model Rules on Arbitral Procedure and the Permanent Court of Arbitration's 1962 Rules for Arbitration and Conciliation for Settlement of International Disputes Between Two Parties of Which Only One is a State.").

international law,[56] international arbitration and alternative dispute resolution ("ADR"),[57] and international relations and diplomacy.[58] These fundamental characteristics were outlined at the outset of the negotiations of the ICSID Convention as follows:

> a recognition by [s]tates of the possibility of direct access by private individuals and corporations to an international tribunal in the field of financial and economic disputes with Governments;
>
> a recognition by [s]tates that the agreements made by them with private individuals and corporations to submit such disputes to arbitration are binding international undertakings;
>
> the provision of international machinery for the conduct of arbitration, including the availability of arbitrators, methods

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56. The system borrows important legal infrastructure from international law. Irrespective of whether or not an international investment agreement ("IIA"), contract, or investment law refers to international law as the law applicable to the merits of the dispute, international law will be the law governing the dispute to the extent that what is at stake is the international responsibility of a state. The tools available under public international law for the interpretation and the application of a treaty also determine formal elements of jurisdiction, competence, attribution, and reparation. *See* Yas Banifatemi, *The Law Applicable in Investment Treaty Arbitration*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES (Katia Yannaca-Small ed., 2010).

57 . Investor-state arbitration borrows from international arbitration and alternative dispute resolution ("ADR") the idea of technical specialization to deal with matters wherein the technical complexity surpasses the knowledge of generalist or parochial judges. It also borrows the idea of procedural fairness and territorial 'neutrality' reflected in institutions such as the party appointed arbitrator/conciliator and, in the case of the ICSID system, delocalized arbitration, to ensure the recognition, enforcement and execution of the arbitration even against the losing party's will.

58. Reputation and the preference for negotiated outcomes are important elements of international relations practice. Under the eyes of the planner, in an internationally interdependent world, a trustworthy reputation is necessary to attract FDI. Reputation and cooperation are important for assessing trustworthiness of international actors and increase the likelihood that they will abide by the terms of negotiated agreements. These features are evident in clear mandates for registration to assess formal elements of jurisdiction and ripeness of claims and the collection of data on states that breach commitment towards investors in a multilateral setting. *See* Aron Broches, *Theory and Practice of Treaty Registration with Particular Reference to Agreements of the International Bank (1957)*, *in* Broches, ESSAYS, *supra* note 54, at 99, 129–58 (examining the attitude of the ICJ and its failure to address treaty non-registration by reviewing five cases where the issue of registration should have been raised but was ignored).

> for their selection and rules for the conduct of the arbitral proceeding;
>
> provision of arbitration as an alternative to conciliation.[59]

This background, as well as the particular design of the organization, gives rise to ICSID's three different goal-based justifications relied on by the organization's leadership to externally defend its existence. When dissected, the three sources support different understandings of what the function of the institution is, sustain different views of the remedy enabled by the institution, and entail distinct ways to empirically evaluate the institution.

B. *Specialization: International Investment Disputes Settlement*

ICSID's first claimed source can be found in its utility as a specialized facility for international investment dispute settlement. The particular dynamics found in conflicts over property relationships involving states and foreign investors have served as the main justification for the organization.

Both pragmatic and ideological forces animate this source of legitimacy. Pragmatically, ICSID represents a response to calls for effective justice in the form of readily available, competent, neutral, and procedurally informal (compared to the formalities imposed by public international law) processes for resolving disputes involving investment abroad.[60] Ideologically, ICSID reflects the response to a particular way of problematizing types of economic conflicts and the variability (and specificity) of factors involved.[61] The response to these demands was a multilateral governmental organization with authority to enable specialized forms of international investment disputes

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59. Memorandum from A. Broches, Gen. Counsel, to the Executive Directors: "Settlement of Disputes between Government and Private Parties" (1961), *reprinted in* 2 HISTORY OF THE CONVENTION, § 1 (1968) [hereinafter Broches, Note].

60. *See* EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 29 (1915) ("[I]t is clear that by international law there is no legal duty incumbent upon the state to extend diplomatic protection. Whether such a duty exists towards the citizen is a matter of municipal law of his own country, the general rule being that even under municipal law the state is under no legal duty to extend diplomatic protection.").

61. *See* William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, L. & SOC'Y REV. 15, 15–16 (1981) (arguing that disputes in general are social constructs).

settlement, including what is termed arbitration without privity.[62]

According to ICSID, proceedings brought to the organization are treated with neutrality in an institution that operates under calibrated, truly international rules approved by a council where all member parties have voting power.[63] Under the specialization claim, the dispute settlement process administrated by the organization is designed primarily to respond to concerns over *procedural justice* and to seek a settlement or award that confirms that a disrupted investment by the hands of the state had value.[64] The dispute settlement techniques are consensual and should encourage negotiated outcomes (i.e., amicable settlement between the parties.)[65]

The claim of specialization has a direct conceptual association with ICSID's Secretariat in Washington, D.C. Its field is dispute settlement over investments where a state (or constituent subdivision or agency of the state) is a party. Its mandate is easily recognizable in Article 25 of the Convention, which sets the formal elements of the Centre's jurisdiction.[66] The broad concept of "investment" adopted in the Convention places primary control over this delegated authority back in the hands of the state.[67] The flexibility embedded in the term investment helps states to adapt to changes and to establish the

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62. *See, e.g.*, Jan Paulsson, *Arbitration without Privity*, 10 ICSID REV.-FOREIGN INVESTMENT L.J. 232, 232 (1995) ("This new world of international arbitration is one in which the claimant need not have a contractual relationship with the defendant"). Arbitration without privity takes place in a setting where the investor (and potential claimant) need not have a contractual relationship with the state (or potential defendant). *Id.*

63. ICSID Convention, *supra* note 1, art. 7(2) (outlining voting procedure).

64. *See generally* E. Allan Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224, 225 (1993).

