

THE ICSID CONVENTION: ORIGINS AND TRANSFORMATION

*Andreas F. Lowenfeld**

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* Andreas F. Lowenfeld is the Herbert and Rose Rubin Professor of International Law at New York University. Professor Lowenfeld delivered this speech at the Seminário Internacional Sobre a Arbitragem Relativa a Investimentos Internacionais, organized by the Associação Portuguesa de Arbitragem in Lisbon in October 2007. This Article was first published in REVISTA INTERNACIONAL DE ARBITRAGEM E CONCILIAÇÃO 37–53 (Almedina ed., 2009), and is here published with permission; it has been edited for content and length.

I. INTRODUCTION

I may not be the only surviving founder of the ICSID Convention, but I believe there are not many of us left. In any event, I was “present at the creation,” to borrow Dean Acheson’s phrase, and I think it is of interest – not only historical interest – to go back to the period 1963-1965 to look at what was expected, what looked possible, and what has become of the Convention in the intervening decades.

II. ORIGINS OF THE CONVENTION

A. A Decade at the United Nations

The initiative for the Convention came as a counterpoint to the debate that had gone on for some ten years in various organs of the United Nations over the relation between host countries – i.e. developing countries – and foreign investors – i.e. multinational corporations. A compromise Resolution on Permanent Sovereignty over Natural Resources¹ had finally made it through the General Assembly, containing numerous recitals of sovereignty and self-determination and not much welcome to increased foreign investment. A proposal that compensation for expropriation or nationalization be subject only to the national law of the host state was defeated, and the final version as adopted spoke of “rules in force in the State taking such measures . . . and in accordance with international law.”² The back and forth at the United Nations (UN) can be seen in the following two sentences of the same paragraph.

First,

In any case where the question of compensation gives rise to controversy, the national jurisdiction of the State taking such measures *shall* be exhausted.

Second,

However, upon agreement by Sovereign States and other parties concerned, settlement of the dispute *should* be made through arbitration or international negotiation.³

¹ G.A. Res. 1803 (XVII), U.N. Doc. A/5217/Supp. No. 17 (Dec. 14, 1962).

² *Id.*

³ *Id.* ¶ 4. It is interesting that in comparison with the draft proposed by the Special Commission to the General Assembly, the first sentence was changed from “should” to “shall” – i.e. stronger for the host country, while the second sentence was changed from “may” to

Would investor-state arbitration be compatible with this formulation? Many states thought not: international law concerned agreements between states; agreements between states and private parties were subject only to national law. The United States and the United Kingdom sought to counter this view by introducing an amendment that became a new Paragraph 8, providing that foreign investment agreements “shall be observed in good faith.”⁴ The amendment did not state explicitly “agreements between foreign investors and sovereign States.” Apparently that would have been too direct. The best the capital-exporting countries could do was the formula “*by or between* sovereign States.”⁵

This then was the climate of opinion, reflected in a fragile consensus, at the United Nations.

B. A Different Climate at the World Bank

At the World Bank, meanwhile, where the industrial states had greater voice and greater vote, a different perception was taking shape. Neither the World Bank and its regional analogues, nor bilateral assistance programs such as the American “Alliance for Progress,” could satisfy the needs for capital of the developing countries. Moreover, while the public sector could only provide funds, private investors could provide the technical skills, management, know-how, and marketing needed for sustainable economic advancement. But in the wake of decolonization in Africa and parts of Asia and take-overs of foreign investments throughout the Third World, potential investors would seek some protection before risking their capital and personnel in an often hostile environment. Even if agreement on the substance of the obligations of host states to foreign investors could not be achieved except in the most general terms, availability of a stable facility for dispute settlement, presided over by

“should,” – i.e. stronger for the investors.

⁴ *Id.* ¶ 8.

⁵ The final version of Paragraph 8 read:

Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith; States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution.

