

2013

Treaty Shopping and Expansive Jurisdiction: Causes and Effects of Venezuela's Denunciation of the ICSID Convention

Kathryn Rimpfel

Follow this and additional works at: <http://elibrary.law.psu.edu/arbitrationlawreview>



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Kathryn Rimpfel, *Treaty Shopping and Expansive Jurisdiction: Causes and Effects of Venezuela's Denunciation of the ICSID Convention*, 5 *Y.B. Arb. & Mediation* 371 (2013).

This Student Submission - Foreign Decisional Law is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Arbitration Law Review by an authorized editor of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

TREATY SHOPPING AND EXPANSIVE JURISDICTION: CAUSES AND EFFECTS OF VENEZUELA'S DENUNCIATION OF THE ICSID CONVENTION

Kathryn E. Rimpfel*

I. INTRODUCTION

The denunciation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“the ICSID Convention”) by Venezuela poses many questions for, and undoubtedly has an impact on, the international investment arbitration community.¹ The January 24, 2012 denunciation by the Latin American oil giant was the third in the history of the International Centre for the Settlement of Investment Disputes (“ICSID”), preceded by Ecuador in 2009 and Bolivia in 2007.² This recent string of departures, as well as a pattern of ICSID awards against Latin American countries, has uncovered displeasure with ICSID and raised questions about the fairness of the institution.³ Additionally, pending ICSID cases involving Ecuador, Bolivia, and now Venezuela suggest that denunciation does little to address the institution’s decisions toward Latin American countries.⁴ Instead, ICSID’s jurisdiction over investment disputes remains in effect through an elaborate web of bilateral investment treaties, State-level legislation, and investment instruments.⁵

* Kathryn E. Rimpfel is an Associate Editor of the Yearbook on Arbitration and Mediation and a 2014 Juris Doctor Candidate at The Pennsylvania State University Dickinson School of Law.

¹ *ICSID News Release*, INT’L CTR. FOR SETTLEMENT INV. DISP. (Jan. 26, 2012), <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement100>; Sergey Ripinsky, *Venezuela’s Withdrawal From ICSID: What it Does and Does Not Achieve*, INV. TREATY NEWS (Apr. 13, 2012), <http://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/>.

² *Id.*; *ICSID News Release*, INT’L CTR. FOR SETTLEMENT INV. DISP. (July 9, 2009), <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement20>; *ICSID News Release*, INT’L CTR. FOR SETTLEMENT INV. DISP. (May 16, 2007), <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement3>.

³ See Katia Fach Gómez, *Latin America and ICSID: David Versus Goliath?*, 17 L. & BUS. REV. AM. 195, 197 (2011) (setting forth several sources of displeasure with ICSID, such as the fear that hostility toward ICSID may hamper access to World Bank credit, pressure to hire expensive law firms to navigate the system, a lack of transparency by arbitration panels, the absence of an appeals process and limited annulment procedure, and failure of tribunals to incorporate economic downturns, health, and environmental interests into their decisions).

⁴ ICSID Case Database, INT’L CTR. FOR SETTLEMENT INV. DISP., <https://icsid.worldbank.org/ICSID/FrontServlet> (last visited Oct. 13, 2012) (follow “cases” and then “search cases,” narrow search to “Ecuador,” “Bolivia,” or “Venezuela”) (Bolivia has two pending ICSID cases, Ecuador has three, and Venezuela has twenty).

⁵ Christoph Schreuer, *Commentary on the ICSID Convention*, 11 ICSID REV. 318, 423 (1996) [hereinafter “*Commentary*”].

While ICSID tribunals hear claims from across the world, the institution's caseload has been disproportionately concentrated in Latin America.⁶ South and Central American States have been the source of 36% of ICSID's cases over the institution's 46-year history, with Venezuela and Argentina making up the bulk of that percentage.⁷ Much, if not all of this activity arose in the past two decades as the region began to integrate into the global economy.⁸ The region was slow to join the trend of bilateral investment treaties ("BITs") that serve as the overwhelming basis of ICSID's jurisdiction, and many South and Central American countries did not become signatories to the ICSID Convention until the 1990s.⁹ With the entrance of these countries came a subsequent rise in ICSID arbitration activity. While only 38 cases were registered by ICSID in the first 25 years of its history, 344 cases have been filed between 1997 and 2012.¹⁰

This delayed integration into international institutions such as ICSID can be attributed to the prevailing school of thought in much of Latin America concerning international relations: The Calvo Doctrine. This doctrine, set forth by Argentine legal scholar Carlos Calvo, maintained that foreign aliens should be subject to the laws of the nation in which they do business, and that the jurisdiction for an investment dispute lies in the country where the investment was made.¹¹ This theory runs contrary to the very purpose of ICSID, which was formed to limit diplomatic protection in cases of investor-

⁶ See Mary Helen Mourra, *The Conflicts and Controversies in Latin American Treaty-Based Disputes*, in *LATIN AMERICAN INVESTMENT TREATY ARBITRATION: THE CONTROVERSIES AND CONFLICTS* 5-10, 15-17 (Thomas E. Carbonneau ed. 2008) (detailing the proliferation of claims against Latin American countries on the ICSID caseload prior to 2007).