65. ICSID, *Rules of Procedure for Arbitration Proceedings (Arbitration Rules)* Rule 21, *available at* http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp [hereinafter *ICSID Arbitration Rules*].

66. ICSID Convention, *supra* note 1, art. 25.

67. Julian Davis Mortenson, *The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law*, 51 HARV. INT'L L.J. 257, 260 (2010) (suggesting reasons of why tribunals should defer to state commitments to investors).

limits of their own consensual delegation to the Centre's jurisdiction.[68]

The contours of ICSID's claim of expertise are also evident in the provisions of the Convention concerning the qualities of neutral decision-makers. Not only do these provisions demand that arbitrators be independent from the parties in the dispute, but they also emphasize competence in the fields of law, commerce, industry, and finance.[69] Moreover, formal rules establish a methodology that ensures that a party cannot block the proceedings by refusing to cooperate in the tribunal or commission's constitution,[70] or by not paying the required administrative fees of the proceedings.[71] The Secretary-General is vested with powers akin to a Registrar's to refuse registration of cases manifestly outside of the formal limits of the Convention, discontinue proceedings for lack of payment (by the moving party), or appoint arbitrators when necessary.[72]

Under this first claim, ICSID is an agreed forum to enable and administer dispute settlement in a neutral way. With ICSID and the threat of neutrally-administrated international dispute settlement technique—the argument follows—even the most sturdy state can become attractive for investors, including states who had not originally stipulated international forms of dispute settlement in individual contracts. This feature, also known as open-ended consent, obviates the need for investors to negotiate the internationalization of a regime consisting of arbitration and an international law clause into individual contracts with the host state.

Professor Michael Reisman presents ICSID as a forum for enabling compulsory forms of dispute settlement to facilitate negotiated outcomes and guarantee bargaining power via a

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68. *See* ICSID 1984 REPORT, *supra* note 17 (characterizing the absence of a clear definition of the notion of investment in the ICSID Convention as "a wise precaution").

69. ICSID Convention, *supra* note 1, art. 14.

70. *See id.* art. 38 (allowing Chairman to appoint an arbitrator ninety days after notice at the request of one party, and after "consulting both parties as far as possible"); *ICSID Arbitration Rules*, *supra* note 65, at 105–06.

71. The financial provisions of the ICSID regime are enumerated under Chapter III of the ICSID Arbitration Rules. *ICSID Arbitration Rules*, *supra* note 65, at 111.

72. *See* ICSID Convention, *supra* note 1, arts. 36(3), 38; ICSID, *Administrative and Financial Regulations*, Regulation 14(3), *available at* http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp.

private right of action, independent of the ad hoc, individual negotiation, licensing, or other parts of the investment process, in a fundamentally asymmetrical context as follows:

> A common feature of foreign direct investment is that the investor has sunk substantial capital in the host [s]tate, and cannot withdraw it or simply suspend delivery and write off a small loss as might a trader in a long-term trading relationship. The Romans said "*potior est conditio defendentis*," and this is likely to be the situation in foreign direct investment. So rather than having an equality of bargaining power in an exclusively negotiation-based regime, parity will cease and things will tilt heavily in favor of the respondent [s]tate. *Unless*, that is, both sides appreciate that if negotiations fail, compulsory arbitration will follow.[73]

C. *De-Politicization: International Economic Legalization*

The second source adopts the stereotype followed by some international law experts that power is a force that works in opposition to law. Prior to ICSID's system, international conflicts over the treatment of foreign property experienced the direct involvement of the states of nationality of the investor and the investment's host. In such context—according to the foundational assumptions underpinning ICSID—the involvement would inescapably favor powerful states over weaker ones. With the increasing complexity of international relations this could give rise to paralyzing diplomatic confrontations and destructive zero-sum games between states affected by the conflict.[74]

ICSID, however, attempts to create a mutually beneficial setting for all the parties involved. It does so by compartmentalizing potentially daunting conflicts between states into individual disputes between investors and states. This—some argue—helps to "de-politicize" internationally distressing conflicts, liberating a tense space between states to be

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73. W. Michael Reisman, *International Investment Arbitration and ADR: Married but Best Living Apart*, 24 ICSID REV.-FOREIGN INVESTMENT L.J. 185, 190–91 (2009) (emphasis in original).

74. Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT'L L. 64, 65 (2006) ("[L]egal rules and institutions did not arise out of the power of the coercive state but, rather, out of custom, consensus, and private ordering.").

employed for building constructive relationships. [75] This approach tames the role of power in world politics, favoring long-term cooperation and diplomatic solidarity.

As the goal-based argument goes, to compartmentalize conflicts and relax state-to-state relations, a less formal order (as compared to the system of adjudication of public international law) and more transparent process (as compared to the informal efforts that the WB would provide at request of member states) was "institutionalized."[76] Thus, by allowing an individual or a corporation to proceed directly against a state in an international forum, ICSID arguably helps to reduce the interference of the state of nationality of the investor in the domestic affairs of the host state. This should also be reassuring for the host state because it allows it to avoid the acceptance of the jurisdiction of the courts of another state. Moreover, the WB was relieved of and added transparency to some of "the extra-curricular burdens" assumed from time to time at request of the state members.[77]

By relying on the legal order enabled by ICSID, the foreign investor improves her position by having a better ability to assess the risks in investing abroad, and if the reasonable operating assumptions are affected by illicit government intervention the foreign investor may be able to succeed in an independent legal process.[78] By obviating the need for diplomatic protection, the investor has much more control, including the ability to influence the outcome by bringing arguments that better fit her reality and appointing a neutral, yet suitable decision-maker

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75. Martins Paparinskis argues that the concept of de-politicization may be used in four different fashions but "has no self-evident use for conceptualising and resolving modern challenges." *See* Martins Paparinskis, *The Limits of Depoliticisation in Contemporary Investor-State Arbitration*, *in* 3 SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW 271 (James Crawford & Sarah Nouwen eds., 2010). In this Article I take the meaning officially advanced by the institution's leadership and not other possible uses of the same concept.