Id. (emphasis added). For details of the debates and the various drafts considered by the General Assembly, see Stephen M. Schwebel, *The Story of the UN's Declaration on Permanent Sovereignty over Natural Resources*, 49 A.B.A. J. 463 (1963), and Karol N. Gess, *Permanent Sovereignty over Natural Resources*, 13 INT'L & COMP. L.Q. 398 (1964), which reproduces the final text along with two earlier drafts.

an institution with both prestige and money, might reduce some of the disincentives to foreign direct investment and thereby contribute to the Bank's mission of furthering economic development.

C. *Laying Out the Plan*

Internal memoranda along these lines had been circulating at the World Bank since the summer of 1961, written or stimulated by the Bank's creative General Counsel, Aron Broches.⁶ By April 1962, the Bank's Executive Directors devoted a meeting to the proposal for a Centre for Settlement of Investment Disputes, to be created by a multilateral treaty,⁷ and a Working Paper in the form of a draft convention was circulated to governments in the summer of 1962.⁸

In February 1963, Broches submitted to a Committee of the Whole⁹ a detailed commentary on the proposal.¹⁰ Interestingly enough, Broches made no mention of the debates at the United Nations or of the Resolution on Permanent Sovereignty just adopted. But he spoke of three proposals under discussion. One was the Draft OECD Convention on the Protection of Foreign Property, which would set out substantive rules for the protection of foreign-owned property as well as rights of investors to proceed against host states before an international tribunal.¹¹ That proposal got nowhere at the time, nor when renewed in the 1990s.¹²

A second proposal was to establish a multilateral investment insurance system. That proposal also got nowhere in the 1960s, but was the forerunner

⁶ I rely for this pre-history on 2 INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES, CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION, pt. 1 (1968) [hereinafter ICSID HISTORY].

⁷ Memorandum of Meeting of Executive Directors on the Subject of "Settlement of Investment Disputes" (Mar. 13, 1962), *in id.* at 13–19 (Doc. No. 5).

⁸ Working Paper in the Form of a Draft Convention Prepared by the General Counsel and Transmitted to the Executive Directors (June 5, 1962), *in id.* at 19–46 (Doc. No. 6).

⁹ The Committee of the Whole is comprised of all the Executive Directors organized as an ad hoc committee without reference to their respective voting power.

¹⁰ Paper Prepared by the General Counsel and Transmitted to the Members of the Committee of the Whole (Feb. 18, 1963), *in ICSID HISTORY, supra* note 6, at 71–85 (Doc. No. 15).

¹¹ See Organization for Economic Cooperation and Development [OECD], *Draft Convention on the Protection of Foreign Property*, 2 I.L.M. 241 (1963), available at <http://www.oecd.org/dataoecd/35/4/39286571.pdf>.

¹² See ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT [OECD], INTERNATIONAL INVESTMENT, REPORT TO THE MINISTRY BY THE SECRETARY GENERAL, THE MULTILATERAL AGREEMENT ON INVESTMENT: WHY DID IT FAIL? 162–70 (1999).

of MIGA, the Multilateral Investment Guarantee Agency, organized under auspices of the World Bank in the 1980s.¹³ “The Bank’s approach to the problem,” Broches wrote, “is more modest than the other two.”

While they aim at improving the investment climate, the proposals submitted to [the Bank’s] Executive Directors neither contemplate rules for the treatment of foreign property nor compulsory adjudication of disputes. They would make available to foreign investors and host governments facilities for conciliation or arbitration of disputes between them. Use of these facilities would be entirely voluntary. No government and no investor would ever be under an obligation to go to conciliation or arbitration without having consented thereto.¹⁴

Broches then set out the principal features of the proposal – about the role of the Bank, the rules for conduct of an arbitration or conciliation, and the binding effect on both parties of an agreement to submit particular controversies to arbitration under the convention:

If the parties had agreed to use the services of the Center for arbitration as the sole means of settling their dispute, the government party should not be permitted to refer the private party to the government’s national courts, and the private party should not be permitted to seek the protection of its own government and that government would not be entitled to give such protection Finally, . . . the Convention would provide that such awards would be enforceable in the territories of the countries adhering to the Convention.¹⁵

Essentially, this became the plan for the Convention, as it went through several further drafts. What was carefully omitted was any provision going to the substance of the obligations running between host states and foreign investors. The Convention, in other words, was to be an arbitration convention, not a convention concerning the international law of investment.

