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## COMMENTS

### UNCHARTED WATERS: FINANCIAL CRISIS AND ENFORCEMENT OF ICSID AWARDS IN ARGENTINA

CHARITY L. GOODMAN\*

#### 1. INTRODUCTION

The creation of the International Centre for Settlement of Investment Disputes (ICSID)<sup>1</sup> conceived a system of dispute resolution in 1966 that would allow judicial settlements between foreign investors and state governments for disputes that previously lacked a forum for resolution.<sup>2</sup> ICSID originated under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the Convention) and was designed

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\* J.D. Candidate, 2007, University of Pennsylvania Law School; M.Sc. Latin American Studies, 2004, University of Oxford; A.B. Politics, 2000, Princeton University. Many thanks to Professor William Burke-White and Danny Allen for their invaluable input and comments during this process, and to the editors of the *Journal of International Economic Law* for their tremendous effort in preparing this article for publication.

<sup>1</sup> 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 (entered into force Oct. 14, 1996), *available at* <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm> [hereinafter ICSID Convention].

<sup>2</sup> Prior to ICSID's creation, the international community worried that existing international arrangements for dealing with disputes between developing countries and foreign investors were inadequate. Historically, settling such claims was difficult, in large part because investors had little ability to control court access. Although the investor could resort to either local remedies or home state courts, the ability to do so was dependent on the local government's willingness to submit to a court's jurisdiction. *See* James C. Baker & Lois J. Yoder, *ICSID and the Calvo Clause a Hindrance to Foreign Direct Investment in LDCs*, 5 OHIO ST. J. ON DISP. RESOL. 75, 75 (1989) (discussing this background).

to promote increased flows of international investment.<sup>3</sup> By creating facilities for the arbitration of investment disputes between Contracting States and nationals of other Contracting States, the Convention aimed to promote mutual confidence between States and investors and increase the flow of investment, particularly into less-developed countries (LDCs).<sup>4</sup> Moreover, because the President of the World Bank traditionally had assisted in mediation of investment disputes between governments and private foreign investors, the formation of ICSID was also intended to relieve the President and the staff of the burden of involvement in such disputes.<sup>5</sup>

Executed in Washington, D.C., the ICSID Convention (also known as the Washington Convention) was sponsored by the International Bank for Reconstruction and Development (IBRD or more commonly known as the World Bank). Aron Broches, then the General Counsel for the World Bank, conceived of the Convention after efforts by the Organization for European Economic Cooperation (now known as the OECD) to create a similar framework failed.<sup>6</sup> By consulting legal experts in Africa, the Americas, Asia, and Europe regarding a preliminary draft of an international convention, Broches and his staff prepared an official draft to the Executive Directors of the World Bank. In March 1965, this text was approved as the text of the ICSID Convention. The mandatory minimum of twenty States quickly ratified the Convention, and the Convention was entered into force on October 14, 1966.<sup>7</sup>

In the early years of the Convention, a relatively small number of cases were tried under the auspices of ICSID. Few materials interpreted the Convention, and copies of arbitral awards were difficult to find.<sup>8</sup> However, in recent years, as more States have ratified

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<sup>3</sup> Mary L. Moreland, "Foreign Control" and "Agreement" under ICSID Article 25(2)(B): Standards for Claims Brought by Locally Organized Subsidiaries Against Host States, 9 CURRENTS INT'L TRADE L.J. 18, 18 (2000).

<sup>4</sup> Baker & Yoder, *supra* note 2, at 75.

<sup>5</sup> *About ICSID*, THE WORLD BANK GROUP, <http://www.worldbank.org/icsid/about/about.htm> (last visited March 29, 2007). See also K.V.S.K. NATHAN, THE ICSID CONVENTION: THE LAW OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES 49 (2000) (generally discussing the history of the ICSID Convention, including the World Bank President's role as an international arbitrator).

<sup>6</sup> LUCY REED ET AL., GUIDE TO ICSID ARBITRATION 1 (2004) (outlining a brief history of the ICSID Convention).

<sup>7</sup> *Id.* at 2.

<sup>8</sup> Moreland, *supra* note 3, at 18.

the ICSID Convention, the number of disputes heard under the Convention has risen dramatically. Ninety-nine countries had signed the Convention as of 1990. By December 15, 2006, 155 States had signed the Convention and 143 States had ratified it.<sup>9</sup> In fact, roughly as many cases are presently pending before the tribunal as have been decided since creation of the Convention.<sup>10</sup>

Argentina was among the most recent wave of signatories to the Convention, signing the treaty in May of 1991 and depositing its instrument of ratification in October 1994.<sup>11</sup> Ratifying the Convention represents a marked departure from prior economic investment policy for many Latin American countries. In fact, for much of the twentieth century, Argentina required investors to submit contractual disputes of foreign investors to local courts for remedy.<sup>12</sup> In order to facilitate the introduction of capital into its markets, Argentina abandoned this policy by signing the ICSID Convention and entering into a number of bilateral agreements with the United States and thirty-seven other countries, all of which allow the use of international arbitration without first resorting to domestic courts.<sup>13</sup>

The consent to ICSID arbitration has since opened Argentina up to a potentially untenable volume of arbitration suits. The economic upheaval that Argentina experienced in 2001 and 2002 left private investors with numerous claims for breach of contract against the State for its actions during the crisis. In 2004, thirty-five ICSID cases were pending against Argentina, most of which were based on measures the government introduced to address the eco-

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<sup>9</sup> *List of Contracting States and other Signatories of the Convention*, THE WORLD BANK GROUP, <http://www.worldbank.org/icsid/constate/c-states-en.htm> (last visited Mar. 29, 2007) [hereinafter *List of Contracting States*].

<sup>10</sup> One hundred ten cases were pending before the ICSID tribunals as of April 2007, whereas one hundred twenty-one had been concluded by the same date. See *ICSID Cases*, THE WORLD BANK GROUP, <http://www.worldbank.org/icsid/cases/cases.htm> (last visited Mar. 29, 2007) (listing the cases currently before ICSID).

<sup>11</sup> *List of Contracting States*, *supra* note 9.

<sup>12</sup> See *infra* Section 4 (discussing the Calvo Doctrine).

<sup>13</sup> Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., Nov. 14, 1991, S. TREATY DOC. NO. 103-2 (1993). See also *Bilateral Investment Treaties*, THE WORLD BANK GROUP, <http://www.worldbank.org/icsid/treaties/argentina.htm> (last visited Mar. 29, 2007) (detailing Argentina's bilateral investment treaties).

conomic crisis in 2001.<sup>14</sup> Indeed, many were brought by foreign-owned utilities with local concessions and stem from Argentina's decision in 2002 to convert utility rates into devalued pesos and freeze them.<sup>15</sup> Although the devaluation operated across the board and affected all creditors, companies such as BP, France Telecom, Siemens, and Suez have pursued claims against Argentina for breach of contract and international treaty law, particularly the bilateral investment treaties (BITs) signed between Argentina and other individual nations.<sup>16</sup>

In May 2005, an ICSID tribunal ruled in favor of a U.S. company, CMS Gas Transmission Company,<sup>17</sup> in a suit against Argentina for violations of contractual undertakings and the U.S.-Argentina BIT. Argentina was ordered to pay CMS over \$130 million to compensate for losses incurred as a result of the crisis.<sup>18</sup> By February 2007, there were thirty-four cases pending against Argentina under ICSID for the loss of income and change to existing contracts following the financial crash.<sup>19</sup> ICSID arbitration is not an inexpensive process for Argentina to undergo, however. Hiring the three arbitrators necessary to arbitrate each case costs the government on average an estimated \$500,000.<sup>20</sup> Moreover, because the Argentine government defaulted on \$80 billion of its debt in 2001, bondholder claims worldwide are worth more than \$100 billion after unpaid interest is included.<sup>21</sup>

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<sup>14</sup> See James L. Loftis & Adrienne L. Goins, *International Law, in 2005 Year in Review*, 69 TEX. B.J. 45, 46 (2006) (giving these figures as an illustration of the rise in international arbitration taking place). By February 2007, only one of these cases seems to have been fully settled against Argentina according to the ICSID website. *Cases*, THE WORLD BANK GROUP, <http://www.worldbank.org/icsid/cases/pending.htm> (last visited Mar. 29, 2007).

<sup>15</sup> *Argentina Treasury Attorney: World Bank Claims Could Reach \$80 Billion* (Dow Jones Newswires Jan. 21, 2005) [hereinafter *World Bank Claims*].

<sup>16</sup> Luke Eric Peterson, *Legal Tango*, FOREIGN DIRECT INVESTMENT, Aug. 1, 2005, [http://www.fdimagazine.com/news/fullstory.php/aid/1336/Legal\\_tango.html](http://www.fdimagazine.com/news/fullstory.php/aid/1336/Legal_tango.html).

<sup>17</sup> *CMS Gas Transmission Co. v. Argentine Republic*, ARB/01/8 (ICSID 2005).

<sup>18</sup> *Id.*

<sup>19</sup> *Cases*, *supra* note 14.

<sup>20</sup> LUKE ERIC PETERSON, *BILATERAL INVESTMENT TREATIES AND DEVELOPMENT POLICY-MAKING* 24-25 (2004), available at [http://www.iisd.org/pdf/2004/trade\\_bits.pdf](http://www.iisd.org/pdf/2004/trade_bits.pdf) (last visited Mar. 29, 2007).

<sup>21</sup> *German Investor Dogs Argentines on Debt* (Dow Jones Newswires Jan. 21, 2005). Although some of this debt has since been restructured, the potential payout for Argentina is significant.