76. Memorandum from the General Counsel to the Executive Directors (Jan. 19, 1962), *reprinted in* 2 HISTORY OF THE CONVENTION 6 (1968).

77. *Id.*

78. Philip C. Jessup, *Responsibility of States for Injuries to Individuals*, 46 COLUM. L. REV. 903, 908 (1946) (describing the pre-ICSID limitations on foreign investor's power); *see* J.L. BRIERLY, THE LAW OF NATIONS 277–78 (6th ed., 1963) (arguing that state-to-state procedure "is far from satisfactory from the individual's point of view. He has no remedy of his own, and the state to which he belongs may be unwilling to take up his case for reasons which have nothing to do with its merits").

(conciliator or arbitrator). In this sense, this second foundational source follows a *corrective justice rationale* because it is more interested in the "victim's" perspective, i.e. the entity that allegedly suffered injustice at the hands of the infracting state.[79]

For the host state and the state of nationality of the investor the benefits are also clear: not only under Article 27 would the respondent avoid facing the state of nationality of the investor (often more powerful given investment trends) in the dispute, but both could focus on building constructive relationships and avoiding foul claims over money.[80] This individual-state mode of dispute settlement will reduce the possibility of abuse by powerful states by prohibiting the espousal of the claim, unless the respondent state fails to abide by and comply with the pecuniary obligations of the awards.[81]

The goal of a de-politicized system is to resolve disputes required by building a specific legal and institutional infrastructure into the ICSID Convention. This infrastructure represented a historical quid pro quo: the private right of action and the commitment of states to recognize and enforce pecuniary obligations as if they were the final judgment of a national court were paralleled by the obligation on the part of the state of nationality of the investor not to intervene in the dispute.[82] In addition, the ICSID Convention changed the

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79. For a discussion of the history of modern corrective justice theory, see George P. Fletcher, *Remembering Gary—And Tort Theory*, 50 UCLA L. REV. 279, 287 (2002) (arguing that "strict liability—liability for harmed caused by risk-taking without wrongdoing—is a fact of modern tort law").

80. Hersch Lauterpacht, *The Subjects of the Law of Nations*, 63 L.Q. REV. 438, 454 (1947), *reprinted in* 2 INTERNATIONAL LAW, BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 487, 504 (1975) (arguing that the espousal of a claim by the state tends to impart the complexion of political controversy and of unfriendly action); ICSID Convention, *supra* note 1, art. 27.

81. *See* SCHREUER, *supra* note 52, at 416. Professor Schreuer explains: "[T]he arbitration procedure provided by ICSID offers considerable advantages to both sides. The foreign investor no longer depends on the uncertainties of diplomatic protection but obtains direct access to an international remedy. The dispute settlement process is depoliticized and subjected to objective legal criteria . . . . In turn, the host State by consenting to ICSID arbitration obtains the assurance that it will not be exposed to an international claim by the investor's home." *Id.*

82. ICSID Convention, *supra* note 1, art. 54. ICSID has a particular advantage since its methodology also allows for what is called a delocalized system of enforcement preventing the intervention of domestic courts in reviewing ICSID decisions. Art. 54 of

presumption of operation of the local remedies rule for the signing states. Under Article 26 of the Convention, ICSID signatories maintain the right to require the prior exhaustion of local remedies, however, in the absence of an express requirement the state is deemed to have consented to such forum to the exclusion of any other remedy, including domestic courts.[83]

In short, this second source of legitimacy originates from the attempts to compartmentalize international economic conflicts and the consequent insulation of inter-state politics through a formal legal process.[84] Under this view, ICSID is a system of protection of foreign investors and de-politicization of investment disputes. This view of ICSID and investor-state arbitration is adopted by many scholars, including one of the main drafters of the Convention, Professor Andreas F. Lowenfeld. In his view:

> [T]he essential feature of investor-[s]tate arbitration, as it has developed since the ICSID Convention of 1965 . . . is that controversies between foreign investors and host [s]tates are insulated from political and diplomatic relations between states. In return for agreeing to independent international arbitration, the host state is assured that the state of the investor's nationality (as defined) will not espouse the investor's claim or otherwise intervene in the controversy between an investor and a host [S]tate, for instance by denying foreign assistance or attempting to pressure the host State into some kind of settlement. Correspondingly, the state of the investor's nationality is

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the ICSID Convention "excludes any attack on the award in the national courts." Edward Baldwin, Mark Kantor & Michael Nolan, *Limits to Enforcement of ICSID Awards*, 23 J. INT'L ARB. 1, 1 (2006) (quoting *MINE v. Republic of Guinea*, ICSID Case No. ARB/84/4 (1985)).

83. ICSID Convention, *supra* note 1, arts. 26, 42. As argued by I. Shihata, the Convention was superior to the Calvo Doctrine because: (1) prohibited a contracting party giving diplomatic protection to nationals (Article 26); (2) allowed States to require exhaustion of local remedies (Article 27); and, (3) permitted countries to stipulate that their relationship with foreign investors was governed by domestic law (Article 42) *see* I. Shihata, *ICSID and Latin America*, NEWS FROM ICSID 2 (1984).

84. *See* Ibrahim Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA*, ICSID REV.-FOREIGN INVESTMENT L.J. 1 (1986); *see also* Robert B. Shanks, *Lessons in the Management of Political Risk: Infrastructure Projects (A Legal Perspective)*, *in* MANAGING INTERNATIONAL POLITICAL RISK 83, 93 (Theodore Moran ed., 1998).