¹³ Convention Establishing the Multilateral Investment Guarantee Agency, Oct. 11, 1985, T.I.A.S. No. 12089, 1508 U.N.T.S. 99 (concluded in Seoul, South Korea on Oct. 11, 1985 and entered into force Apr. 12, 1988).

¹⁴ ICSID HISTORY, *supra* note 6, at 74.

¹⁵ *Id.* at 80.

The sole provision about what arbitrators might do if a dispute between a state and a foreign investor came before them read like the arbitration rules of the ICC or the London Court of International Arbitration.¹⁶

In the absence of any agreement between the parties concerning the law to be applied, . . . the Arbitral Tribunal shall decide the dispute submitted to it in accordance with such rules of law, whether national or international, as it shall determine to be applicable.¹⁷

Why did the proposed convention not say something about the law, about the obligations that were to be upheld by dispute settlement under the Bank's auspices? I believe for the same reason that Broches and George Woods, the President of the World Bank, carefully avoided a diplomatic conference or even a world-wide preparatory conference. They did not want this effort to replicate the experience of the United Nations. Instead, the Bank called for four regional "Consultative Meetings of Legal Experts," – not, quite clearly, meetings of politicians. The deliberations were to be informative and technical – professionals going over a draft prepared in advance. All expenses (including first class air fare) would be paid by the Bank.

D. The Consultative Meetings (December 1963–May 1964)

At these four meetings – in Addis Ababa, Santiago de Chile, Geneva, and Bangkok – Broches explained the Bank's limited agenda:

Some might think it desirable to go beyond [creating a dispute settlement machinery] and attempt to reach a substantive definition of the status of foreign property At the same time

¹⁶ See ICC Rules of Arbitration, art. 17 (1998 version), available at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf ("In the absence of any . . . agreement, the Arbitral Tribunal shall apply the rules of law which is determines to be appropriate."); LCIA Rules, art. 22 (1998), available at http://www.lcia.org/ARB_folder/ARB_DOWNLOADS/ENGLISH/rules.pdf ("Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power . . . to conduct such enquiries as may appear . . . to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in . . . ascertaining the . . . law(s) or rules of law applicable to the arbitration . . .").

¹⁷ Article VI, section 5(1) in the June 5, 1962 draft, essentially unchanged as Article VI, section 4(1) in the August 9, 1963 draft and as Article IV section 4(1) of the October 15, 1963 draft that became the basis for the four regional meetings described hereafter.

however, there was need to pursue a parallel effort of more limited scope, represented by the Bank's proposals.¹⁸

The bargain offered to developing countries was a convention that would accept in principle that states and foreign investors could submit their legal disputes to international tribunals with binding effect. In return, the investor's home state would no longer be able to "espouse" a claim of its nationals.

The Convention would offer a means of settling directly, on the legal plane, investment disputes between the State and the foreign investor and would insulate such disputes from the realm of politics and diplomacy.¹⁹

The proponents of the Convention wanted to make sure not to take a bigger bite than they could chew. The Convention would not lay down standards for the treatment by States of the property of aliens, and it would not be concerned with the merits of investment disputes.