Although the enforcement of ICSID awards has been neither problematic nor questioned,<sup>22</sup> Argentina's current situation poses a real problem for enforcement in the future. To start, Argentine officials have publicly recognized the country's inability to pay out all of the potential claims.<sup>23</sup> This inability to pay has called the credibility of the system as a whole into question. For politicians from Argentina and similarly situated countries, a system that cannot cope with the realities of economic crisis cannot be sustained. Indeed, current Attorney for the Treasury, Osvaldo Guglielmino, criticized ICSID as being more extraordinarily unfavorable than justice systems in any other country in the world.<sup>24</sup> Argentina's former Minister of Justice, Horacio Rosatti, has similarly criticized the system, prominently arguing for its reform in such a way that would exclude from attachment assets used for public services from its jurisdiction.<sup>25</sup> As Rosatti claimed in an interview, "the public service policy of a country cannot be decided by a litigation at [ICSID]."<sup>26</sup> Under what has since been called the Rosatti Doctrine, the decision of a tribunal cannot have higher legal significance than the domestic Argentine Constitution. Under this doctrine, enforcement of ICSID awards, heretofore thought to be automatic and inescapable, may not be assured against Argentina. Judging from official rhetoric, any awards against Argentina that

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<sup>22</sup> According to Anoosha Boralessa, the issues of enforcement rarely occur because most ICSID cases settle before an award is rendered and states operate in a state of auto-regulation. Sovereign parties are pressured by the desire to maintain a good reputation, within business communities or to the public at large, to comply with the award, regardless of its size. See Anoosha Boralessa, *Enforcement in the United States and United Kingdom of ICSID Awards Against the Republic of Argentina: Obstacles that Transnational Corporations May Face*, 17 N.Y. INT'L L. REV. 53, 55 (2004) (outlining this argument). Moreover, the Debtor State has the incentive to comply with awards because the investor is given a revival of the right to diplomatic protection by the investor's state of nationality under Article 27. *Id.* at 66.

<sup>23</sup> *World Bank Claims*, *supra* note 15.

<sup>24</sup> *Id.*

<sup>25</sup> Julio Burdman, *La protección a las inversiones extranjeras en Argentina (1989-2005): Una mirada político-económica*, in *POLÍTICAS LIBERALES EXITOSAS: SOLUCIONES PENSANDO EN LA GENTE* 139, 149 (Gustavo Lazzari & Martín Simonetta eds., 2005), available at [http://admin.fnst.org/uploads/1198/Políticas\\_liberales\\_exitosas.pdf](http://admin.fnst.org/uploads/1198/Políticas_liberales_exitosas.pdf) (last visited Mar. 29, 2007).

<sup>26</sup> Roberto Bissio, *Argentina*, THE THIRD WORLD INSTITUTE, March 31, 2005, [http://www.item.org.uy/eng/texto\\_completo.php?id=2716](http://www.item.org.uy/eng/texto_completo.php?id=2716).

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are contrary to what the country deems a domestic constitutional legal right may be rejected.<sup>27</sup>

It is important to note here, however, that the ICSID Convention provides for automatic enforcement of its awards in the jurisdictions of other Convention signatories.<sup>28</sup> Claimants can enforce the awards against Argentine assets abroad without Argentina's interference or consent. Thus, while Argentina may make this argument regarding domestic enforcement, there may be enough Argentine assets in Contracting States to settle many of the awards regardless of Argentina's domestic rejection of the ICSID award. However, the actual ability of Argentina to satisfy claims and the advisability of doing so for its national economic well-being are two separate questions.

This comment will thus examine how the ICSID arbitration system deals with matters of large economic upheaval, particularly as it pertains to Argentina. It will first deconstruct the pertinent history and requirements of the dispute settlement system. In recognition of the importance of Argentina's prior policy regarding international disputes, this comment will also give brief overviews of both the Calvo Clause and Bilateral Investment Treaties as they concern Argentina. Finally, the comment will examine in more detail Argentina's current position regarding arbitration awards and the implications of this position for ICSID as a whole.

## 2. BEHIND THE ICSID CONVENTION

ICSID was created as a result of the international community's concern with the inadequacy of measures to deal with disputes between developing countries and foreign investors, with the view that the dearth of such procedures impeded the flow of development into those countries.<sup>29</sup> Private foreign investors have historically struggled to effectively bring claims against developing coun-

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<sup>27</sup> *Id.*

<sup>28</sup> See ICSID Convention, *supra* note 1, art. 54(1), which states:

Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

<sup>29</sup> Baker & Yoder, *supra* note 2 at 76-77.

tries. Among the myriad problems facing the investors was the inability of the investor to control court access. The basic international legal rule is that individuals have no access to international courts. While an investor could resort to local remedies, the availability was determined by the host government. The individual, even if able to secure settlement in local courts, would likely be subject to domestic prejudice. If the investor were to seek protection from his own government, resolution of the dispute would still require the host government to submit to a court's jurisdiction.<sup>30</sup> With the traditional ideas of sovereign immunity, it was extremely difficult to induce a state to agree to restrict its own power vis-à-vis a foreign private investor. Private investors lacked jurisdictional standing to proceed against foreign governments in international forums.<sup>31</sup> Any chance of gaining jurisdiction required that their home government sponsor the cause of the investors before they could proceed against the offending country. Not only did this make the protection of the investors' rights more difficult, but it also turned private investment disputes into political issues.<sup>32</sup>

The idea of an international forum for disputes between private investors and States was presented by the Secretary-General of the United Nations (U.N.) in 1960, but was unable to gain traction.<sup>33</sup> In 1961, Broches, then the General Counsel of the World Bank, conceived the idea for the Convention in 1961 in the wake of earlier efforts by the OECD to create a framework for the protection of international investment.<sup>34</sup> Broches convened consultative

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<sup>30</sup> *Id.*

<sup>31</sup> See, e.g., *The Mavrommatis Palestine Concessions* (Greece v. Gr. Brit.), 1924 P.C.I.J. (ser. B) No. 3, at 6-7 (Aug. 30), available at [http://www.worldcourts.com/pcij/eng/decisions/1924.08.30\\_mavrommatis.htm](http://www.worldcourts.com/pcij/eng/decisions/1924.08.30_mavrommatis.htm) (discussing that although the dispute was between a private individual and a State, its status changed when the home State of the private individual took up the case). This case states:

It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights. . . .

*Id.* at 7.

<sup>32</sup> See ICSID Convention, *supra* note 1. See also Danny Allen (unpublished manuscript, on file with author) (summarizing the history of the Convention).

<sup>33</sup> Allen, *supra* note 32, at 2.

<sup>34</sup> REED ET AL., *supra* note 6, at 1.

conferences of legal experts throughout the world to discuss the proposition, and the World Bank staff then devised a draft of the Convention. It was submitted to the President of the bank for circulation to all member States; the mandatory minimum of twenty States ratified the Convention so that it entered into effect on October 14, 1966.<sup>35</sup> The World Bank's status as a neutral financial intermediary between capital-importing countries and capital-exporting countries also helped the Convention gain traction as actualizing what it purported to embody.<sup>36</sup>

The drafters of the Convention thus were highly concerned with the need for even-handedness when establishing ICSID, seeking to maintain a careful balance between the interests of investors and those of host States.<sup>37</sup> This balance was hardly surprising given that the Convention's purpose was to devise a system able to promote mutual confidence between States and foreign investors and to stimulate flow of private capital into countries wishing to attract it.<sup>38</sup> The provisions of the Convention were adapted for cases to be brought by either a State or private party. The Convention provided facilities to both host states and investors, and allowed proceedings to be initiated by either party.<sup>39</sup> ICSID is thus

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<sup>35</sup> *Id.* at 2.

<sup>36</sup> Allen, *supra* note 32, at 3.

<sup>37</sup> See Ibrahim F.I. Shihata, *ICSID Arbitration: The Institution's Point of View*, in PRIVATE INVESTMENTS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1993 16-1, 16-2 (Carol J. Holgren, ed. 1993) (explaining the purposes and goals of the Convention). See also Int'l Bank for Reconstruction and Dev. [IBRD], *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (March 18, 1965), compiled in ICSID CONVENTION, REGULATIONS AND RULES 35, 41 (1993), <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm> [hereinafter *Report of the Board*]. The Report of the Executive Directors of the Convention states:

While the broad objective of the Convention is to encourage a larger flow of private international investment, the provisions of the Convention maintain a careful balance between the interests of investors and those of host States. Moreover, the Convention permits the institution of proceedings by host States as well as by investors and the Executive Directors have constantly had in mind that the provisions of the Convention should be equally adapted to the requirements of both cases.

<sup>38</sup> See Shihata, *supra* note 37, at 16-2 ("The Centre's founders['] . . . broad purpose was to devise a dispute settlement system capable of 'promoting an atmosphere of mutual confidence' between States and foreign investors and thus 'stimulating a larger flow of private International capital into those countries which wish to attract it.'").

<sup>39</sup> See *id.* at 16-3 (describing provisions of the Convention).

unique in that it affords a private party direct access to an international system of dispute resolution in which it may participate on an equal footing against a State.<sup>40</sup>

However, it is important to remember that the primary purpose behind the creation of ICSID was the promotion of foreign investment. The Report of the Executive Directors on the Convention emphasized promoting global economic development through private international investment.<sup>41</sup> The founders of the Convention hoped that offering “a neutral dispute resolution forum both to investors that are (rightly or wrongly) wary of nationalistic decisions by local courts and to host States that are (rightly or wrongly) wary of self-interested actions by foreign investors” would encourage investment.<sup>42</sup> As such, the initial language of the Convention, — “[c]onsidering the need for international cooperation for economic development, and the role of private international investment therein”<sup>43</sup> — reflects this attempt by a financial intermediary both to further the interests of all its member States, which includes developed and developing countries, and to promote economic development.