> relieved of the pressure of having its relations with the host State disturbed or distorted by a controversy between its national and the host [s]tate.[85]

D. *Stabilization: International Public Policy Institution*

The post-war stabilization efforts resulted in the continued desire on the part of western policy-makers to involve private enterprise in economic activity and to encourage private investment to eventually replace aid programs and state subsidization. At the same time, these efforts contributed to understanding risk management and the creation of agencies to address non-commercial risks like inconvertibility, expropriation, civil war, revolution, or insurrection.[86]

These ideas of risk reduction and economic efficiency underscore the third goal claimed by ICSID: stabilization of economic policy. Informed by neoclassical economic theory, some economists and development specialists advocated—successfully—for the extension of a private right of action for damages as a risk reducing commitment. Under this theory, private FDI leads to economic growth and economic development. In order to encourage FDI, well-defined property rights adopted in different instruments of protection (i.e., relationship-specific contracts, foreign investment laws or investment treaties) shall be complemented by access to a functional dispute-settlement forum. The third goal-based argument continues as follows: without a proper forum, property rights' enforcement would be unreliable, unreliability creates higher risks, and therefore lower incentives to invest.[87]

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85. Andreas F. Lowenfeld, *Separate Opinion, in Corn Products Int'l, Inc. v. United Mexican States,* ICSID CASE NO. ARB(AF)/04/01 (NAFTA) (2008).

86. *See* SHAYERAH ILIAS, CONG. RESEARCH SERV., 98-567, THE OVERSEAS PRIVATE INVESTMENT CORPORATION: BACKGROUND AND LEGISLATIVE ISSUES 2–3 (July 5, 2011), *available at* www.fas.org/sgp/crs/misc/98-567.pdf (stating that the creation in 1969 of the Overseas Private Investment Corporation (OPIC), as an agency of the United States under the policy guidance of the Secretary of State, took investment guaranty operations of AID).

87. Broches, Note, *supra* note 59, at 2. In the words of one of the delegates participating in the ICSID Convention negotiation: "economic development could not be achieved without capital and . . . developing countries would not obtain capital unless they provided adequate [legal] guarantees." *Id.*

Under this third justificatory source, ICSID is identified as a multilateral governmental organization within the domain of international economic policy stabilization and cooperation. ICSID is one of five organizations of the WB, all of them working individually within their mandate but in coordination under the same mission. ICSID is designed to allow for maximum flexibility in implementing economic policy strategies to involve the private sector, formalize FDI protection, and establish a mechanism for enforcement of such commitments that would deter opportunistic and rapacious behavior on the part of governments against foreigner investors.

It is important to clarify that ICSID and the Convention create no obligation to submit any particular dispute to conciliation or arbitration. However, ICSID membership, combined with an instrument of protection consenting to ICSID's jurisdiction may be a sufficient combination of substantive and procedural commitments to create a reliable system. ICSID is therefore, considered to be the enforcement side that minimizes some risks for long-term commitment of resources. The quid pro quo in this strategy requires states to surrender original jurisdiction for potential claims to international investment dispute settlement in the hope of attracting sustained fluxes of foreign investment that will increase the possibilities for economic development. For that, the focus of the dispute settlement process under this claim is *deterrence*; the process of economic compensation to affected investors serves mainly as an ex post remedy in order to assure that ex ante potential wrongdoers will weigh the costs of injury against the benefits of productive activity.

This justification finds background in the very first sentence of the Convention's Preamble, which refers to "the need for international cooperation for economic development and the role of private international investment therein."[88] Moreover, the WB's role in coordinating this larger economic policy objective is reflected in the management of ICSID (the President of the WB as ex officio Chairman of the Administrative Council), the seat of the Centre (the principal

88. ICSID Convention, Regulations and Rules, at Preamble (Apr. 2006), *available at* https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/main-eng.htm.

office of the WB), the Memorandum of Administrative Arrangement dealing with the financing of the Centre (the WB covers the overhead of expenditures of the Centre),[89] and the different operational policies that coordinate ICSID and the WB.[90] In addition, the WB often promotes a strategy built around protection of property rights and arbitration as an effective mechanism for dispute resolution that incentivizes long-term commitment of resources.[91]

Under this third source, ICSID is part of a multilateral economic organization that enables cooperation to facilitate the use of private rights of action for damages as a risk-reducing commitment. This, the argument follows, deters the opportunistic, rapacious, and nationalistic behavior of states, having in mind—in the long run—incentivizing foreign investment. This theory is expressed in the analysis of law and economic scholars like Professor Alan O. Sykes:

> The utility of a private right of action for money damages is obvious. To see why, consider a world of [bilateral investment treaties] without the private action. In the event of an uncompensated expropriation or similar action, an

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89. *See* Memorandum of Administrative Arrangements Agreed between the International Banks for Reconstruction and Development and the International Centre for Settlement of Investment Disputes (Feb. 13, 1967), *reprinted in* ICSID, ANNUAL REPORT 15 (1967). The Memorandum was signed on February 13, 1967, and entered into force retroactively as of October 14, 1966. By this arrangement, renewed automatically from year to year unless denounced by either party, the Executive Directors formalized the commitment (stated in paragraph 17 of their Report accompanying the Convention) to provide the Centre with free office accommodations and to underwrite, within reasonable limits, the basic overhead expenditures of the Centre for some years after its establishment. The Centre is obliged to reimburse the Bank for this assistance only to the extent that any expenditures are attributable to proceedings. *Id.*; *see* Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, ¶ 17 (Mar. 18, 1965), 4 I.L.M. 524, 525 [hereinafter Executive Directors' Report], *available at* https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partB.htm ("The Bank should be prepared to provide the Centre with office accommodation free of charge as long as the Centre has its seat at the Bank's headquarters and to underwrite, within reasonable limits, the basic overhead.").

90. *See* WORLD BANK OPERATIONAL POLICY STATEMENT, 7.40: DISPUTES OVER DEFAULTS ON EXTERNAL DEBT, EXPROPRIATION, AND BREACH OF CONTRACT 1 (2001), *available at* http://go.worldbank.org/WBOMT5JTU0 (dealing with suspension of lending operations to recalcitrant parties).

91. *See Investment Across Borders and Indicators*, WORLD BANK, http://iab.worldbank.org/Data/Explore%20Topics/Arbitrating-disputes (last visited Oct. 24, 2012).