While the Bank believed that private investment had a valuable contribution to make to economic development, it was neither a blind partisan of the cause of the private investor, nor did it wish to impose its views on others.²⁰

The suggestion to spell out the law – and in particular the international law – to be applied came up only in the Geneva meeting – dominated by representatives of capital-exporting countries, and was neatly parried by Broches.²¹ In the Santiago meeting which I attended, the United States delegation quickly got the hint. We expressed support for the Convention by proposing technical drafting changes, particularly with respect to defining a foreign investor in terms of ownership and control even if it was locally incorporated.²² But we made no speeches about the benefits of foreign investment, or the dangers of expropriation, the Hull Formula, or similar elements of United States doctrine.

¹⁸ ICSID HISTORY, *supra* note 6, at 240–41.

¹⁹ Broches gave substantially the same introductory speech at each of the meetings. *Id.* at 241–43 (Addis Ababa), 303–05 (Santiago), 369–73 (Geneva), 464–65 (Bangkok).

²⁰ *Id.* at 242.

²¹ *Id.* at 418–20.

²² *Id.* at 359–62 (remarks of Mr. Belin and Mr. Lowenfeld).

Even the modest proposals of the Bank were hard for many of the Latin Americans to accept. The delegate of Brazil stated that the Convention raised constitutional problems, since it implied curtailment of the judicial branch's monopoly of the administration of justice, and would grant foreign investors a legally privileged position in violation of full equality before the law.²³ The representative of Argentina said that foreign investors in his country had sufficient guarantees so as to make recourse to other bodies unnecessary: "No shadow of suspicion must be allowed to fall on these guarantees, as would be the case were the suggested agreement ratified."²⁴

E. Adoption of the Convention—Not by Consensus

In the event, as is well known, the World Bank went ahead with a resolution of the Board of Governors at the Annual Meeting in Tokyo to approve the Convention for submission to member governments. The resolution was passed, but with 21 countries – all the Latin American countries plus the Philippines – voting against.²⁵ I believe this was the first time that a major resolution of the World Bank had been pressed forward with so much opposition – "El No de Tokyo" as the Latin American press called it.²⁶

I tell this story to recall for the present generation how it was that the ICSID Convention came out as it did. On the one hand it reflected a significant counter-trend to the trend at the United Nations that was moving at the same time from "Permanent Sovereignty" to the "New International Economic Order," which would have essentially excluded international law from the regulation of foreign investment. On the other hand the Convention had two very large gaps: (1) Companies considering an investment in a country that had joined the Convention could not count on consent to arbitrate, and (2) even if a host state gave its consent to arbitrate disputes that might arise out of a given investment, there was no assurance about the criteria that an ICSID tribunal might apply if a dispute were submitted to it. No "fair and equitable treatment" provision, no non-discrimination provision, nothing about expropriation, compensation, or "full protection and security." Remember, this was the period when the U.S. Supreme Court wrote:

²³ *Id.* at 306 (remarks of Mr. Ribeiro).

²⁴ *Id.* at 308 (remarks of Mr. Barboza).

²⁵ *Id.* at 608 (Resolution No. 214 of the Board of Governors, Sept. 10, 1964).

²⁶ For a detailed discussion of the reasons for the negative attitude toward the Convention in Latin America, see Paul C. Szasz, *The Investment Disputes Convention and Latin America*, 11 VA. J. INT'L L. 256 (1971).

There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens.²⁷

No wonder that only eleven disputes were brought to the Centre in its first fifteen years, and only six resulted in a final award.

III. THE TRANSFORMATION

In the 1980s and thereafter, the two gaps were filled. One could say the Convention was amended, but of course the provisions for amendment of the Convention were not followed, and indeed are almost impossible to follow.²⁸ Transformation is a better term from the point of view both of legality and reality.