### 3. OVERVIEW OF ICSID REQUIREMENTS AND CONCERNS

The ICSID Convention is entirely voluntary and guarantees all parties upon their initial consent to ICSID arbitration the ability to take full advantage of procedural rules specifically adapted to their needs.<sup>44</sup> The administration of these rules will also be exempt from

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<sup>40</sup> *Id.*

<sup>41</sup> The report emphasized the theme of “partnership and interdependence between industrialized and developing countries, protected by a regime of truly independent dispute resolution . . .” REED ET AL., *supra* note 6, at 2.

<sup>42</sup> *Id.* at 3.

<sup>43</sup> ICSID Convention, *supra* note 1, Preamble.

<sup>44</sup> Georges R. Delaume, *ICSID Arbitration and the Courts*, 77 AM. J. INT’L. L. 784, 784–85 (1983). See also ICSID Convention, *supra* note 1, art. 42. The Convention states:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

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the scrutiny or control of domestic courts of Contracting States to the Convention.<sup>45</sup>

### 3.1. *Jurisdiction*

The Convention defines jurisdictional requirements in Article 25.<sup>46</sup> It outlines who is subject to the Convention, the types of conflicts covered by the Convention, and what constitutes consent to the arbitration.

#### 3.1.1. *Personal Jurisdiction*

ICSID, as previously noted, was created to settle disputes between a Contracting State and a national<sup>47</sup> of another Contracting State.<sup>48</sup> As such, *only* disputes between a contract state and a national of another Contracting State may be submitted to ICSID arbitration.

However, the Convention excludes disputes between international persons, disputes between private law persons, and disputes between a Contracting State and one of its own nationals.<sup>49</sup>

For cases in which the investment dispute arises out of problems concerning the host country's sovereign debt, as in many of the Argentine cases, this divide can be somewhat problematic. If ICSID primarily arbitrates disputes between contracting States and nationals of other contracting States, what should be done in cases where some of the large number of creditors are nationals of States that have not ratified the Convention? According to Steven Schwarcz, an unresolved dispute between a creditor and debtor-State might disrupt an overall settlement among all creditors. As Professor Schwarcz suggests, creditors thus would most likely prefer that the Convention authorize arbitration between Contracting States and any creditor that subjects itself to the tribunal's jurisdiction. Indeed, ICSID has taken this course since 1978 by allowing

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<sup>45</sup> See Delaume, *supra* note 44, at 785 (explaining the operation of this "rule of abstention").

<sup>46</sup> ICSID Convention, *supra* note 1, art. 25.

<sup>47</sup> The term national applies to both physical and juridical persons. *Id.* art. 25(2).

<sup>48</sup> *Id.* art. 25(1).

<sup>49</sup> Delaume, *supra* note 44, at 793.

arbitration between States and nationals of non-contracting States that consent to arbitration about their investment disputes.<sup>50</sup>

### 3.1.2. *Subject Matter Jurisdiction*

The Convention retains subject matter jurisdiction in the case of any “legal dispute arising directly out of an investment . . .”<sup>51</sup> The definition of investment, however, has been disputed. Neither the legislative history of the Convention nor the language of the Convention itself supplies the precise definition of the term, even though it is a central element of the Convention as a whole.<sup>52</sup> This lack of definition was a deliberate decision by the drafters, who viewed the addition of a definition as too restrictive.<sup>53</sup> When the Convention was drafted, most investments took the form of concessions, joint ventures, or loans made by private financial institutions to foreign public entities and arrangements regarding industrial property rights. More recently, new investment associations have developed, including profit sharing, service and management contracts, contracts for the sale and erection of industrial plants, turn-key contracts, international leasing arrangements, and agreements for the transfer of know-how and of technology.<sup>54</sup> According to Georges Delaume, a Senior Legal Advisor at the World Bank, this contemporary context requires an economic concept of investment to be progressively substituted for the traditional notion of investment in capital. Accordingly, ICSID tribunals have recently found disputes to be subject to the Convention where, at a minimum, the investment: had a significant duration; provided a measure of return to the investor; involved an element of risk on both sides; involved a substantial commitment on the part of the investor; and was significant to the State’s development.<sup>55</sup>

### 3.2. *Consent*

Consent by the parties involved in a dispute subject to ICSID jurisdiction is perhaps key to the Convention’s effectiveness.<sup>56</sup> In

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<sup>50</sup> Steven L. Schwarcz, *Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach*, 85 CORNELL L. REV. 956, 1027 (2000).

<sup>51</sup> ICSID Convention, *supra* note 1, art. 25(1).

<sup>52</sup> Delaume, *supra* note 44, at 795.

<sup>53</sup> REED ET AL., *supra* note 6, at 14.

<sup>54</sup> Delaume, *supra* note 44, at 795.

<sup>55</sup> REED ET AL., *supra* note 6, at 15.

<sup>56</sup> It is important to note that both ratification and consent are generally nec-

their 1965 Report on the Convention, the executive directors of ICSID called consent the "cornerstone of the jurisdiction of the Centre."<sup>57</sup> Indeed, Articles 25 and 26 rely heavily on the idea of consent as the threshold for obtaining jurisdiction. In Article 25, the Convention requires parties to the dispute to "consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."<sup>58</sup> The Convention deems its jurisdiction absolute, in the language of Article 26. However, it simultaneously provides States with the option of limiting ICSID jurisdiction up front, by stating that States shall be:

deemed [to have consented] to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.<sup>59</sup>

Once parties consent to ICSID arbitration, the Convention has exclusive jurisdiction for those disputes which arise under its auspices.

Consent to ICSID arbitrations has been growing. Although consent to arbitration must be in writing by both parties, a specific form of the consent is neither specified within the Convention nor limited by case law. Consent must be explicit, however, not

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essary to bring arbitration in front of ICSID. A country may ratify the Convention, but the measures necessary to make any treaty effective in a domestic legal sphere will vary depending on the country's constitutional system. Some countries require domestic legislation incorporating the treaties into domestic law. In others, treaties that have been duly promulgated internally in principle may be applied without the legislation. Some countries require implementing legislation in order to bring domestic legislation in line with treaty obligations. Article 69 of the Convention concerns the duty of Contracting States to take any measures necessary in their domestic law to carry out their obligations under the Convention, but does not deal with consent. Articles 25 and 26 discuss voluntary consent to jurisdiction, which no Contracting State is obliged to give. However, offering such consent would make the Convention more effective. This Section discusses this concept of voluntary consent to ICSID given by States rather than ratification of the Convention or implementation of the Convention's obligations. For an in-depth discussion of Consent, see CHRISTOPH SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 201-03, 1277-80 (2001) [hereinafter *A COMMENTARY*].

<sup>57</sup> *Report of the Board*, *supra* note 37, at 43.

<sup>58</sup> ICSID Convention, *supra* note 1, art. 25(1).

<sup>59</sup> *Id.* art. 26.

merely construed.<sup>60</sup> It may be given in advance and with respect to a defined class of future disputes or with respect to an existing dispute.<sup>61</sup>

Thus, while a large number of countries have signed the Convention within the last two decades, giving broad consent to its jurisdiction, other forms of consent have also proliferated. In practice, consent is given in one of three ways. First, it is given unambiguously via a consent clause in a direct agreement between the parties, such as via a concession contract. Second, consent to ICSID jurisdiction can be achieved through a standing offer within a treaty between the host State and the investor's State of nationality. Bilateral investment treaties and regional multilateral treaties (MITs), such as NAFTA, often contain clauses offering access to ICSID. These offers of arbitration must be fulfilled by an acceptance on the part of the investor. The third method of giving consent to ICSID arbitration as a means of dispute settlement is through a standing offer within a provision in the national legislation of the host State, most often through investment codes. As with bilateral and multilateral treaties, an offer of ICSID arbitration in national legislation must be accepted by the foreign investor. According to Schreuer, recent cases that have come before ICSID show a trend from consent through direct agreement between the parties to consent through a general offer by the host State, which is later accepted by the investor often simply through instituting proceedings.<sup>62</sup>

Consent to ICSID jurisdiction can be granted exclusively or can be included in a treaty, law or contract as one of several options. Consent may be given with respect to existing or future disputes. In the majority of cases, an agreement between the parties may record the consent to ICSID arbitration through a promissory clause to dispose of future disputes via ICSID arbitration. Although in many cases an ICSID arbitration clause is included in an investment agreement, consent need not be recorded in a single instrument. Rather, it can be expressed through a series of letters or

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<sup>60</sup> See United Nations Conference on Trade and Development, New York, Geneva, March 2003, *Course on Dispute Settlement*, U.N. Doc. UNCTAD/EDM/Misc.232 (prepared by Christoph Schreuer), available at <http://r0.unctad.org/disputesettlement/course.htm> [hereinafter *Course on Dispute Settlement*].

<sup>61</sup> REED ET AL., *supra* note 6, at 22.

<sup>62</sup> *Course on Dispute Settlement*, *supra* note 60, at 16.

documents between the parties.<sup>63</sup> Consent may also result from a unilateral offer by a party.<sup>64</sup> Some domestic laws specifically state that the consent of the State to ICSID jurisdiction is constituted by Articles referring to the Convention.<sup>65</sup> Promissory clauses are also (rarely) used to submit disputes already arisen between the parties.<sup>66</sup>

Consent to ICSID arbitration via investment laws, BITs,<sup>67</sup> and MITs with ICSID clauses has steadily been growing.<sup>68</sup> As of May 2000, States had consented in advance to submit their disputes to ICSID in approximately 20 investment laws and in over 900 bilateral investment treaties.<sup>69</sup> ICSID arbitration has similarly emerged as a mechanism for settling disputes under recent multilateral treaties, including NAFTA, the Energy Charter, the Cartagena Free Trade Agreement, and the Colonia Investment Protocol of Mercosur.<sup>70</sup>

The Convention requires that both parties consent in writing to the dispute. Until now, this article has primarily discussed the ways in which a country may consent to ICSID jurisdiction, but an investor must consent as well. Generally, there must be a BIT or MIT between the host State and the State of the investor's nationality. However, the extension of an ICSID clause in a BIT of the host State to an investor of a non-signatory State is possible on the basis of a most-favored nation clause in a treaty between the investor's home State and the host State.<sup>71</sup>

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<sup>63</sup> See Delaume, *supra* note 44, at 792 (detailing the methods of consenting to the Convention).