> investor would have to lobby her own government to take some sort of action against the violator state. The investor might be politically inefficacious in this process for any number of reasons. She might be unable to offer enough political benefits in return for the governments' assistance. Her government might have diplomatic reasons for declining to take any action or for declining to retaliate against the violator in any effective way. And even if some retaliation were forthcoming, the retaliation might do nothing to compensate the investor for her losses. Considerable risk for investors would remain, and the risk premium on new investments would reflect it. A credible promise of monetary compensation to investors, by contrast, in an amount set by neutral arbitrators, goes much further to reduce investment risk and to achieve the developing countries' goal of lowering the cost of foreign capital.[92]

In summary, ICSID has defended its existence by relying on three goal-based claims, all of which find background in the organization's mandate and constitutive instrument: first, as an institution specialized in international methods for investment dispute settlement; second, as a system to achieve legalization towards an increased "de-politicization" of investment disputes; and, third as a multilateral organization that facilitates economic policy stabilization and the removal of impediments to the free international flow of private investment that are posed by non-commercial risks. This distinction also helps understand how the three dimensions of investor-state arbitration under ICSID stress particular theories of compensation: first, as the preferred specialized international method for investment dispute settlement concerned with *procedural justice*; second, as a self-contained and delocalized process to deciding legal disputes between states and investors allowing for direct *corrective justice*; and third, as a multilateral enforcement mechanism concerned with *deterrence* of conducts affecting investment abroad. The following section discusses how these different conceptions render different analytical assessments.

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92. Alan O. Sykes, *Public Versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. LEGAL STUD. 631, 643 (2005).

III. *ASSESSMENT: EVALUATION, EVIDENCE, AND CRITIQUE*

Using Shihata's insights in official documents of the organization, this final section proposes a research agenda for empirical investigations on ICSID. I argue that the three sources identified above are concerned with specific outcomes, are susceptible to critiques posed by diverse theoretical approaches to international law and therefore compel scholars to perform detailed empirical assessments to evaluate ICSID's effectiveness in response to the Centre's critics.[93]

A. *Facilitating Conflict Avoidance, Access to Justice, and Dispute Settlement*

ICSID's emphasis on its expertise in international investment dispute settlement implies a particular identification of success. As presented under the specialization approach, its effectiveness relates to preventing the escalation of conflicts by empowering individuals and corporations to directly participate in a fair and functional justice system and dispute settlement process.[94] Shihata cleverly recognized this as the primary role of ICSID, linking the institution's success to the dispute settlement process as follows:

> [ICSID should not] be assessed only on the basis of the number of disputes that have been submitted to or settled by ICSID. When an ICSID clause provides for compulsory arbitration [it] contributes to conflict avoidance as well as to settlement of conflicts if they arise.[95] [Hence, the] high proportion of settlements . . . shows the real contribution that ICSID can make in restoring the climate of mutual

93. *See, e.g.*, Gus Van Harten et al., Public Statement on the International Investment Regime, ¶ 15, (Aug. 31, 2010), *available at* http://www.osgoode.yorku.ca/public_statement (recommending that international organizations "refrain from promoting investment treaties and should conduct research and make recommendations on the serious risks posed to governments by investment treaty arbitration; on preferred alternatives to investment treaty arbitration including private risk insurance and contract-based arbitration; and on strategies for states to pursue withdrawal from or renegotiation of their investment treaties.").

94. Reisman, *supra* note 73, at 186 (assessing "very little, [third-party] dispute resolution [under ICSID] and much of is already being disposed of through informal settlement").

95. ICSID, 1986 ANNUAL REPORT 4 [hereinafter ICSID 1986 REPORT].

> confidence between States and investors, which is the paramount objective of ICSID.[96]

In spite of the ICSID founders' good intentions, international policy scholars have voiced important criticism against it. In their eyes, the problem is that the techniques promoted, especially ad hoc investor-state arbitration, are not fair because decision-makers are not truly independent. [97] Moreover, according to some of them, "the decision-making has been placed primarily in the hands of an exceedingly small pool of super-elite, like-minded international lawyers who operate largely divorced from any local political process." [98] Furthermore, in part because of design elements, ICSID is not truly accessible to the majority of the business community.[99] Therefore, the interests of large transnational corporations are served particularly well by the establishment of legal empowerment rules that in actuality are accessible to very few actors and in effect support the power positions of already empowered economic participants.

There are a number of empirical questions to evaluate the goals of ICSID in this realm that could be posed against this line of critique. These questions may be aggregated into two broad policy inquiries: (1) what precise role does expertise and specialization play in international dispute settlement?; (2) is ICSID an adequate venue for the resolution of international investment disputes?

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96. *Id.*

97. *See* Emilie M. Hafner-Burton et al., *Political Science Research on International Law: The State of the Field*, 106 AM. J. INT'L L. 47, 85 (2012) ("[P]olitical scientists have recently analyzed several ways in which delegation of problems and conflicts to international courts shapes legal evolution. One important finding is that the extent of such delegation increases with two variables relating to the design of courts: judicial independence (which depends on the selection method and tenure of judges) and access. Another important finding—which resonates with work done by lawyers on the impact of independent tribunals—is that access for private, non-state litigants and compulsory jurisdiction both contribute to judicial independence.").

98. Jason Webb Yackee, *Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality*, 32 FORDHAM INT'L L.J. 1550, 1610–11 (2008).

99. *See* Karen J. Alter, *Private Litigants and the New International Courts*, 39 COMP. POL. STUD. 22, 46 (2006) (noting that notwithstanding the increase of compulsory jurisdiction, international adjudicative bodies still have limited resources for the majority of the business community).

Any assessment of the effects of ICSID as an institution specialized in international methods for investment dispute settlement must compare what happens to cases brought to ICSID with what would have happened to like cases in the absence of ICSID.[100] This analysis raises complex methodological challenges, including inexistent or, at best, anecdotal evidence.