A. The State's Consent to Arbitrate

None of the discussion at the consultative meetings, or so far as I know in the contemporary writing and legislative consideration, addressed the possibility that a host state in a bilateral treaty could give its consent to arbitrate with investors from the other state without reference to a particular investment agreement or dispute. I know that I did not mention that possibility in my

²⁷ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

²⁸ Article 66 of the ICSID Convention provides that a proposed amendment shall enter into force thirty days after *all* Contracting States have ratified, accepted, or approved it. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 66, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention] (emphasis added). In contrast, the Articles of Agreement of the World Bank itself provide that, except for three sections concerning withdrawal and liability, amendments enter into force for all members when approved by three-fifths of the members having four-fifths of the voting power. International Bank for Reconstruction and Development Articles of Agreement art. 8 (as amended Feb. 16, 1989). The same formula, also with limited exceptions, is contained in the Articles of Agreement of the IMF (International Monetary Fund), which was in fact amended in a major way in 1978. The provision on amendment was changed from the earlier drafts which called for a two-thirds majority except for amendments imposing new obligations or affecting the provisions on jurisdiction and enforcement, but some states were nervous about being bound by any provisions their parliament had not approved. See International Monetary Fund Articles of Agreement art. 28 (as amended Nov. 11, 1992). At the meeting of the Executive Directors in March 1965, Broches said he would have preferred an amendment procedure that did not give every state a veto, but he did not insist, evidently because he did not want to risk sending the convention back to governments that had already approved it. ICSID HISTORY, *supra* note 6, at 1000–03.

testimony before the U.S. Congress,²⁹ and neither did anyone else.³⁰ Nor, except in a very subtle hint, was the suggestion made in the Report of the Executive Directors of the Bank submitted to governments with a view to ratification of the Convention.³¹ Yet consent by states pursuant to the Bilateral Investment Treaties (BITs) has become the standard practice.

I am not suggesting that the practice, whereby the State's consent to arbitration is open-ended and the investor's consent is given typically only when a dispute arises, is unlawful. Linking the dispute resolution provisions of BITs to ICSID can be reconciled without difficulty to Article 25 of the Convention:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State . . . and a national of another Contracting State which the parties to the dispute consent in writing to submit to the Centre.³²

²⁹ See *U.S. Implementation of the Convention on Settlement of Investment Disputes Between States and Nationals of Other States: Hearing on H.R. 15785 Before the Subcomm. on International Organizations & Movements of the H. Comm. on Foreign Affairs*, 89th Cong. 6 (1966) (statement of Andreas Lowenfeld, Legal Advisor, U.S. State Dept.).

³⁰ For a fuller record of consideration of the Convention by the U.S. Senate, including the submissions of the Executive Branch and numerous private parties and organizations, see CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES ACT OF 1966, S. REP. NO. 89-1374 (2d Sess. 1966).

³¹ Paragraphs 23 and 24 of the Report of the Executive Directors read as follows:

23. Consent of the parties is the cornerstone of the jurisdiction of the Centre. Consent to jurisdiction must be in writing and once given cannot be withdrawn unilaterally (Article 25(1)).

24. Consent of the parties must exist when the Centre is seized (Articles 28(3) and 36(3)) but the Convention does not otherwise specify the time at which consent should be given. Consent may be given, for example, in a clause included in an investment agreement, providing for the submission to the Centre of future disputes arising out of that agreement, or in a *compromise* regarding a dispute which has already arisen. Nor does the Convention require that the consent of both parties be expressed in a single instrument. Thus, a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.

REPORT OF THE EXECUTIVE DIRECTORS ON THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES (Mar. 18, 1965), reprinted in *ICSID CONVENTION: REGULATIONS AND RULES* 43 (2006).

³² ICSID Convention, *supra* note 28, art. 25.

Nothing in the text says the consent by the State must have been given in the investment agreement giving rise to the dispute, or even that there must have been an investment agreement. But the link was unexpected, and I am fairly certain, unplanned. There is no doubt that the vast number of BITs containing consent to arbitrate under ICSID has effected a major transformation of the Convention.