⁷ The ICSID Caseload – Statistics, p. 11, Chart 6 (Issue 2012-2) <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English32> [hereinafter "ICSID Caseload 2012-2"]; see Ibrionke T. Odumosu, *The Antinomies of the (Continued) Relevance of ICSID to the Third World*, 8 *SAN DIEGO INT'L L.J.* 345, 348, 358 (2007) (explaining that the majority of state defendants in ICSID cases are Third World countries and Organization for Economic Cooperation and Development (OECD) states, and positing that "their economies and populations are more vulnerable to the negative effects of foreign investment" and "the state of their economies dictate the necessity for some level of government intervention in foreign investment").

⁸ See ICSID Caseload 2012-2, *supra* note 7, at 11, Chart 6.

⁹ See Alejandro A. Escobar, *Introductory Note on Bilateral Investment Treaties Recently Concluded by Latin American States*, 11 *ICSID REV.* 86, 87 (1996); *List of Contracting States and Other Signatories of the Convention*, *INT'L CTR. FOR SETTLEMENT INV. DISP.* (July 25, 2012) <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English>; Mourra, *supra* note 6, at 15-17 (explaining that lending policies of world financial institutions influence the liberalization of investment policies that, in turn, increased Latin American adoption of BITs. In addition, the Latin American Debt Crisis of the 1980s made adherence to these economic policies a necessity).

¹⁰ ICSID Caseload 2012-2 *supra* note 7, at 7, Chart 1.

¹¹ Bernardo M. Cremades, *Resurgence of the Calvo Doctrine in Latin America*, 7 *BUS. L. INT'L* 53, 55-56 (2006); James Thuo Gathii, *War's Legacy in International Investment Law*, 11 *INT'L COMMUNITY L. REV.* 353, 355, 362-363 (2009) (Explaining that the Calvo Doctrine, as well as the subsequent Drago Doctrine, served as efforts against economic inequality between powerful European nations and weaker Latin American nations that became apparent during nineteenth century military interventions to collect the debts of nationals. The Doctrine maintained that foreign investors do not have a separate, universal standard of justice or access to diplomatic protection by their native country, but are instead subject to the laws of the particular jurisdiction and have the same remedies as domestic investors); Mourra, *supra* note 6, at 8 (describing the Calvo Doctrine as "a very classic, state-centric view of international law, based on an absolutist view of state sovereignty and equality of the states").

state disputes by giving investors international standing and a course of redress outside of national courts.¹² Championed as a neutral facility that encouraged investment by assuring a fair forum for disputes,¹³ ICSID was not accepted by much of Latin America until the 1990s, when the region experienced a liberalization of trade and investment.¹⁴

The departures by Bolivia, Ecuador and now Venezuela reflect a return to the Calvo Doctrine, as all three countries cited ICSID's infringement on national sovereignty and right to regulate investment as the reason for their departure.¹⁵ Nicaragua has also reportedly threatened departure through its Attorney General,¹⁶ and proposed legislation in Argentina calls for the same.¹⁷ Similarly, Venezuela declared that subjecting contracts of public interest to any jurisdiction other than national courts would be a violation of the 1999 Venezuelan Constitution.¹⁸ While this constitutional conflict is certainly Venezuela's legal explanation for denunciation, the Nation's recent history with the institution and interactions with industry investors provide depth to the understanding of the country's break with ICSID.

II. EXPANSIVE JURISDICTION: CAUSE FOR DENUNCIATION?

Former Venezuelan President Hugo Chávez's international demeanor made the decision to denounce the ICSID convention somewhat expected, and the transition of

¹² Schreuer, *supra* note 5, at 324; Tai-Heng Cheng, *Power, Authority and International Investment Law*, 20 AM. U. INT'L L. REV. 464, 470-71 (2005) ("Although some states claim to exert great authority over foreign investments, multinational corporations and capital-exporting states have secured greater investment protections over time . . . Arbitral tribunals and international courts have usually been custodians of international investment norms . . . National courts have often deployed their enforcement authority to support decisions by international tribunals").