Another particular difficulty in this assessment relates to the effects on what Shihata termed "conflict avoidance."[101] At minimum, this raises a complex question: can a connection between an ICSID clause and a negotiated outcome be established? Similarly complex is the effect of ICSID on access to a dispute settlement process. ICSID's design is premised on the hypothesis that it provides a forum for litigants who otherwise would not have any real venue or would settle early in effort to avoid unwanted costs or delays involved in the more formal system of public international law: the unpredictability of diplomatic negotiations, or the unreliability of domestic courts. Assessing the role of ICSID in this realm implies ascertaining whether the establishment of ICSID changed the rate at which cases otherwise covered by ICSID's jurisdictional domain in other venues are filed as well as the rate at which they are decided. It also involves understanding whether ICSID increased access to adjudicative processes and, if so, which and how corporations or individuals are using this private, non-state litigation forum.

Since, as explained, the specialization claim is primarily concerned with *procedural justice*, some goal-based elements of procedural justice could serve to assess the effectiveness of ICSID. Among these elements are the cost of litigation (as compared to other settings) or the extent to which ICSID's expertise affects the cost of litigating a case, the case delay or whether ICSID caused cases to be resolved more or less rapidly,

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100. *See generally* Yackee, *supra* note 9 (analyzing bilateral investment treaties in this comparative matter). Susan Franck tackles one aspect of this question, concluding about ICSID arbitration process that "it was not possible to ascertain evidence of bias at ICSID in the pre-2007 population of investment treaty awards. Certain results suggested that allegations of bias related to amounts claimed may create a basis for concern, but would be improperly attributed to ICSID in the pre-2007 population." Franck, *ICSID Effect*, *supra* note 8, at 831.

101. *See* ICSID 1986 REPORT, *supra* note 95, at 4.

and whether ICSID led to more favorable reactions than other litigation experiences in comparable and alternative venues. Addressing these questions would help assess the value of adversarial arbitration in settings where resolving conflicts in modalities other than transparent third party decisions can undermine the credibility of governments.

These are just a few examples of specific empirical inquiries connected with ICSID's goal as a forum for enabling compulsory forms of specialized dispute settlement. Answering these questions may promote confidence among key stakeholders of the system and ensure that when conciliation or arbitration is used to finally resolve investment disputes, it is resolved properly, addressing the needs of disputants. It would also invite the Centre to respond to more objective questions—even perhaps—compelling the institution to move away from defending its success simply by using the number of cases registered each year as a standard baseline.[102]

B. *Limiting Abuses of Diplomatic Protection*

The specialization and the de-politicization claims are both concerned with the effects of legal proceedings on conflict. However, de-politicization is specifically concerned with the effect on the diplomatic relationship between the state of nationality of the investor and the host state of the investor. Under this claim, international legalization results in justice and equality among states and without de-politicization, global power—relegated to the sphere of power politics—would reign.[103] Promoters would argue that with ICSID as a formal dispute settlement mechanism between investors and states,

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102. ICSID, 2009 ANNUAL REPORT 5 [hereinafter ICSID 2009 REPORT] (noting the growing number of cases registered by the Centre); ICSID, 1999 ANNUAL REPORT 4 (describing the effect of various investment treaty arrangements on the ICSID's increasing caseload).

103. This dichotomy finds a classical expression in the context of ICSID and IIA since it relates to the relationship between strong, capital-exporter states that may use power diplomacy to force weaker, capital-importer states to settle in unequal terms. Professor Sornarajah states that one feature of the IIAs "is that they are treaties between unequal partners." M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 207 (1994). For lists of bilateral investment treaties ("BITs") by country see *ICSID Database of Bilateral Investment Treaties*, ICSID, https://icsid.worldbank.org/ICSID/FrontServlet (follow "Bilateral Investment Treaties" hyperlink).

politics can be framed in stable ways to facilitate the pursuit of other instrumental goals.[104]

In relying on this goal-based justification, Shihata considered that the assessment of ICSID should also be connected to its ability to provide political stability and to act as a tool for balancing power between asymmetrical states. For Shihata "[ICSID] provide[s] developing countries with a response which, compared to the Calvo Doctrine, is both more adequate in the depoliticization of disputes and more effective in the encouragement of foreign investment, without inviting the abuses of diplomatic protection."[105] Accordingly:

> [A]nother encouraging factor [of the ICSID] is the fact that . . . the history of ICSID shows a high degree of State participation in the proceedings [allowing] the States against which proceedings have been instituted [to present] their own grievances in the form of counterclaims that insured them a full day in court. This consideration is of direct interest to the effectiveness of ICSID awards.[106]

Critics would argue that this picture of ICSID is idealized. International realists as well as critical legal scholars have long pointed to the ways in which international law itself is instrumental to and shaped by power.[107] Moreover, the idea of international legalization, with judges and adjudication as a centerpiece, is often a form of denying that the work of these elite players is also ideologically based, and reinforced by the stereotype that power is a force that works in opposition to

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104. *See* Christian Reus-Smit, *The Politics of International Law*, *in* THE POLITICS OF INTERNATIONAL LAW 1, 36 (Christian Reus-Smit ed., 2004) (concluding that institutions are "created by political actors as structuring or ordering devices, as mechanisms for framing politics in ways that enshrine predominant notions of legitimate agency, stabilize individual and collective purposes, and facilitate the pursuit of instrumental goals").

105. *See* Shihata, *supra* note 84, at 24–25.

106. *See* ICSID 1986 REPORT, *supra* note 95, at 4.