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

<sup>65</sup> According to Schreuer, provisions to this effect are found in the national legislation of the Central African Republic, the Côte d'Ivoire, and Mauritania. A COMMENTARY, *supra* note 56, at 200.

<sup>66</sup> See *Course on Dispute Settlement*, *supra* note 60 at 7.

<sup>67</sup> See discussion *infra* Section 5.

<sup>68</sup> See Shihata, *supra* note 37, at 16-23 (analyzing the growth of acceptance of the ICSID system).

<sup>69</sup> Schwarcz, *supra* note 50, at 1025-26.

<sup>70</sup> Moreland, *supra* note 3, at 18. For an in-depth discussion of consent to the Convention via NAFTA, the Energy Charter Treaty, Mercosur, and the Cartagena Free Trade Agreement, see A COMMENTARY, *supra* note 56, at 224.

<sup>71</sup> See A COMMENTARY, *supra* note 56, at 218 (discussing acceptance by the investor).

### 3.3. *Exclusivity of Remedy*

A corollary to consent, and another key factor behind the Convention's ability to remain effective, is the exclusive nature of ICSID's jurisdiction. The Report of the Board presumed that, absent evidence of a State's reservation of rights to different recourse, signatories of the Convention intended ICSID to have exclusive jurisdiction over pertinent investment disputes. According to the Report:

[W]hen a State and an investor agree to have recourse to arbitration, and do not reserve the right to have recourse to other remedies or require the prior exhaustion of other remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy. . . . [T]he second sentence [of Article 26] explicitly recognizes the right of a State to require the prior exhaustion of local remedies.<sup>72</sup>

As a result, by ratifying and then consenting to the Convention, Contracting States limit their ability to remove any particular, individual issues from ICSID's jurisdiction.

Indeed, ICSID awards are final and binding. They are subject to the limited remedies of rectification, interpretation, revision and annulment, but not to appeal or review by national courts.<sup>73</sup> Consent to arbitration under the Convention is thus "deemed to exclude recourse to any other remedy."<sup>74</sup> The restriction requires that the domestic courts of contracting states abstain from taking any action that might interfere with the autonomous and exclusive character of ICSID arbitration.<sup>75</sup>

The exclusivity of the Convention can be seen as a form of protection for the contracting States from having to defend suits in innumerable, unfriendly forums.<sup>76</sup> Because the consent to ICSID arbitration is just as binding on the investor as it is on a State in a dispute, a State can be assured that the investor cannot bring an ac-

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<sup>72</sup> *Report of the Board*, *supra* note 37, at 45.

<sup>73</sup> REED ET AL., *supra* note 6, at 8.

<sup>74</sup> Shihata, *supra* note 37, at 16-3.

<sup>75</sup> Delaume, *supra* note 44, at 785.

<sup>76</sup> However, related suits may still be brought in domestic courts, and multi-state ICSID claims may be brought under different Bilateral Investment Treaties (BITs).

tion in a non-ICSID international forum, even in his own State.<sup>77</sup> In the case of an adverse decision by ICSID, a domestic court could resume hearing a case that had fallen within domestic jurisdiction but was removed for also falling within ICSID. However, to do so, it must have an independent basis for jurisdiction over the people and subject matter.<sup>78</sup> As a result, the only role of domestic courts in these disputes is regarding the recognition and enforcement of ICSID awards.<sup>79</sup>

The exclusivity of jurisdiction also restricts the State whose national is a party to an agreement. In such cases, the State may not espouse the case of its national, give that national diplomatic protection, or bring an international claim in respect of the dispute.<sup>80</sup> Drafters reasoned that in exchange for access to a truly international system, investors should not be able to ask their home States to espouse their claims, and the home States should not be permitted to do so.<sup>81</sup> Article 27 thus states that “[n]o Contracting State shall give diplomatic protection, or bring an international claim” on behalf of one of its nationals.<sup>82</sup>

The exclusivity of remedy may create some tension between Contracting States and investors in situations of major economic distress because it limits the options a Contracting State possesses after it consents to ICSID arbitration. While exclusivity gives investors confidence that countries may be held accountable for their actions (as it was intended to), it may be undesirable for Contracting States because it restricts countries from removing measures

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<sup>77</sup> Delaume, *supra* note 44, at 791.

<sup>78</sup> *Id.* at 785.

<sup>79</sup> *Id.*

<sup>80</sup> ICSID Convention, *supra* note 1, art. 27. Article 27 states:

(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

(2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

See also Delaume, *supra* note 44, at 791 (discussing the restrictions on Contracting States).

<sup>81</sup> Shihata, *supra* note 37, at 16-5.

<sup>82</sup> ICSID Convention, *supra* note 1, art. 27.

taken by the State for legitimate policy, social, or economic reasons from the Convention's reach.

### 3.4. Recognition and Enforcement

Awards granted by ICSID tribunals are binding on both parties and subject to only limited appeal.<sup>83</sup> They are final awards, and they are often expressed in terms of *res judicata*.<sup>84</sup> Once an ICSID award has been rendered, the parties may not seek remedy on the same dispute in another forum.<sup>85</sup> An ICSID award may be used as a defense against an action in the same matter in front of another judicial forum, even if that other forum would otherwise have jurisdiction over the matter.<sup>86</sup>

During the Convention's drafting, it was generally expected that Contracting States would comply voluntarily with awards, and thus enforcement would not be a practical problem.<sup>87</sup> Not only does an award represent a treaty obligation for the Contracting State, but the obligation would be backed up by the State's concern for its reputation as a place of investment and by the revival of the right to diplomatic protection by the investor's State of nationality.<sup>88</sup> However, the Convention articulated a mechanism for recognition and enforcement of awards equally against both parties, even though it was originally established in order to ensure that the investors would comply with awards.<sup>89</sup> Article 54 states that all Contracting States, not just parties to the dispute,

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<sup>83</sup> See ICSID Convention, *supra* note 1, art. 53 ("The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.").

<sup>84</sup> See A COMMENTARY, *supra* note 56, at 1079 (discussing the binding nature of an award)

<sup>85</sup> See *Id.* at 1077, 1085 (discussing Article 53 of the Convention and the *res judicata* effects of awards)

<sup>86</sup> *Id.* However, it is important to note that this only applies if the ICSID tribunal has yielded a decision on the merits. Where a tribunal declines jurisdiction, a party may take its claim to another forum. *Id.* at 1086.

<sup>87</sup> *Id.* at 1088.

<sup>88</sup> *Id.* at 1102. Article 27 of the Convention states that no Contracting State shall give diplomatic protection, or bring an international claim, regarding a dispute between one of its nationals and another Contracting State, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute. ICSID Convention, *supra* note 1, art. 27.

<sup>89</sup> A COMMENTARY, *supra* note 56, at 1102

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must recognize awards under the Convention and enforce pecuniary obligations within their territories.<sup>90</sup>

The fact that recognition and enforcement of an award may be sought in any State party to the ICSID Convention, coupled with the fact that 155 States have signed the Convention,<sup>91</sup> practically ensures that all awards will be enforceable because assets located within any Contracting States would be thereby attachable. Indeed, it would be a treaty violation for a Contracting State to refuse to enforce an award.<sup>92</sup> Non-compliance with Article 54 thus carries the consequences of State responsibility, including diplomatic protection. According to Schreuer, "the State of the nationality of an investor who has prevailed in an ICSID arbitration could bring an international claim against a State that was not a party to the arbitration but whose court and authorities have failed to recognize and enforce the award in violation of Art. 54."<sup>93</sup>

Due to the voluntary nature of joining the ICSID arbitration system, recognition and enforcement of the awards was a major concern for the drafters of the convention. When writing the Convention, the drafters wanted to ensure that both the investor and the State would comply with any judgment made.<sup>94</sup> Although Article 27 allows the right of espousal should a host State fail to comply with an award against it, it also states that the host State will then be exposed to the possibility of proceedings against it in the International Court of Justice (ICJ) for its violation of its ICSID treaty obligations.<sup>95</sup> The Convention also requires investors to comply with adverse awards rendered in Article 54, which states that all Contracting States are licensed to enforce such awards "in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state."<sup>96</sup> It is important to note that an ICSID award is a title that is immediately executable.<sup>97</sup> All Contracting States are

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<sup>90</sup> ICSID Convention, *supra* note 1, art. 54.

<sup>91</sup> See *List of Contracting States*, *supra* note 9 (listing the States that have signed the Convention).

<sup>92</sup> A COMMENTARY, *supra* note 56, at 1110.

<sup>93</sup> *Id.*

<sup>94</sup> Shihata, *supra* note 37, at 16-5.

<sup>95</sup> *Id.*

<sup>96</sup> ICSID Convention, *supra* note 1, art. 54.