¹³ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Preamble, Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter "ICSID Convention"]; Report of the Executive Directors of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, ¶¶ 9-13 (March 18, 1965) [hereinafter "Report of the Executive Directors"]; Odumusu, *supra* note 7, at 346 ("In the face of unclear rules, and against the backdrop of the need to protect foreign investment through the internationalization of investment dispute settlement, and the position that this will facilitate investment flows to Third World States, the World Bank established the International Centre for the Settlement of Investment Disputes (ICSID)").

¹⁴ See Alejandro A. Escobar, *Introductory Note on Bilateral Investment Treaties Recently Concluded by Latin American States*, 11 ICSID REV. 86, 87 (1996).

¹⁵ See Gomez, *supra* note 3, at 209-10 (explaining that both Ecuador and Bolivia had Constitutional provisions that prohibit them from signing international treaties or instruments that would subject the nations to international arbitration).

¹⁶ See *id.* at 209.

¹⁷ 1311-D-2012, Mar. 21, 2012 (Arg.) (proposed legislation by National Deputy for the City of Buenos Aires Fernando Ezequiel Solanas calling for the repeal of Law 24 353, in which the country adopted the ICSID convention; The bill criticizes the Bilateral Investment Treaties signed during the administration of former President Carlos Menem, as well as ICSID's infringement on national sovereignty through diversion of claims away from national courts and the lack of an appeals process) *available at* <http://www.hcdn.gov.ar/proyectos/proyecto.jsp?id=134892>.

¹⁸ *Venezuela Formalizes its Withdrawal from World Bank's ICSID*, EMBASSY OF VENEZ. (Jan. 25, 2012) <http://venezuela-us.org/2012/01/25/venezuela-formalizes-its-withdrawal-from-world-bank%E2%80%99s-icsid/#more-22034>; Mourra, *supra* note 6, at 20.

power in the wake of his death will determine the permanency of the departure.¹⁹ Aside from Venezuela's diplomatic history, the Latin American nation's experience before ICSID tribunals is telling of its larger struggle with international investment arbitration. At the time of Venezuela's denunciation, there were approximately 20 cases pending against the nation, half of which had been filed in the previous year.²⁰ Venezuela attempted to stem this tide of claims by challenging the facility's authority over the cases, yet ICSID tribunals denied these objections in five out of the six jurisdictional decisions they handed down.²¹ Aside from these ICSID decisions, Venezuela faces recent International Chamber of Commerce awards of \$66.8 million and \$908 million to ConocoPhillips and Exxon Mobil, respectively.²² These awards in favor of foreign investors arise either out of the same events or the same nucleus of facts that spurred the same companies to bring claims before ICSID tribunals in 2007.²³ The enormity of these debts, as well as the long line of investors waiting in the wings for their time to bring Venezuela before ICSID tribunals, is certainly a motivating factor in the denunciation. Chavez described this predicament himself by calling the monetary claims and requests by Exxon "impossible," and announced that Venezuela would pay only \$255 million of the \$908 million originally awarded to the company.²⁴

The general claim of infringement on national sovereignty advanced by Bolivia, Ecuador, and now Venezuela relates in part to the substantive outcomes of the cases, but deals much more with the procedural structures of ICSID. The nature of the tribunal system set forth in the ICSID Convention has a tendency to subject nations like

¹⁹ See Parisa Hafezi, *Iran, Venezuela in "Axis of Unity" Against U.S.* REUTERS, (July 2, 2007, 1:32pm EDT), available at <http://www.reuters.com/article/2007/07/02/us-iran-venezuela-idUSDAH23660020070702> (quoting Chavez as saying, "The two countries will united to defeat the imperialism of North America"); Nathan Crooks and Jose Orozco, *Chavez Says Venezuela Won't Accept World Bank Arbitration*, BLOOMBERG NEWS (Jan. 9, 2012, 9:34pm ET) <http://www.bloomberg.com/news/2012-01-08/venezuela-won-t-accept-icsid-verdict-on-exxon-chavez-says.html> (reporting that Chavez refused to accept any ICSID rulings, and that Chavez had threatened to withdraw from ICSID as early as 2007); Juan Forero, *In Upcoming Venezuelan Vote, Hugo Chavez Looms Large*, NAT'L PUBLIC RADIO (March 12, 2013, 3:58am) <http://www.npr.org/2013/03/12/174057927/in-upcoming-venezuelan-vote-hugo-chavez-looms-large>.

²⁰ ICSID Case Database, INT'L CTR. FOR SETTLEMENT INV. DISP., <https://icsid.worldbank.org/ICSID/FrontServlet> (last visited Oct. 13, 2012) (follow "cases" and then "search cases," narrow search to "Venezuela").