107. For a classic discussion on the role of power see KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS (1979) (arguing that international rules are the pronouncements of powerful states and are subject to change along with fluctuations in state power). *See also* John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT'L SEC. 5, 7 (1995) (arguing that international institutions cannot have independent effects on state behavior); *supra* notes 72–73 and accompanying text (discussing the role of power in international law).

law.[108] At the same time, international adjudicatory bodies may serve as substitutes that allow domestic power brokers to exit local jurisdictions with poor institutions or to affect judicial politics around specific normative issues by extending corrective options to foreign investors.[109]

Several questions touch upon the debate as framed by the second goal-based source and critique. These questions can also be aggregated into larger policy inquiries such as the following: (1) what precise role does ICSID's investor-state form of legalization play in the stabilization of diplomatic relations?; and, (2) how does power interact with other forces to shape outcomes under this system?

Of course, research would not adopt a simple view of power since isolating the effect of international law from other influences on behavior is complex and would involve prohibitively laborious analysis. However, to assess the effects of ICSID as a de-politicized system, scholars can compare what happens in cases brought to ICSID against similar cases in which there was an espousal of a claim by a state, cases involving diplomatic negotiations (assuming it is possible to know), or cases that were brought by private parties in other forums.[110] Promising empirical research already involves sorting out the effect of power in the distribution of ICSID outcomes.

Other questions of effectiveness that relate to power and politics are more easily addressed by empirical evidence. Subjective (disputant oriented) effects of ICSID could give some hints of the value of the Centre. This would involve assessing how parties value ICSID as a corrective mechanism, as well as

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108. Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, XV LEG. STUDIES FORUM 327, 328 (1991) (arguing in part that early conservative economic rhetoric justified the existing capitalist system as being based on freedom). For a discussion on the stereotype see Steinberg & Zasloff, *supra* note 74, at 74 ("[S]tate behavior and associated international outcomes may appear to be shaped by international law, but because international law mirrors the interests of powerful states, international law is merely an epiphenomenon of underlying power.").

109. *See* Tom Ginsburg, *International Substitutes for Domestic Institutions*, 25 INT'L REV. L. & ECON. 107, 108 (2005); *see also* Sergio Puig, *Investor-State Tribunals and Constitutional Courts: The Mexican Sweeteners Saga*, 5 MEX. L. REV. 199, 238 (2013) ("[S]upranational adjudicatory bodies may affect domestic politics by empowering and expanding corrective options to foreign investors.").

110. For an empirical analysis comparing ICSID proceedings with other investor-state arbitration decisions see Franck, *ICSID Effect*, *supra* note 8, at 850–61.

assessing whether, and to what extent, the Centre promotes a sense of participation (voice), trust and satisfaction with the process on the part of foreign investors and respondent states. That being said, such an endeavor is made difficult by the fact that the main users of the system mediate the preferences of a number of constituencies.

The empirical evidence for understanding this set of questions would consist of extensive surveys within signatory states and claimants and counterfactual scenario analyses. It would also involve case studies to compare the experiences of countries that rely on private rights of action in IIAs or investment laws, with those that have followed different strategies. However, improving our understanding of the political dimension of ICSID, albeit in minor ways—at the very least—may encourage ICSID to assess its success in more concrete ways than simply by referring to its growing caseload, membership, or the participation of respondent states in arbitration proceedings.[111]

C. *Securing Stable and Increasing Flow of Resources*

ICSID's ultimate goal is to add certainty and incentivize flows of FDI, thereby promoting economic growth and national economic development.[112] This is anchored in the third goal-based source of legitimacy. This source, in turn exposes the institution to another type assessment, which implied that "the prospect of involvement in [ICSID] proceedings will work as a deterrent to the actions which give rise to the institution of proceedings."[113] Therefore, ICSID:

> should be regarded as an effective instrument of international public policy which is meant in the final analysis to secure a stable and increasing flow of resources to developing countries under reasonable conditions. . . . ICSID is not merely a dispute settlement mechanism, [it] aims at improving the international

111. ICSID 2011 REPORT, *supra* note 15, at 6 (noting the growing membership and caseload of the Centre as marker of success).

112. Executive Directors' Report, *supra* note 89, ¶ 10; *see* Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 258 (1988) (describing "the absolute right to binding third-party investment disputes").

113. ICSID 1986 REPORT, *supra* note 95, at 4.

> investment climate . . . . ICSID should renew its efforts to secure a stable and increasing flow of resources to developing countries under reasonable conditions.[114]

The embedded idea in this source—investors as rational decision makers—has been most recently challenged by the findings of behavioral economists and social psychologists, who showed that human decisions are not purely rational.[115] Instead, they are susceptible to systematic biases and errors, and they are greatly affected by internal processes that do not correspond to cost-benefit analysis.[116] Similarly, law and society scholars have long argued that law-related considerations often play a surprisingly minor role in the organization and implementation of business affairs and decisions to invest.[117] Moreover, since the underlying assumption of the system is that flows of foreign investment lead to economic development, law-and-development scholars contest that the ideas promoted by ICSID limit, rather than incentivize, the inclusion of meaningful provisions for the promotion of economic development in IIAs.[118] Finally, there is a concern by such strand of international law scholarship that in the attempt to deter actions that may give rise to ICSID proceedings, actual democratic choices are overlooked and the regulatory space of states is diminished.[119] This, at the same time, affects the capacity of governments to act

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114. ICSID 1984 REPORT, *supra* note 17, at 4–5.

115. *See generally* Emilie M. Hafner-Burton, D. Alex Hughes & David. G. Victor, *The Behavioral Psychology of Elite Decision Making: Implications for Political Science* (Univ. of Cal., San Diego, Sch. of Int'l Relations & Pac. Studs., 2011), *available at* http://polisci2.ucsd.edu/dhughes/research/Elites.pdf.

116. *Id.*

117. *See* Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 1, 12 (1963) ("while detailed planning and legal sanctions play a significant role in some exchanges between businesses, in many business exchanges their role is small."); *see also* Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465, 467 (1985) ("Contract planning and contract law, at best, stand at the margin of important long-term continuing business relations. Business people often do not plan, exhibit great care in drafting contracts, pay much attention to those that lawyers carefully draft, or honor a legal approach to business relationships.").