<sup>97</sup> Delaume, *supra* note 44, at 801.

thus committed to enforcing the final judgments of the courts of the countries concerned.<sup>98</sup>

### 3.5. *Non-compliance and Remedies for Non-compliance*

The mechanics behind non-compliance by Contracting States are actually surprisingly difficult. Because most titles are immediately executable by any Contracting State, in theory, there is little chance that a country with an adverse judgment against it will be able to completely avoid enforcement. A country inevitably will have assets in a Contracting State that can be seized by that State for enforcement. Moreover, political considerations, embarrassment over lawsuits, or the desire to promote foreign investment may prompt countries to pay an award. However, the threat of non-compliance with ICSID awards is not an idle one. Although in some cases circumstances may lead countries to pay awards without argument, these incentives do not always work.<sup>99</sup>

To some extent, enforcement may represent a practical difficulty. Attaching the assets of a foreign private individual or company can be an effective way to enforce judgments against private investors. However, finding attachable governmental assets outside of the domestic borders to attach can be harder, particularly when the State does not possess any State-Owned-Enterprises (SOEs).<sup>100</sup> Moreover, although Contracting States are bound to recognize ICSID awards, Article 55 of the Convention states that the enforcement of ICSID awards are governed by each State's own laws, which in turn might give immunity to the host State from execution.<sup>101</sup> According to Choi, in 1997, in two out of three cases where enforcement of an ICSID award was sought, parties could not receive payment of the award because the funds they sought to attach did not qualify for attachment under national laws.<sup>102</sup> Thus, when a Contracting State does not comply with an award, a plea of sovereign "immunity from execution might effectively bar . . . execution against that state."<sup>103</sup> Although a private investor may at-

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<sup>98</sup> Shihata, *supra* note 37, at 16-5.

<sup>99</sup> Susan Choi, *Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions*, 28 N.Y.U. J. INT'L. L. & POL. 175, 213 (1995-96).

<sup>100</sup> See Schwarcz, *supra* note 50, at 1029 (discussing suits and judgments for foreign debtor-States).

<sup>101</sup> Choi, *supra* note 99, at 180.

<sup>102</sup> *Id.* at 181.

<sup>103</sup> Delaume, *supra* note 44, at 801.

tempt to circumvent the problem by seeking enforcement in a State with narrow immunity doctrine, it may still be difficult to prove that the assets fall within the category not considered immune.<sup>104</sup>

Contracting States do not surrender their right to sovereign immunity via the Convention. However, they also cannot neglect their treaty commitments. If a Contracting State pleaded immunity in order to frustrate enforcement of an ICSID award, the State would be violating its obligation under the Convention to comply with the award. For such a violation of treaty obligations, a State would likely be exposed to various sanctions provided for in the Convention.<sup>105</sup> Failure to comply would restore the right of the Contracting State whose national is the award creditor to either give that national its diplomatic protection or to bring a claim against the other State on the private investor's behalf.<sup>106</sup> A violation of treaty obligations would also allow the State whose national is involved to bring suit against the non-complying State at the ICJ.<sup>107</sup>

Indeed, in practice, most awards are satisfied through voluntary compliance of the parties.<sup>108</sup> Although a State may possess the right to bring a lawsuit against the non-complying State on behalf of one of its nationals, it would likely "be reluctant to do so for political reasons."<sup>109</sup> As Schwarcz argues, it is in all parties' best interests to adhere to the Convention. Its provisions were established for the benefit of both the investors and the States. Retaining access to capital market funding in the future depends on com-

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<sup>104</sup> See Choi, *supra* note 99, at 213 (discussing how attempts at enforcing awards have played out in cases in both France and the United States).

<sup>105</sup> Delaume, *supra* note 44, at 801.

<sup>106</sup> See ICSID Convention, *supra* note 1, art. 27(1) (stating that "[n]o Contracting State shall give diplomatic protection . . . unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute").

<sup>107</sup> See *id.* art. 64 ("Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement."). See also Delaume, *supra* note 44, at 801-02 (discussing the ramifications of non-compliance).

<sup>108</sup> See Schwarcz, *supra* note 50, at 1023 ("Outside of expropriation cases, few disputes arise between sovereign States and foreign private parties.").

<sup>109</sup> *Id.* at 1023-24.

pliance.<sup>110</sup> As a result, both parties have a vested interest in seeing awards respected.

Although many countries voluntarily comply with ICSID awards, Argentina has shown some reluctance to honor the potential awards against it.<sup>111</sup> The Ministry of Economy of Argentina is on record stating that the decisions of the arbitration tribunals in the more than thirty ICSID arbitrations pending against the country would be “subject to local court review in Argentina if they ‘disturb public order because they are unconstitutional, illegal or unreasonable or if they were handed down in violation of the terms and conditions undertaken by the parties.’”<sup>112</sup> The country is in the unenviable position of potentially being liable for an extraordinary amount of money in awards. If Argentina cannot or will not honor these awards, it will be abandoning its treaty obligations.

There are many potential consequences to a refusal of Argentina to comply. As discussed above, states with liberal immunity clauses may allow investors to attach assets within their borders. Argentina may be unable to access international capital markets due to a lack of investor confidence. Although Argentina’s situation is to some extent a unique one, and so may not signify a major flaw in the ICSID enforcement system as whole, the situation is also troubling because it represents the potential problems that many countries could face when undergoing a massive economic collapse.

#### 4. THE CALVO CLAUSE AND LATIN AMERICA

Initially, many Latin American countries resisted joining the ICSID convention as a result of the widespread adoption of the Calvo Doctrine and the inclusion of “Calvo Clauses” in investment contracts.<sup>113</sup> Named for the Argentine diplomat and jurist, Carlos Calvo, the Calvo Doctrine states that legal disputes involving pri-

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<sup>110</sup> *Id.* at 1028.

<sup>111</sup> See discussions *infra* Sections 1, 5, 6 (regarding Argentina’s current position).

<sup>112</sup> Edward Baldwin et al., *Limits to Enforcement of ICSID Awards*, 23 J. INT’L ARBITRATION 1, 2 (2006), available at [http://www.milbank.com/NR/rdonlyres/CF3F1236-AA39-405F-8086-A1E60AD104B2/0/0106\\_Nolan\\_Journal\\_of\\_Intl\\_Arbitration.pdf](http://www.milbank.com/NR/rdonlyres/CF3F1236-AA39-405F-8086-A1E60AD104B2/0/0106_Nolan_Journal_of_Intl_Arbitration.pdf).

<sup>113</sup> See Baker & Yoder, *supra* note 2, at 75 (discussing Latin American reliance on the Calvo doctrine).

vate individuals conducting business in a foreign country should be resolved by local remedies rather than by international legal remedies.<sup>114</sup> The doctrine was aimed at preventing abuses from invocations of diplomatic protection. The Calvo Clause was inserted in many documents to ensure that all chance of diplomatic intervention was eliminated and that an alien was truly on an equal legal stance as a national.<sup>115</sup>

Argentina subscribed to the theory that inserting Calvo Clauses into treaties and contracts was necessary to preserve sovereignty and independent authority over its investment interests. A typical Calvo Clause contained a commitment to submit all disputes to local courts and a provision that defined the scope of the contractual stipulation. Also included in the Clause was a waiver of the protection by the home State of the investor and a surrender of all future claims based on rights under international law.<sup>116</sup> However, the Clause did not bar an international suit against the State asserting its protection in the event of unjust procedural delay or manifest denial of justice.<sup>117</sup>

The Calvo Clause was utilized particularly by Latin American countries. In the late nineteenth and early twentieth centuries, private investors supplied large amounts of capital into the development of natural resources in Latin America.<sup>118</sup> Investors often distrusted the justice systems of the countries in which they were investing, and therefore requested protection by their home countries.<sup>119</sup> The intervention of these governments on investors' behalf created a body of precedent that eventually "established the ability to appeal to the diplomatic protection of one's home government as a right of a foreign national in a Latin American country."<sup>120</sup> Eventually, the extent to which private investors were able to take a strong position for or against the insertion of Calvo Clauses de-

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<sup>114</sup> See *Id.* at 75, 90 (defining the Calvo doctrine).

<sup>115</sup> According to Baker and Yoder, the Calvo Clause took several forms. It could exist as an express agreement in the contract or deemed to be an implied contract term in those States that have included Calvo Clauses in their constitutions and statutes. *Id.* at 91.

<sup>116</sup> David Graham, *The Calvo Clause: Its Current Status as a Contractual Renunciation of Diplomatic Protection*, 6 TEX. INT'L L.F. 289, 290 (1970).

<sup>117</sup> *Id.* at 293, 304.

<sup>118</sup> Allen, *supra* note 32, at 3.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

pended on whether they would be able to rely on their governments to support them in any disputes.

Through much of the twentieth century Latin American countries remained suspicious of the arbitral, as opposed to the judicial, process.<sup>121</sup> As such, the countries generally inserted Calvo Clauses into their documents and resisted signing international treaties that would require arbitration. However, since 1980 this has begun to change.<sup>122</sup> Business-oriented Latin American countries have recognized that the Convention is a cheaper, more flexible, and speedier alternative to traditional, civil court litigation. The Convention enhanced the traditional devices for attracting foreign investors—such as tax breaks, customs preference, etc.—by offering institutional stability assurances that the traditional investment inducements would not be withdrawn suddenly.<sup>123</sup>

According to Paul Szasz, rigid adherence to the Calvo Doctrine and the principle of opposition to arbitrating foreign investment disputes were diluted by the conclusion of Investment Guaranties Agreements,<sup>124</sup> which operate in the same capacity as BITs, between the United States and a number of Latin American States requiring arbitration for the settlement of disputes.<sup>125</sup> As more and more countries have become signatories of the Convention, Latin American countries have also gradually opened up. Today, with the notable exceptions of Mexico and Brazil, the vast majority of Latin American countries are parties to ICSID.<sup>126</sup>

Because so many of these countries, in particular Argentina, wished to attract foreign investment to their economies, it was in their best interests to abandon the use of the nationalistic Calvo Clause in favor of conceding to the investor-friendly ICSID requirements. And yet, it is precisely because ICSID is so investor-friendly that Argentina has begun to question its adherence to the Convention. Although it has not reverted to the Calvo Doctrine, Argentina has attempted to ensure that Calvo-like protections of sovereignty are protected under ICSID as well. Indeed, the inser-

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<sup>121</sup> Paul Szasz, *The Investment Disputes Convention and Latin America*, 11 VA. J. INT'L L. 256, 262 (1970).