²¹ *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, ¶ 45 (July 11, 1997), 5 ICSID Rep. 186 (2002); *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, ¶ 144 (September 27, 2001), 16 ICSID Rev. 419 (2004); *Vannessa Ventures Ltd. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Decision on Jurisdiction (Aug. 22, 2008); *Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶ 209 (June 10, 2010); *Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, ¶ 160 (Dec. 30, 2010); *Brandes Investment Partners LP v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Award, ¶ 121 (Aug. 2, 2011).

²² Alison Sider, *ConocoPhillips Awarded \$66.8 Million in Venezuela Case*, THE WALL STREET JOURNAL (Sept. 21, 2012, 6:51 pm ET) <http://online.wsj.com/article/SB10000872396390444165804578010702582544458.html>.

²³ *Id.*

²⁴ Nathan Crooks & Jose Orozco, *Chavez Says Venezuela Won't Accept World Bank Arbitration*, BLOOMBERG NEWS (Jan. 9, 2012, 9:34pm ET) <http://www.bloomberg.com/news/2012-01-08/venezuela-won-t-accept-icsid-verdict-on-exxon-chavez-says.html>.

Venezuela to ICSID authority through either expansive or unclear definitions of investments and nationality.²⁵ The ambiguity of these factors, as well as the multiple methods of obtaining State consent to ICSID jurisdiction, make the system easily manipulable by claimants seeking access to ICSID tribunals.²⁶ As a result, it is arguable that many parties are gaining ICSID jurisdiction over disputes that the respondent-nations did not intend to be within the scope of their consent to ICSID jurisdiction, and would have otherwise been subject to local courts of the nation in dispute.²⁷

A. *Establishing ICSID Jurisdiction*

Article 25 of the ICSID Convention sets forth the facility's scope of jurisdiction.²⁸ As with the American conception of jurisdiction, the Convention's parameters establishes both a subject matter requirement and a personal requirement – commonly known as *ratione materiae* and *ratione personae*.²⁹ In the substantive aspect, the claim must be a “legal dispute arising directly out of an investment,” although the Convention does not go on to define the framer's intent in the use of “legal dispute” or “investment.”³⁰ Because these definitions are essentially left to the agreement or disagreement of the parties, a body of case law has developed to fill this void, especially when countries seek to contest the legitimacy of an investment within the host State.³¹

²⁵ See Maurice Mendelson, *Issues Relating to the Identity of the Investor*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2010 23 (Arthur W. Rovine, ed. 2010) (“...the Washington Convention is . . . rather too unsophisticated to provide clear answers to the many issues that arise in relation to the identity of the investor”); *but see* W. Michael Reisman and Anna Vinnik, *What Constitutes an Investment and Who Decides?* in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2010 53 (Arthur W. Rovine, ed. 2010) (positing that, in the wake of ICSID tribunal interpretations of the meaning of “investment,” post-*Fedax* investors could be deprived of ICSID jurisdiction even if the transaction in question qualified as an investment under the BIT).

²⁶ *See id.*; *see also infra* notes 54-66 and accompanying text.

²⁷ *See id.*

²⁸ ICSID Convention, *supra* note 13, at art. 25(1) (“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When Parties have given their consent, no party may withdraw its consent unilaterally”).

²⁹ Schreuer, *supra* note 5, at 324; Brigitte Stern, *The Scope of Investor's Protection under the ICSID/BIT Mechanism: Recent Trends*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2010 (Arthur W. Rovine, ed. 2010); Odumosu, *supra* note 7, at 351.

³⁰ *See* Report of the Executive Directors, *supra* note 13, at ¶¶ 26-27 (shedding light on the meaning of “legal dispute” by stating that mere conflicts of interest are not within the jurisdiction of the Centre, yet admitting “no attempt was made to define the term ‘investment’”); Schreuer, *supra* note 5, at 325.

³¹ *See* *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4 (Decision on Jurisdiction) (July 23, 2001); Emmanuel Gaillard & Yas Banifatemi, *Introductory Note to ICSID: Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco (Proceeding on Jurisdiction)* 42 I.L.M. 606 (2003) (explaining that *Salini* established a four-part test to define investments that required the “existence of contributions, a certain duration in the performance of the contract, and participation in the risks of the transaction,” and that the “transaction contribute to the economic development of the host State.”).