It is interesting that Broches, in his many speeches and writings about the Convention,³³ did not mention the link until 1982 – i.e., never before it was widely in use. I do not know whether Broches, who spent so much of his career in drafting and promoting the ICSID Convention, did not think of the possibility of consent in blank by host states, or believed that if he mentioned the idea it would contribute to the nervousness of host states. In his only writing, as far as I know, on BITs, Broches concluded:

Investment protection treaties and the Convention serve the identical aim of creating mutual confidence and an investment climate which will promote increased international investment flows Introducing the Convention mechanism into investment protection treaties may therefore be regarded as a particularly felicitous development.³⁴

B. The Applicable Law

As I mentioned earlier, what became Article 42 of the Convention was adopted with as little discussion as possible. In the absence of agreement by the parties, the tribunal was to apply the law of the host State “and such rules of international law as may be applicable.”³⁵ The BITs provide the agreement. *First*, there is no more “absence of agreement.” The treaty itself is applicable, thereby overcoming the law in many states (as well as the Charter of Economic Rights and Duties of States) committing regulation of foreign investment solely to national law. *Second*, specific obligations with respect to treatment of foreign investments are set out: national treatment, most-favored-nation treatment, fair and equitable treatment “no less than,” or “as required by” international law. *Third*, some BITs add the so-called “umbrella clause”

³³ See ARON BROCHES, *SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW* (1995) [hereinafter *SELECTED ESSAYS*].

³⁴ ARON BROCHES, *Bilateral Investment Protection Treaties and Arbitration of Investment Disputes*, in *SELECTED ESSAYS*, *supra* note 33, at 457.

³⁵ ICSID Convention, *supra* note 28, art. 42.

expressly requiring host states to observe any obligation it may have entered into with regard to foreign investments, that is converting (or purporting to convert) contracts subject to domestic law into international obligations. *Fourth*, the BITs universally set out the conditions for permissible expropriation, including a requirement of compensation and the criteria for such compensation. *Fifth*, the BITs provide a right to foreign investors to resort to international dispute settlement – nearly always with ICSID as one of the available fora.

In enumerating these provisions typical in Bilateral Investment Treaties I am not telling this audience everything it did not know. Nor am I suggesting that the words in the treaties answer all the questions, or that phrases such as “fair and equitable treatment” or “as required by international law” or “fair market value” have clear and uncontested meanings. My point is that the gap in the Convention has been filled, and that it has been transformed into a foreign investment protection convention.

One might say that was always the intention, and that the Convention as negotiated and adopted in the 1960s was a stepping stone. But Mr. Broches was careful to say at each of the Consultative Meetings that the Convention was not concerned with the merits of investment disputes,³⁶ and in his Hague Lectures he rejected the characterization of the Convention as an instrument for the protection of private foreign investment as “one-sided and too narrow.”³⁷ But with the link to the BITs, the Convention, and the two-hundred or so disputes that have come before ICSID Tribunals, ICSID has become a vast and growing depository of decisions, rulings, and precedents – one may fairly say a corpus juris of foreign investment law, or if you will, foreign investment protection law. This brings me to my last point.

IV. BITS AND CUSTOMARY LAW

Given the large web of BITs covering every continent and countries in all stages of development – 2,781 according to my latest information – can one say that the BITs as construed and interpreted by international tribunals are now evidence of customary international law, so that it is dispositive even when a given controversy is not explicitly governed by a treaty?

³⁶ ICSID HISTORY, *supra* note 6, at 242 (Addis Ababa), 304 (Santiago), 372 (Geneva), 465 (Bangkok).

³⁷ ARON BROCHES, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, in SELECTED ESSAYS, *supra* note 33, at 197.