<sup>122</sup> See *List of Contracting States*, *supra* note 9, (providing a record of when each Latin American state finally chose to sign the ICSID Convention).

<sup>123</sup> Szasz, *supra* note 121, at 264.

<sup>124</sup> See *infra* Section 5 (discussing similar bilateral investment treaties).

<sup>125</sup> Szasz, *supra* note 121, at 264.

<sup>126</sup> *List of Contracting States*, *supra* note 9.

tion of Article 27 in the ICSID Convention gives many of the same protections that the Calvo Clauses did. Article 27 grants States "the possibility of an effective (because authorized by each Contracting State through its ratification of the Convention) waiver by an investor of the right to his State's diplomatic protection with regard to any matter that the host State is willing to take to the Centre for arbitration."<sup>127</sup> As a result, ICSID potentially offers Argentina the same protections that the Calvo Doctrine does.

##### 5. BILATERAL INVESTMENT TREATIES AND THEIR CONTRIBUTION TO ICSID ARBITRATION

Most arbitration cases dealt with at ICSID are the consequence of BIT provisions that contain a general offer or acceptance by Contracting States to settle investment disputes by ICSID arbitration.<sup>128</sup> Over the last few decades, BITs increasingly have become an important aspect of international trade relations,<sup>129</sup> and have provided a basis for implementing the ICSID system. Contracting States often provide a generalized consent to ICSID within the text of BITs as a means of protecting investors. According to Vinuesa, ICSID tribunals have held that the generic consent to submit to ICSID jurisdiction contained within BITs constitutes consent to ICSID arbitration as required by Article 25 of the Convention. An investor covered by that BIT is assumed to have consented to ICSID jurisdiction after the dispute has arisen and the investor has requested ICSID arbitration.<sup>130</sup>

However, consent via a BIT does not automatically correspond to ICSID consent. After any objection to ICSID jurisdiction, a tribunal will test jurisdiction by examining that both the legal jurisdictional requirements of BITs and the ICSID Convention are met. These conditions may include, among other things, satisfying

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<sup>127</sup> See Szasz, *supra* note 121, at 261 (finding that Article 27 represents a waiver by an investor of the right to his State's diplomatic protection); Baker & Yoder, *supra* note 2, at 76 (noting that the recognition of certain attributes of the Calvo doctrine led to the incorporation of a modified version of the Latin American Calvo Clause into Article 27 of the Convention).

<sup>128</sup> Raul Emilio Vinuesa, *Bilateral Investment Treaties and the Settlement of Investment Disputes under ICSID: The Latin American Experience*, 8 L. & BUS. REV. AM. 501, 502 (2002).

<sup>129</sup> See generally Bernard Kishoyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 NW. J. INT'L L. & BUS. 327 (1994) (analyzing the advent and rise of the use of BITs in international trade).

<sup>130</sup> Vinuesa, *supra* note 128, at 503.

two separate definitions each of both protected investment and juridical persons subject to protection. Vinuesa argues that this set of requirements acts as a double filter in order to confirm ICSID jurisdiction.<sup>131</sup>

BITs have proliferated as a consequence of the international move towards a market economy; foreign investment was seen as key to integrating developing economies into the global economy. Although BITs generated reciprocal rights and duties among states, they generally did not directly address how the private investor would be affected by disputes.<sup>132</sup> Like ICSID, most BITs express the desire of States to promote investment through the creation of favorable conditions.<sup>133</sup> As such, BITs created a network of legal provisions to deal with promotion and protection of foreign investments, and bind all of the related countries closer together.<sup>134</sup>

In the last 20 years, BITs have become a conduit for countries to encourage, if not mandate, the use of arbitration to settle investment disputes.<sup>135</sup> In fact, as of 2002, most arbitration cases dealt with at ICSID were the consequence of BIT provisions containing an offer or acceptance by Contracting States to settle investment disputes via ICSID arbitrations.<sup>136</sup> Although a State was still required to be a party to the ICSID Convention for the case to be brought under ICSID rules, inserting BIT consent clauses was a means of gaining explicit consent to ICSID arbitration. The Contracting State consented via their insertion of the clause, and the foreign private investors consented via any later signal of consent, which was generally contractual in nature or was assumed by the request for ICSID arbitration.<sup>137</sup> ICSID arbitration tribunals that deal with BITs assume that the jurisdiction is based on the consent of the parties under Article 25 of the Convention<sup>138</sup> and that the BIT

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<sup>131</sup> For an in-depth discussion of meeting ICSID and BIT jurisdictional requirements, see generally Vinuesa, *supra* note 128.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 505.

<sup>135</sup> See Emmanuel Gaillard, *International Arbitration Law: 'Vivendi' and Bilateral Investment Treaty Arbitration*, 229 N.Y.L.J. 3 (2003) (referencing the "significant proliferation of the number of ICSID arbitrations initiated on the basis of BITs (15 out of new 19 cases referred to ICSID arbitration in 2002, more than in any previous year)").

<sup>136</sup> Vinuesa, *supra* note 128, at 502.

<sup>137</sup> *Id.* at 503.

<sup>138</sup> ICSID Convention, *supra* note 1, art. 25.

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itself constitutes consent to ICSID arbitration.<sup>139</sup> It is important to note, however, that consent in the BIT does not automatically amount to consent under ICSID; each treaty's individual consent requirements must be met.<sup>140</sup>

BITs have been particularly germane to the change in many Latin American countries' stances regarding the use of arbitration. Like other States, Latin American countries have entered into bilateral agreements with developed countries to promote private foreign investment.<sup>141</sup> However, unlike other countries, such agreements represent a significant change in policy away from the protectionism represented by the inclusion of Calvo Clauses in investment contracts over the last half century.

Argentina's resistance to arbitration, in particular, shaped negotiations of BITs regarding how disputes would be settled between States and foreign investors. Initially, schemes were negotiated to require foreign investors to submit their claims to tribunals within the domestic courts of the State.<sup>142</sup> Receiving any remedy through international arbitration was dependent on: a period of time passing in which a final decision did not result from a claim brought to the domestic tribunal; the parties remaining in dispute after a final decision was rendered; or one of the parties considering that the dispute remained. This treatment was inspired by the Calvo Doctrine requirement that foreign investors exhaust local remedies before utilizing international settlement systems. However, when Argentina accepted the idea of ICSID authority, this doctrine was replaced within Argentine BITs by the recognition of an investor's right to choose his jurisdiction.<sup>143</sup>

The Argentina-United States BIT was signed in 1991 and entered into force in 1994. In many ways, it served as a precedent. According to Marian Nash, the "standstill and rollback of Argentina's trade-distorting performance requirements . . . were precedent-setting steps in opening markets for U.S. exports, and in this respect, as well as in its approach to dispute settlement, the Treaty

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<sup>139</sup> Vinuesa, *supra* note 128, at 503.

<sup>140</sup> *Id.* at 504.

<sup>141</sup> *Id.* at 505.

<sup>142</sup> *Id.* at 508.

<sup>143</sup> *Id.* at 509.

[served] as a model for U.S. negotiations with other South American countries.”<sup>144</sup>

Argentina views BITs as within a category of treaties referred to within the Argentine Constitution<sup>145</sup> as meriting higher deference than Argentine laws and statutes, yet being below the Argentine Constitution in the same legal deference hierarchy.<sup>146</sup> For a country with immense economic problems, and therefore with the potential for a large number of suits to be filed as a result of policy decisions made during economic turmoil, the BITs may not allow sovereign policy decisions to justify breaches of contract. Where they do not, BITs may act much the same as the ICSID Convention in that they disallow the state to make policy decisions based on economic need.<sup>147</sup>

However, BITs are negotiated between two sovereign nations. Unlike ICSID, the limited application of BITs may make it more likely for Argentina to negotiate with its treaty partner to resolve differences brought from general economic turmoil. In bilateral treaties, good faith is generally a key component, and thus public policy can be accounted for.<sup>148</sup> ICSID provides no such remedy.

Moreover, although BITs are designed to encourage foreign investment flows, many BITs also contain non-precluded measures (NPM) clauses that actually limit investor protections in situations of particular importance to the investor country.<sup>149</sup> NPMs allow a country to take actions inconsistent with treaty obligations when necessary for the maintenance of public order, national security, or

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<sup>144</sup> Marian Nash, *US Practice: Bilateral Investment Treaties*, 87 AM. J. INT'L L. 433, 433 (1993).

<sup>145</sup> The Argentine Constitution states, in part, that Congress is empowered “[t]o approve or reject treaties concluded with other nations and international organizations, and concordats with the Holy See. Treaties and concordats have a higher hierarchy than laws.” CONST. ARG., sec. 75, subsec. 22.

<sup>146</sup> See Horacio Rosatti, *Globalization, Statism and Law (Argentina and ICSID)*, TRANSNATIONAL DISPUTE MANAGEMENT 2004, at 18, available at [http://www.transnational-dispute-management.com/news/tdm2-2005\\_2.pdf](http://www.transnational-dispute-management.com/news/tdm2-2005_2.pdf) (stating this view of the importance of BITs). The Argentine Constitution is the supreme law of the land. CONST. ARG., sec. 31.

<sup>147</sup> See *id.* at 25 for a discussion of conflating ICSID and BITs.

<sup>148</sup> Burdman, *supra* note 25, at 152.