The personal element of ICSID jurisdiction requires that the parties be a “Contracting State” and a “national of another Contracting State.”³² The intent of this provision is that the investor is not a national of the host State, limiting jurisdiction to truly international issues that deserve standing before ICSID, rather than a local court.³³ This standard finds its roots in the original purpose of the facility, which was to alleviate the ills of diplomatic protectionism over investment disputes by giving the individual investor standing to bring claims without implicating the resources or international relations of the investor’s home country.³⁴ As will be discussed, this element has become increasingly difficult to establish given the rise in complex corporate structures that implicate the laws of several countries.³⁵

Parties must also consent, in writing, to the submission of the claim to ICSID.³⁶ One of the strong features of ICSID as a legitimate international forum is its requirement that, once consent has been given under Article 25, “no party may withdraw its consent unilaterally.”³⁷ This requirement primarily binds nations, who usually serve as respondents, although the structure of the Convention allows both States and investors to file claims with ICSID.³⁸

B. Obtaining Consent

Consent to ICSID jurisdiction, as with nationality requirements, must be established at the time of the institution of the proceedings.³⁹ Despite the simplicity of this requirement, consent to ICSID jurisdiction does not have to be expressed in a single instrument, and can instead be pieced together through various instruments or actions of the investor and the State and perfected well in advance of conflict or filing of claims.⁴⁰ Aside from individual investment contracts between the investor and State that explicitly provide that disputes will be submitted to ICSID, the primary methods of obtaining consent function like a unilateral contract.⁴¹ For example, in an effort to attract and promote a secure environment for investment, host States often establish their consent to

³² ICSID Convention, *supra* note 13, at art. 25(1).

³³ Anthony C. Sinclair, *ICSID’s Nationality Requirements*, 23 ICSID REV. 57, 60 (2008).

³⁴ Sinclair, *supra* note 33, at 58; Odumosu, *supra* note 7, at 353 (“Prior to this time [drafting of the ICSID Convention], foreign investment protection was assured through the instrumentality of merging the legal systems of the colonized and the colonizer and where this failed, . . . through gunboat diplomacy”).

³⁵ See *infra* notes 55-60.

³⁶ Sinclair, *supra* note 33, at 58.

³⁷ *Id.*

³⁸ Report of the Executive Directors, *supra* note 13, at 41 (“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 interest 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”).

³⁹ See Schreuer, *supra* note 5, at 437.

⁴⁰ Report of the Executive Directors, *supra* note 13, at 43.

⁴¹ Christoph Schreuer, *Denunciation of the ICSID Convention and Consent to Arbitration*, in THE BACKLASH AGAINST INVESTMENT ARBITRATION 353-368, 358 (Waibel et al. eds., 2010) (“The exact terms of consent are determined by the combination of offer and acceptance. The investor’s acceptance of consent can be given only within the limits of the offer”).

ICSID jurisdiction for disputes arising out of certain defined categories of investments either through national legislation or bilateral investment treaties.⁴² These pronouncements of consent, although occasionally equivocal or ambiguous, serve as an offer to potential investors to take advantage of the legislation or treaty and begin projects in the host State.

Aside from the reciprocal act of making the desired investment, investors must take some affirmative actions to express acceptance of the offer to subject disputes to ICSID. This could come in the form of applying for an investment license under national legislation, or simply communicating to the State that the investor is making the investment with the understanding that any disputes that may arise would be subject to ICSID jurisdiction.⁴³ Although unwise,⁴⁴ consent or acceptance of the offer can be expressed at the time of the claim's initiation, allowing an investor to give its requisite consent and accept the State's offer of ICSID jurisdiction by filing a claim with ICSID.⁴⁵ Once the investor acts upon the consent of the host State and perfects its own consent, ICSID's rule of irrevocability can be put into effect and parties are bound to ICSID jurisdiction if other requisite elements are met.⁴⁶

C. *The Role of Bilateral Investment Treaties – “Treaty Shopping”*

The nature and prevalence of BITs have made these documents valuable tools in the search for consent to ICSID jurisdiction. These treaties have been formed between States since 1959, when the first was signed between Germany and Pakistan in order to promote non-discriminatory treatment of nationals from the other state and provide for protection in the case of expropriation.⁴⁷ These treaties gained heightened significance as vehicles for obtaining consent to arbitration when ICSID was formed in 1965, yet many treaties failed to provide requisite consent because they merely referred to the possibility of resort to ICSID.⁴⁸ After ICSID's release of Model Clauses Relating to the Convention

⁴² See Schreuer, *supra* note 5, at 423, 429; Schreuer, *supra* note 41, at 357 (“Consent through BITs has become accepted practice and is nowadays the basis for jurisdiction in the majority of cases administered by ICSID. This phenomenon has been called arbitration without privity”); Odumosu, *supra* note 7, at 349.

⁴³ Schreuer, *supra* note 5, at 429, 437-38.

⁴⁴ Schreuer, *supra* note 41, at 363 (“Therefore, it is inadvisable for an investor to rely on an ICSID consent clause contained in the host state's domestic law or in a treaty without making a reciprocal declaration of consent. The investor may wait with its acceptance of the offer of consent until it institutes proceedings before the Centre. But in doing so it runs the risk that the offer may be withdrawn before then”).