F.A. Mann, writing early in the Age of BITs, answered “yes.”³⁸ Others, particularly those who question how voluntary the rush to sign BITs really was, answer “no.” Their contention is that each BIT is a *lex specialis*, applicable only between the host country and a national of the other State Party to the treaty, so that precedents arising out of disputes under other treaties are of no consequence, even if their content is identical or nearly so.³⁹ The argument, recently embraced by the United States government in the context both of investment treaties and of humanitarian law, is that to create or evidence customary law, states need not only follow a certain practice in large numbers, but need to do so from a sense of legal obligation – *opinio juris*.⁴⁰

I find that argument unconvincing. It relies on a definition of customary international law – itself creature of customary law – that is inextricably circular: practice, no matter how widespread, cannot ripen into customary law unless it is taken from a belief that it is required by law, and it cannot be regarded as law if it has not ripened (some use “crystallized”) as law. Some authorities suggest that a widely accepted multilateral treaty may lead to the creation of customary international law.⁴¹ My submission, consistent with the position of Dr. Mann, is that the ICSID Convention, the very wide acceptance of substantially identical BITs, and the substantial body of precedents, taken together, do represent a contribution to customary international law, a body of law that cannot and should not stand still.

³⁸ F.A. Mann, *British Treaties for the Promotion and Protection of Investment*, 1981 BRIT. Y.B. INT’L L. 241. Dr. Mann wrote:

The paramount duty of States imposed by international law is to observe and act in accordance with the requirements of good faith. From this point of view it follows that, where these treaties express a duty which customary international law imposes or is widely believed to impose, they give very strong support to the existence of such a duty and preclude the Contracting States from denying its existence.

Id. at 249–50.

³⁹ See, e.g., Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 NW. J. INT’L L. & BUS. 327, 329 (1994).

⁴⁰ See Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT’L L. 639, 686–87 (1998); see also *Introductory Note of U.S. Joint Letter from John Bellinger III, Legal Adviser, U.S. Department of State, and William J. Haynes, General Counsel, U.S. Department of Defense, to Dr. Jakob Kellenberger, President, International Committee of the Red Cross, Regarding Customary International Law Study by Dennis Mandsager*, 46 I.L.M. 511 (2007). For the recent U.S. government position, see Model Bilateral Investment Treaty Annex A (2004).

⁴¹ See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(3) (1987).

In a dispute arising under a BIT, I am clear that the ICSID Tribunal can and generally should take account of – not necessarily follow but consider – decisions and awards rendered by other tribunals, whether under ICSID, UNCITRAL, or other comparable tribunals hearing claims under other BITs. The harder question arises when no BIT is directly applicable. My answer is the same. Thus, if I may borrow from my own treatise on International Economic Law:

Suppose Patria has entered into [substantially identical] BITs with Xandia, Tertia, and Quarta, but not with Quinta. However, Patria has joined the ICSID Convention, and has consented to ICSID arbitration of disputes that may arise in connection with an investment agreement with Supranational Corporation (SUNATCO), a corporation organized and existing under the laws of Quinta. A dispute arises and is submitted to an ICSID Tribunal. In [my submission,] the arbitrators should take into account all the obligations undertaken by Patria in its BITs with Xandia et al., as evidence of Patria's understanding of international law for the purpose of applying Article 42 of the ICSID Convention. Patria should be given the opportunity to explain why it had not concluded a treaty with Quinta, but unless the explanation is compelling that a different standard of treatment of investors from Quinta was contemplated and communicated to the government of Quinta and to SUNATCO, the failure to conclude an agreement with Quinta applicable to the dispute should not [preclude the Tribunal from applying contemporary customary law as reflected in the web of bilaterals]. In contrast, if Patria has consistently declined to conclude a BIT with any country, the argument in favor of applying the principle set out in the BITs, while not excluded, would be significantly weaker.⁴²

V. CONCLUSION

In sum, it is hard to tell to what extent ICSID plus BITs have led to increased private investment of the kind that contributes to economic development, though in individual instances, such as Argentina's rush to

⁴² ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* § 17.3(e), at 585–86 (2d ed. 2008).

privatization in the 1990s under President Menem, the combination of ICSID and BITs clearly served as a stimulus to foreign investors. But the combination has clearly transformed the Convention, filled in the gaps necessary to make ICSID an important institution, and as I see it, contributed to the progress of customary international law.