<sup>149</sup> See generally William Burke-White & Andreas von Staden, *Rethinking the Bargain: Balancing Investor Protections with State Freedom of Action in the Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties* (forthcoming 2007) (on file with author) (discussing NPM clauses in the BITs of Germany, India, and the United States).

other essential security interests. According to Kenneth Vandeveld, an NPM generally is included in a BIT and later invoked because "some public policy concerns of the state were deemed sufficiently compelling that they justified state interference with market-based allocations of capital."<sup>150</sup> If countries are able to judge for themselves whether an action taken falls under the essential security interest exception to BIT protections, the consequences for investors are potentially far-reaching. If taken under the guise of essential interests, actions against investment would be immune from review by any party or tribunal established under the BIT; "[i]n short, invocation of the essential security interests exception would cut off all investor remedies under the BIT."<sup>151</sup>

Thus growing use of and reliance on NPM clauses has thereby changed the understanding of what a BIT stands for. As discussed above, BITs have traditionally been valued as bargains that grant foreign investors international protection against host State usurpations in exchange for investment in those developing host State economies. The use of NPMs within those treaties, however, suggests that certain "host states grant investors greater protection than they would have had under customary international law in exchange both for the greater prospect of investment flows and a greater freedom of action in times of crisis than would be available under customary international law."<sup>152</sup>

The use and interpretation of NPM clauses has been particularly important for Argentina. In many of the ICSID cases brought against Argentina, Argentina has asserted its rights under the NPM clause of the United States-Argentina BIT as a defense against claims that Argentina had breached its treaty obligations.<sup>153</sup> Tribunals have weighed in on how to interpret NPM clauses in two ICSID cases brought against Argentina, *CMS v. Argentina*<sup>154</sup> and *LG&E v. Argentina*,<sup>155</sup> but with very different assessments. In *CMS*, the tribunal found that the NPM was not appropriate in the Argentine case in light of the stringent customary international law de-

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<sup>150</sup> Kenneth J. Vandeveld, *Of Politics and Markets: The Shifting Ideology of the BITs*, 11 INT'L TAX & BUS. L. 159, 164 (1993).

<sup>151</sup> *Id.* at 176.

<sup>152</sup> Burke-White & Von Stadten, *supra* note 149, at 5.

<sup>153</sup> *See id.* at 6 (discussing Argentina's use of the NPM as a defense).

<sup>154</sup> *CMS Gas Transmission Co. v. Argentine Republic*, ARB/01/8 (ICSID 2006).

<sup>155</sup> *LG&E Energy Corp v. Argentine Republic*, ARB/02/1 (ICSID 2006).

fense of necessity. In *LG&E*, on the other hand, the tribunal found that because of the NPM clause in the United States-Argentina BIT, Argentina was not liable for any actions during the economic crisis.<sup>156</sup> As such, interpretation of NPM clauses in BIT agreements is far from settled, but can have sizeable effects on the outcome of many of the cases against Argentina.

## 6. ARGENTINA'S CURRENT POSTURE

Far more now than in any other period in its history, Argentina has demonstrated a willingness to utilize arbitration as a method of dispute resolution.<sup>157</sup> And yet, although Argentina has become more accepting of utilizing international arbitration to settle disputes with foreign investors, it has not accepted the Convention's jurisdiction for all disputes that could possibly qualify.<sup>158</sup> In particular, Argentina has fought the assertion of ICSID jurisdiction in disputes concerning the breach of concession contracts that had forum selection clauses in favor of domestic jurisdiction.<sup>159</sup> In at least one of these cases, the ICSID tribunal affirmed its jurisdiction however, "holding that claimants' claims concerning the actions of the federal government of Argentina. . . were properly characterized as claims arising under the BIT, and not as contractual claims under the concession agreement."<sup>160</sup> As a result, even in the face of Argentina's denial of jurisdiction, the tribunals have found that they retain authority to hear such cases.

Economic and political realities have placed Argentina in an unsteady position with respect to how it will deal with its obligations under international treaties. There are at least 32 pending cases (out of 103) involving the Argentine government in front of the ICSID tribunal at present.<sup>161</sup> Many of these cases stem from the

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<sup>156</sup> For an in-depth discussion of *CMS* and *LG&E*, see Burke-White & Von Stadten, *supra* note 149, at 6.

<sup>157</sup> See Christina Whittinghill, *The Role and Regulation of International Commercial Arbitration in Argentina*, 38 *TEX. INT'L L.J.* 795, 796 (2003) (utilizing Argentina as a case study due to its willingness to enter into BITs in the past).

<sup>158</sup> See Vinuesa, *supra* note 128, at 515-34 (detailing descriptions of the cases in which Argentina, even after signing both BITs encouraging arbitration of disputes and ICSID mandating arbitration, objected to ICSID jurisdiction on alternative grounds, such as the existence a forum selection clause).

<sup>159</sup> *Id.* at 525.

<sup>160</sup> *Id.* (citing the Tribunal in *Compañía de Aguas del Aconquija S.A. v. Argentine Republic*, ARB/97/3 (ICSID 2000), *reprinted in* 40 *I.L.M.* 426 (2001)).

<sup>161</sup> See *ICSID Cases*, *supra* note 10 (listing cases pending before ICSID).

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financial turmoil that Argentina underwent in 2001, often as a result of disturbance to private stakes in public utilities.<sup>162</sup> In general, the private investors that have brought suit under ICSID invested billions of dollars during the privatization process of the 1990s, and now seek compensation for breaches of contract and international law.<sup>163</sup> A number of cases have already been tried before ICSID tribunals, generally with the finding that the emergency measures taken by Argentina in 2001 violated contractual promises within many of its investment protection proceedings. For example, although the tribunal in *CMS* recognized that Argentina had not singled out foreign investors for discriminatory treatment, it found that the government had denied such investors the stable regulatory framework advertised to foreigners throughout the 1990s, which they say induced them to invest into the country. This failure to ensure stability and predictability amounted to a breach of the treaty requirement to give foreign investors "fair and equitable treatment."<sup>164</sup>

Argentina now argues that ICSID tribunals seem inclined to interpret treaty protections so as to unfairly privilege foreign investors over domestic.<sup>165</sup> The crisis affected every investor that had money invested within the country, regardless of nationality. By awarding damages in breach of contract cases stemming from the Economic Emergency law in 2002, Argentina argues that ICSID has placed foreign investors that are covered by the ICSID agreement above the domestic investors that must rely on the domestic Argentine system.<sup>166</sup>

When in economic default, countries unable to actually pay debts owed often use policy measures and negotiations to stabilize their debt. By the strict terms of the contract with the State, individual private investors may be entitled to more than they could get if negotiating with the country after default. Under ICSID, domestic political measures and negotiations are of little use because private investors have a financial incentive to use ICSID to regain all of their losses. Thus, with Argentina only able to control its domestic economic policy vis-à-vis those bringing suits in its own courts, Argentina is placed in the untenable position of un-

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<sup>162</sup> Peterson, *supra* note 16.

<sup>163</sup> Vinuesa, *supra* note 128, at 525.

<sup>164</sup> See generally Peterson, *supra* note 16 (discussing *CMS*).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

evenly forcing investment losses upon its own citizens who do not have access to ICSID arbitration. It is understandable, then, that Argentina has taken the positions (1) that a government should have a right under international law to take measures necessary to ensure its survival, and (2) that as long as those measures do not prejudice foreign investors, the international community should not determine the ability of a country to act.<sup>167</sup>

Since ICSID's creation, no country has refused to pay an arbitral award once its determination was finalized.<sup>168</sup> And yet, if all of the cases currently before ICSID were adjudicated, Argentina could be in an unsustainable position of being liable for more than \$17 billion.<sup>169</sup> Moreover, were all the *potential* cases against Argentina adjudicated, it could be liable for nearly \$100 billion.<sup>170</sup> Furthermore, because no hierarchy between cases can be easily ascertained, were Argentina to try each case that is brought against it, its resources would be depleted by those that went to judgment first, thus putting it in the position of being unable to satisfy its creditors. Paradoxically, in an ICSID context where each arbitration is brought separately, the potential for unequal treatment is even higher than in other contexts because each case can be decided on separate grounds.

With this as background, the view of former Argentine justice minister, Horacio Rosatti, that ICSID arbitral decisions should not be held to a higher magnitude than Argentina's own constitution, and may be reviewed by Argentina's courts for compatibility, is understandable. Although this view of hierarchy goes against the notion that ICSID arbitrations are separate and unreviewable by domestic courts, it does present Argentina with a feasible means of self-preservation. Blindly following an ICSID determination, like that in *CMS*, that Argentina was unjustified in its actions following its economic crisis effectively cedes control over its economic policy to each individual arbitration President that hears an Argentine case.

Not only does questioning the power of ICSID decisions decrease the possibility of 20 cases each being resolved under different reasoning, it allows Argentina to develop a single, unified means under which any investment disputes arising out of the

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<sup>167</sup> *Id.*

<sup>168</sup> *See id.* (discussing Argentina's current posture).

<sup>169</sup> *Id.*

<sup>170</sup> *German Investor Dogs Argentines on Debt*, *supra* note 21.

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2001 crisis may be treated, allowing all creditors domestic and foreign to be treated equally.

Even though its politicians have condemned the tribunal's recent decisions, Argentina has indicated that it will honor the Convention and use the narrow procedural grounds available to it in challenging these awards.<sup>171</sup> For the most recent decision against Argentina in *CMS*, these legal procedures will buy Argentina some time before payment is expected, but if it fails to overturn the award, it will be in "uncharted legal waters."<sup>172</sup>

The way that Argentina has chosen to deal with its bondholders after default may be indicative of how the country will treat those that prevail in ICSID arbitrations. Although some would argue that Argentina may comply with any awards granted in order to bolster its reputation and ensure that economic investment is properly incentivized,<sup>173</sup> this is by no means assured. On the contrary, Argentina has shown a distinct willingness to implement nationalistic, populist economic policies, even in the face of alienating multinational organizations and discouraging investment by foreign companies. Indeed, while demanding massive debt relief from its sovereign bond debts, Argentina simultaneously refused to engage in dialogue with its investor base and did not follow through on many of its promises to lending agencies.<sup>174</sup> If a country is willing to alienate its bondholders, it will not likely have a problem treating any suits brought by private investors with equally short-shrift.