⁴⁵ Schreuer, *supra* note 5, at 437-38; David A. Pawlak and José Antonio Rivas, *Managing Investment-Treaty Obligations and Investor-State Disputes: A Guide for Government Officials*, in *LATIN AMERICAN INVESTMENT TREATY ARBITRATION: THE CONTROVERSIES AND CONFLICTS* 171 (Thomas E. Carbonneau, ed. 2008).

⁴⁶ Schreuer, *supra* note 5, at 457.

⁴⁷ Antonio R. Parra, *Remarks, ICSID and the Rise of Bilateral Investment Treaties: Will ICSID be the Leading Arbitration Institution in the Early 21st Century?* *AM. SOC'Y INT'L L., PROCEEDINGS OF THE ANNUAL MEETING* 41 (Charles N. Bower, ed. 2000); Gary Born, *A New Generation of International Adjudication*, 61 *DUKE L.J.* 775, 832 (2012).

⁴⁸ *Id.*

on the Settlement of Investment Disputes Designed for Bilateral Investment Treaties, BITs began to increasingly hit their desired target.⁴⁹

A drastic increase in the number of BITs between the 1970s and the 1990s was attributed to the adoption of the ICSID Additional Facility Rules, which allowed ICSID tribunals to hear claims when one of the parties was not a signatory to the ICSID convention.⁵⁰ This enhanced utility allowed ICSID to evolve into the predominate forum for investment disputes, thus encouraging the development of the approximately 1,400-1,800 BITs estimated to be in effect as of 2000, and over 2,600 by 2010.⁵¹ The substance of these treaties varies widely in their conditions on consent to ICSID jurisdiction, as well as inclusion of “most favoured nation” clauses, definitions of investments, and definitions of nationality.⁵² This is made abundantly clear through the practice of treaty shopping, or strategic incorporation to gain a certain nationality for the purposes of protection under that nation’s treaties.⁵³

Venezuelan arbitration cases have exposed the differences between bilateral investment treaties, with Dutch treaties rising to the top of legal instruments used to initiate ICSID claims. Dutch treaties have been identified as notorious tools for bringing suits against host States due to provisions that make the grant of standing and jurisdiction extremely likely.⁵⁴ Gaining access to these useful treaties has become relatively easy, with an estimated 20,000 “mailbox” or “shell” companies claiming Dutch nationality despite a lack of operational or commercial activity in the nation.⁵⁵ Other commercial and tax benefits can be credited for this phenomenon, although strategic nationality planning for the purposes of international investment is growing due to the approximately 95 bilateral investment treaties executed by the Netherlands with countries across the world.⁵⁶

Through this practice, investors with an unfortunate nationality, i.e. of a country without a BIT with the nation in which the investment is made, or of a country with a restrictive BIT that would not cover its investment or injury, can gain a more favorable nationality through corporate restructuring.⁵⁷ This restructuring begins with the creation of a corporate entity under the laws of a favorable country, and then having that new entity make the investment directly or fund the investment indirectly through the pre-existing corporation that had insufficient nationality for ICSID jurisdiction.⁵⁸ This

⁴⁹ *Id.*; Schreuer, *supra* note 41, at 359.

⁵⁰ Parra, *supra* note 47, at 42.

⁵¹ *Id.*; Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 833 (2012).

⁵² Mourra, *supra* note 6, at 17 (“BITs, while differing from one another, generally contain...” definitions of investments, a national treatment provision, a most-favoured nation (MFN) clause, and a dispute resolution clause, among other provisions).

⁵³ ROOS VAN OS & ROELINE KNOTTNERUS, DUTCH BILATERAL INVESTMENT TREATIES: A GATEWAY TO “TREATY SHOPPING” FOR INVESTMENT PROTECTION BY MULTINATIONAL COMPANIES 4, 9 (Center for Research on Multinational Corporations 2011) [hereinafter “Gateway to Treaty Shopping”].

⁵⁴ *Id.* at 1; Diana Marie Wick, *The Counter Productivity of ICSID Denunciation and Proposals for Change* 11 J. INT’L BUS. & L. 239, 265 (2012).

⁵⁵ Gateway to Treaty Shopping, *supra* note 53, at 10. Rimantas Daujotas, *Jurisdiction Ratione Personae and Corporate Nationality in International Investment Arbitration – Legitimate Corporate Planning or Abuse of Right?* 7 INT’L ECON. L. EJOURNAL 1, 3 (2011) [hereinafter “Daujotas”].

⁵⁶ Gateway to Treaty Shopping, *supra* note 53, at 10.

⁵⁷ *Id.* at 9.