118. *See generally* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES & INVESTMENT FLOWS (Karl P. Sauvant & Lisa E. Sachs eds., 2009) [hereinafter EFFECTS OF TREATIES ON FDI].

119. *See generally* M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (2004); Letter from Kate Horner et al., Friends of the Earth, to Wesley Scholz, U.S. Department of State 2 (Jul. 31, 2009), *available at* http://www.ciel.org/Publications/BIT_Comments_Aug09.pdf.

in the public interest by way of innovative policy-making in response to changing social, economic, and environmental conditions.[120]

The third set of researchable policy questions may address the assessment of this goal: (1) what do ICSID clauses add to what was already available to protect investments from problems of credible commitment?; (2) what are the trade-offs created by instruments containing ICSID clauses?

Within the empirical agenda, these types of questions have attracted the attention of interdisciplinary researchers, who have valiantly attempted to explain the IIAs' causes and consequences and the impact of instruments (especially bilateral investment agreements) containing ICSID clauses.[121] However, researchers in the field have faced multiple conceptual difficulties and problems with data quality.[122] At a minimum, two important challenges remain: first, not all IIAs are created equal and not all ICSID clauses and models of accession to international dispute settlement are the same, obfuscating the inferences that can be drawn from large samples; second, why the IIA–ICSID system is any better suited to performing the task at hand (increase in FDI fluxes) than its primary competitors requires more theorizing.[123]

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120. For a recent book trying to identify and address some of the system concerns, such as limitations on domestic policy space, a lack of democratic accountability, a systemic pro-investor bias, and the inability of treaties to respond to changes in economic circumstances see THE BACKLASH AGAINST INVESTMENT ARBITRATION (Michael Waibel et al., eds., 2010).

121. *See* Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a Bit . . . And They Could Bite*, *in* EFFECTS OF TREATIES ON FDI, *supra* note 118, at 349, 368 (concluding that "little evidence that a BIT can act as a substitute for weak domestic institutions"); *see generally* Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 WORLD DEVELOPMENT 1567 (2005); Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639 (1998); *cf.* Todd Allee & Clint Peinhardt, *Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment*, 65 INT'L ORG. 401 (2011) (concluding that BITs do increase FDI into countries that sign them, but only if those countries are not subsequently challenged before ICSID. On the other hand, governments suffer notable losses of FDI when they are taken before ICSID and suffer even greater losses when they lose an ICSID dispute).

122. *See generally* Jason Webb Yackee, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties*, 33 BROOKLYN J. INT'L L. 405 (2008).

123. *Id.*

Moreover, understanding this relationship, at least in the context of ICSID, assumes that influxes of FDI act as proxy for a positive effect in national economic development. Despite the strong conceptual case for a positive relationship between economic growth, national development, and FDI—the empirical evidence has been mixed at best, thus adding further conceptual difficulties. First, like in the case of IIAs, not all FDI is equal, and therefore, researchers should engage in distinguishing different qualities of FDI. This is especially hard because "quality" is a function of many different country and project characteristics, which are often difficult to measure, and the data quality is generally poor or available only at an aggregated level. Second, any effect should be assessed against the background of the trade-offs, including possible limitations to the regulatory activity of states, bargaining constraints, and restrictions to tactical and strategic decisions.

Some of these empirical investigations require extensive data collection and sorting, complemented with counterfactual and case studies to determine the value of ICSID in this sphere. More importantly, by evaluating the contribution of ICSID in the course of economic development, scholars may succeed in triggering a deeper conversation and understanding regarding how law is implicated in the process of the promotion of FDI, without simply advocating for the replacement of relationship-specific foreign investment protection. This also will prompt ICSID to move beyond claiming success based on the aggregated growth of FDI, which may have almost nothing to do with this institution and its policies.[124]

In short, each source of legitimacy stresses a different function of ICSID, subjecting the institution to a different assessment and critique as summarized in Table 1. At the same time, understanding these three sources can substantially progress and also shift the focus to new empirical investigations in the field.

CONCLUSION

As more authority is delegated to international institutions, answering to questions of effectiveness becomes more pressing.

124. ICSID 2009 REPORT, *supra* note 102.

In particular, in this time of economic anxieties, where the integrity of international economic institutions is questioned, it is of vital importance to cross-examine such criticism with solid and grounded empirical research.

Empirical research has substantially progressed in international law in general and in areas relevant to ICSID in particular. However, the field is far from settled. This Article has tried to deconstruct ICSID's goals to provoke deeper investigations and a shift of focus to new assessments. For the growing number of legal scholars already engaged with empirical research about ICSID, investment law and international dispute settlement, this Article may be seen as a call for casting the legitimacy debate as one more amenable to empirical evaluations. It has also sketched some areas where economic, political science, policy analysis, and other social sciences researchers can collaborate more fully with international legal scholars to improve the understanding and assessment of this complex international organization.

TABLE 1

Summary of ICSID's Goal-Based Perspectives

Source	Origin	Function & Assessment	Critique
Specialization	- Neutral international investment dispute settlement facilities. - ICSID's Secretariat.	- Procedural justice. - Conflict management (cases: settlements, conflict avoidance.)	- Policy Oriented Jurisprudence (e.g., better policy and institutional outcomes if access is extended to all investors.)
De-politicization	- Formal processes in investor-State mode. - ICSID's delocalized system of investment dispute settlement (mainly arbitration.)	- Corrective justice. - Limit the abuses of diplomatic protection by powerful states.	- I. R. Realism (e.g., ICSID is instrumental to, and shaped by, power.) - Critical Legal Scholars (e.g., legalization denies true ideology.)

Economic Policy Stabilization	- Instrument of international public policy for risk reduction. - ICSID's mululateral role as the 'enforcement side' of a private right of action for damages.	- Deterrence - Secure stable and increasing flow of resources to developing countries.	- Law & Development (e.g., ICSID limits the capacity of governments to act in the public interest.) - Law & Society (e.g., ICSID and legal considerations play minor role in investment decisions.)