In fact, the short-term interests of Argentina may indeed be better served by addressing domestic issues of unemployment and poverty with its limited resources than servicing its debt to private foreigners.<sup>175</sup> This is no less true for awards under ICSID arbitration. With mounting domestic problems, Argentina has an increasingly small Treasury to fulfill increasingly large obligations. In the

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<sup>171</sup> Peterson, *supra* note 16.

<sup>172</sup> *Id.*

<sup>173</sup> See Boralessa, *supra* note 22, at 66–67 ("[C]ompliance with awards can bolster a country's reputation for good governance and thereby lower perceived political risks for investors, enhancing its ability to participate and benefit fully from the global economy. Argentina may consider this of particular importance as it is emerging from a financial crisis.").

<sup>174</sup> For a discussion of how Argentina has treated its bondholders, see Arturo C. Porzecanski, *From Rogue Creditors to Rogue Debtors: Implications of Argentina's Default*, 6 CHI. J. INT'L L. 311, 327 (2005).

<sup>175</sup> Boralessa, *supra* note 22, at 67.

future, the neonational tendencies of the Argentine government in dealing with its bondholders and ICSID parties to dispute could very well poison the business climate within the country.<sup>176</sup> Argentina is left balancing immediate issues of societal welfare with longer issues of shoring up foreign investor confidence in Argentina. It is not remotely settled which interest will win out.

It is important to note that, with the tribunal decision regarding NPMs in BITs in *LG&E v. Argentina*,<sup>177</sup> Argentina may have a chance to win some of its cases on the merits even under ICSID auspices. Because *LG&E* found that Argentina's policy reaction to its economic crisis was "a necessary and legitimate measure" that excused the country from liability for the alleged violations of its treaty obligations,<sup>178</sup> Argentina now has some indication that future tribunals may find its defense of economic necessity compelling. Argentina is thus at an uncertain point in its dealings with ICSID. The country has adopted a position that is highly cynical about ICSID and its ability to correctly balance Argentina's interests against those of the investors. However, it has also gained some traction within the system for its argument that the NPM clause in its BITs precludes liability for any actions taken as a matter of national security. It is by no means assured, however, that any future tribunals will find similarly. Each case must be taken on an ad hoc basis under ICSID, which leaves Argentina in a vulnerable and uncertain position.

## 7. CONCLUSION

While the ICSID Convention was established to promote foreign investment in countries that sought it, the fact that it exists as an impartial, non-political system produces a perverse result in situations where a country is required by extraordinary financial straits to work outside of ICSID's treaty obligations. The arbitration system, in these situations, ceases to be a neutral dispute settlement system and instead hands down what amounts to pro-investor awards because it arbitrates without regard for the aggregate circumstances surrounding a "breach."

In the context of disputes over bond defaults, the international community and particularly the G-7 governments have not been

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<sup>176</sup> Porzecanski, *supra* note 174, at 332.

<sup>177</sup> *LG&E Energy Corp. v. Argentine Republic*, ARB/02/1, 71 (ICSID 2006).

<sup>178</sup> *Id.* at 245

willing to take a hard stand against countries that default on their bonds. On the contrary, the countries have provided a safe harbor for Argentina's hard currency assets.<sup>179</sup> If they are willing to turn a blind eye towards helping enforce bondholder rights, it is not inconceivable that they would also do so in Argentine ICSID cases that would otherwise be enforced. Even though some national courts have signaled their willingness to uphold arbitral awards,<sup>180</sup> they have not done so in situations in which the sovereign country at issue was under immense economic distress. And yet, "[d]ealing with a rogue sovereign debtor requires, in actual practice, the political willingness of other sovereign states to confront the errant nation, whether directly or through a supranational body such as the IMF."<sup>181</sup> For Argentina's issues to be resolved, either an individual country or a supranational body must be willing to get involved. A solution must be constructed to apply across all Argentine ICSID cases, not just individual, ad hoc settlements.

ICSID awards were designed to be automatically enforced. It was decided during the ICSID drafting process that states would be unable to opt out of recognizing or enforcing awards on the ground that they conflicted with public policy because doing so would dangerously erode the binding character of the awards.<sup>182</sup> However, doing so indiscriminately does more than impinge lightly upon the sovereign status of countries in favor of upholding the binding quality of ICSID; it gives a direct blow to the ability of sovereign countries to control their economic policy. Tribunals generally view each case on an individual basis; they may not look at the full political or economic situation that informed the actions a country takes. If tribunals subsequently rule against countries for the politically motivated actions they take, they can paralyze the ability of a country that is undergoing massive economic upheaval to manage their policies in a way that would provide the largest overall utility to investors. As Rosatti has pointed out,

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<sup>179</sup> Porzecanski, *supra* note 174, at 327-28. A number of Argentina's assets are held out of attachment range in the Bank for International Settlements (BIS). The international community has also supported Argentina by granting new loans, via the IMF, World Bank and Inter-American Development Bank. Even though the IMF has stopped new funding as the result of Argentina not following through with promised reforms, other multilateral agencies like the IMDB have continued to grant new money.

<sup>180</sup> Loftis & Goins, *supra* note 14, at 46.

<sup>181</sup> Porzecanski, *supra* note 174, at 327.

<sup>182</sup> Boralessa, *supra* note 22, at 74, 77.

the logical *commercial bias* present in the international investment disputes regime . . . raises . . . an additional difficulty to incorporate the ponderation of socio-economic factors within the decision of a dispute, which would not only allow to *explain* the behavior of the respondent but also to *find alternative solutions* for the claimants.<sup>183</sup>

By evaluating each arbitration on the merits, with prior awards given little precedential value, ICSID tribunals lack the ability to give consideration to the global nature of the problem.

Within ICSID, the ability of each private investor to bring an individual suit against the Argentine debtor in an international forum that decides each case *ad hoc*, and rarely relies on precedent from one case to another, may have dramatic consequences on the future stability of the country's economy. Although some companies that have filed suit under ICSID have agreed to suspend their claims as part of interim accords signed with Argentina's public services, they have not been fully dissolved and may be reinstated if the accords do not lead to satisfactory results. Thus, the future status of these claims is a key point of contention in the government's revision of 62 utility contracts.<sup>184</sup> Although the Attorney of the Treasury, Osvaldo Guglielmino, did recognize the tribunal decision in May 2005 against Argentina without resorting to its own Courts for counter-judgment, it is unclear what the future outcome of continued awards against Argentina will be.<sup>185</sup> This is particularly salient because the ICSID Convention does not allow for the arbitration process to be suspended until the end of the current negotiations between the Argentine government and the litigating companies.<sup>186</sup>

Even if the present situation with Argentina does present major problems for operation and enforcement of the ICSID system, it does not follow that these issues will incapacitate or delegitimize the system as a whole. For other countries that have suits pending against them, the incentives to abide by ICSID judgments, which make the system so unique and effective, remain regardless of one country's unique decision not to enforce awards because of the in-

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<sup>183</sup> Rosatti, *supra* note 146, at 24.

<sup>184</sup> *World Bank Claims*, *supra* note 15.

<sup>185</sup> See Burdman, *supra* note 25, at 151 (outlining Guglielmino's recent actions regarding ICSID suits).

<sup>186</sup> Bissio, *supra* note 26.

ability to pay them. Developed countries still have an interest in seeing that their national investors are able to pull misbehaving countries into court. Developing countries likewise have an incentive to follow through with the obligations imposed by the Convention in order to promote a stable economic environment and encourage investment.

As a result, the major reform necessary as a result of Argentina's refusal to recognize any judgments may be the modification of the ICSID charter in a way which accounts for situations of massive economic downturns that it had previously overlooked. The ICSID arbitration could look to the NPM clauses within BIT agreements as a model. Including such a provision within the Convention would still provide investors with protection against host States but would also balance the protections against major national security concerns. Because an incentive exists under the present system for individual plaintiffs to continue filing suits against Argentina in the hopes that they can get money from the government before the Treasury is completely depleted, any real modification which would take into account States' overall economic status when enforcing is at issue must be accomplished on the sovereign state level. It is in Argentina's interest, as well as any other country that may suffer from an economic failure in the future, to be able to create a unified approach to deal with litigation stemming from such a collapse.

But, more than that, the ICSID system must be reformed by including essential security interest provisions so that the very rise in the number of litigations stemming from this type of economic event will not completely incapacitate it. To some extent, it is comforting to know that the bottleneck of Argentina-related cases has prompted World Bank officials to rethink the system. It has been reported that the World Bank initiated a process of revision and updating of the arbitration system.<sup>187</sup> Revision of the Convention to take into account major economic crises would keep the arbitral bureaucracy from becoming overloaded during periods of crisis.

The situation with Argentina has placed the ICSID system in uncharted waters, from which it cannot emerge without a substantial alteration in the very way it views itself. Economic downturns,

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<sup>187</sup> *Argentina Government Rejects Utilities World Bank Tribunal Claims*, NOTICIAS.INFO, available at [http://www.noticias.info/archivo/2004/200410/20041018/20041018\\_36590.shtm](http://www.noticias.info/archivo/2004/200410/20041018/20041018_36590.shtm) (last visited Mar. 29, 2007).

like that which Argentina underwent in 2001, are not unforeseeable in the future. If ICSID is to survive as a meaningful body, the signatory countries must be able to find a method of dealing with countries that do not have the means to enforce judgments against them even if they do have the will to do so. Currently, the fact that no such means exists gives Argentina little choice but to continue on its current path and possibly violate its international obligations.