⁵⁸ *Id.*; See also *infra* notes 73-77 and accompanying text.

restructuring can be done before or after the investment has been made, although the later makes such restructuring more suspect in light of impending arbitration or litigation.⁵⁹

The impact of treaty shopping implicates the underlying concern of nations about their control over foreign investment, particularly amongst Latin American countries guided by the previously addressed national economic interests and Calvo-inspired views toward international law.⁶⁰ While strategic nation planning may appear to be inconsequential in light of ICSID's over-arching purpose of increasing direct foreign investment, it can be argued that such practices can allow corporations to evade local regulations and attempts to promote sustainable development, and even gain entry when their previous nationality would have been grounds for denial.⁶¹ When implemented after the point of investment, this ability to restructure means that a state-respondent could be confronted with ICSID arbitration with a now-Dutch investor, who, at the time of the formation of a service contract or approval of an investment license, was previously controlled by a corporation of a nationality that would not implicate ICSID.⁶² Thus, even when a country seeks to control and manage the extent of its exposure to ICSID liability, restructuring can negate any such certainty.

Due to this jurisdictional disadvantage, one must question whether ICSID is truly a mutually beneficial forum, as emphasized at its founding.⁶³ Consent has transformed from a proximate agreement to a more indirect method that gives investors more flexibility and nations less certainty.⁶⁴ While consent was championed as the cornerstone

⁵⁹ Gateway to Treaty Shopping, *supra* note 53, at 10.

⁶⁰ STEPHEN J. TOOPE, MIXED INTERNATIONAL ARBITRATION: STUDIES IN ARBITRATION BETWEEN STATES AND PRIVATE PERSONS 228-229 (1990) (arguing that foreign investment laws have a two-fold purpose: to both attract and *regulate* foreign investment); Mourra, *supra* note 6, at 21 (“the decline and resurgence of Calvo has exposed a fundamental flaw in both the previous classical Calvo regime and the current dominant neo-liberal regime: the imbalance of the rights and obligations between the host State and foreign investors,” going on to say that States had more power prior to the 1980s, while “the advent of BITs and ICSID arbitrations” has given more power to investors). Daujotas, *supra* note 55, at 18, 25 (arguing that, despite the ills of an increase in treaty shopping, the practice also serves the goal of increased foreign investment).

⁶¹ Gateway to Treaty Shopping, *supra* note 53, at 12 (explaining that restructuring before the point of investment might allow certain corporations access to the country that would otherwise be denied entry, or would allow them to access investment protection not available to local competitors). Tai-Heng Cheng, *Power, Authority and International Investment Law*, 20 AM. U. INT'L L. REV. 464, 482-3 (2005) (describing the decreased regulatory control of the State).

⁶² Gateway to Treaty Shopping, *supra* note 53, at 10.

⁶³ TOOPE, *supra* note 60, at 219-20 (“Despite the fact that the World Bank undertook extensive consultations and oversaw rigorous negotiations before the conclusion of the ICSID Convention, the assertion of a complete balancing of interests is, at best, disingenuous”); Mourra, *supra* note 6, at 67 (“If perceptions of inequality in the process are not redressed, there may be increased movement away from the ICSID processes and toward an alternative”).

⁶⁴ *Id.* at 225, 228 (positing that proximate consent of the parties would make ICSID submission “not an unfriendly act,” but also stating that “ICSID tribunals should exercise caution in claiming jurisdiction rooted in implied consent, or the faith of the developing states in the institution could be undermined considerably”); For a description of the highly reactionary options available for a State to manage investment treaty obligations, see David A. Pawlak and José Antonio Rivas, *Managing Investment-Treaty Obligations and Investor-State Disputes: A Guide for Government Officials*, in LATIN AMERICAN INVESTMENT TREATY ARBITRATION: THE CONTROVERSIES AND CONFLICTS 171, 176-78 (Thomas E. Carbonneau ed. 2008) (detailing steps a State can take to prepare for potential disputes, such as training appropriate agencies on the State's investment protection obligations and hiring an in-house legal team).

for ICSID jurisdiction,⁶⁵ signatories seem to be subject to an ‘all or nothing’ form of consent. Even if countries like Venezuela pick and choose which international partners to enter into bilateral investment treaties with, or which investments and investors to allow into their countries, those investors outside of that narrowly drawn scope of expected jurisdiction can alter their nationality to fall within it. This is best exemplified by the recent ICSID claims against Venezuela by Mobil and CEMEX.

1. *Mobil and Others v. Bolivarian Republic of Venezuela*

As mentioned previously, the dispute between Mobil and Venezuela over the company’s participation in the nation’s oil industry spans at least two international arbitral forums and has already produced a substantial award in favor of Mobil.⁶⁶ The Mobil Corporation initiated ICSID arbitration against Venezuela in 2007 following the nationalization of the oil industry after a period of privatization.⁶⁷ Mobil’s oil ventures in Venezuela began in the mid 1990s, when the country used a wide interpretation of its 1975 Nationalization Law to allow companies like Mobil to participate in the production and upgrading of extra-heavy crude oil.⁶⁸ This was followed by a period of increased regulation of the industry between 2001 and 2007, including mandatory “migration” of previously formed agreements into mixed companies, as well as increases in royalty rates, extraction taxes, and income taxes.⁶⁹ This period ended with a decree ordering all companies that had not complied with the mandatory migration to a mixed status to be nationalized.⁷⁰

The Mobil Corporation initiated arbitration under the Netherlands-Venezuela BIT as well as the Venezuelan Investment Law.⁷¹ Venezuela contested the standing of the parties under the given BIT due to Mobil’s complex corporate structure, which resulted in six different claimants: three Delaware companies, two Bahamian companies, and one Dutch company.⁷² In October 2005, during the course of Mobil’s interaction with Venezuela over the mandated corporate migration, Mobil created a new corporate entity under the laws of the Netherlands, and the new corporate structure was as follows:

21. As the result of this restructuring, Mobil (Delaware) owns 100% of Venezuela Holdings (Netherlands), which owns 100% of Mobil CN Holding (Delaware), which owns 100% of Mobil CN (Bahamas), which finally owns a 41 2/3% interest in the Cerro Negro Association.

⁶⁵ TOOPE, *supra* note 60, at 224

⁶⁶ *See supra* notes 22-23.

⁶⁷ Mobil Corp. & Others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶¶ 1, 30 (June 10, 2010), *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1510_En&caseId=C256.

⁶⁸ *Id.* at ¶¶ 17-18.

⁶⁹ *Id.* at ¶ 19

⁷⁰ *Id.*

⁷¹ *Id.* at ¶¶ 16-19, 24-26.

⁷² Mobil Corp. & Others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction, at ¶ 1.

22. Venezuela Holdings (Netherlands) also owns 100% of Mobil Venezolana Holdings (Delaware), which owns 100% of Mobil Venezolana (Bahamas), which finally owns a 50% interest in the La Ceiba Association.⁷³

Venezuela contended that the named claimants were not the true owners or controllers of the investments in Venezuela, did not qualify as international investors, and did not have standing under the Netherlands-Venezuela BIT.⁷⁴ Because the restructuring occurred after the investment was already made and in the midst of an ongoing dispute, Venezuela alleged that Mobil's corporate restructuring was made in bad faith, and thus should not give it standing under the Netherlands-Venezuela BIT.⁷⁵ As summarized by the Tribunal:

It submits that Venezuela Holdings is a 'corporation of convenience' created in anticipation of litigation against the Republic of Venezuela for the sole purpose of gaining access to ICSID jurisdiction. It concludes that 'this abuse of the corporate form and blatant treaty-shopping should not be condoned.'⁷⁶

Furthermore, Venezuela claimed that the Delaware and Bahamas corporations listed as claimants do not have standing under the Dutch treaty through their relation to and the existence of the Dutch corporation.⁷⁷

The claimants responded to this allegation by asserting that the creation of the Dutch entity was in the course of ongoing and new investments and projects, and was thus not intended to "position" the claimants for arbitration or litigation.⁷⁸ Mobil argued that there is no legal basis for piercing the corporate veil or imposing nationality requirements not enumerated in the BIT.⁷⁹ After agreeing with Venezuela that the Investment Law did not give the requisite consent to ICSID arbitration due to ambiguous intent and language,⁸⁰ the tribunal nonetheless granted jurisdiction under the Netherlands-Venezuela BIT and rejected Venezuela's claims of insufficient nationality, the absence of a direct investment, and abuse of the corporate form.

The tribunal's analysis revealed the unusual benefits of the Dutch-Venezuela BIT, which defines a "national" as:

- (i) national persons having the nationality of that Contracting Party;
- (ii) legal persons constituted under the law of that Contracting Party;

⁷³ *Id.* at ¶¶ 17-18, 20-21.

⁷⁴ *Id.* at ¶ 26.

⁷⁵ *Id.* at ¶ 47.

⁷⁶ *Id.* at ¶ 27.

⁷⁷ Mobil Corp. & Others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction, at ¶ 49.

⁷⁸ *Id.* at ¶¶ 32, 40.

⁷⁹ *Id.* at ¶ 40.

⁸⁰ *Id.* at ¶ 140.

(iii) legal persons not constituted under the law of that Contracting Party, but controlled, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii) above.⁸¹

Venezuela contended that this definition of nationality was at odds with the limits on jurisdiction provided by the ICSID Convention, which Venezuela interpreted to exclude a control test like the one contained in part (iii) of the BIT.⁸² The Tribunal rejected this argument, holding that the Convention’s language does not impose any particular criteria for nationality – control or otherwise – on juridical persons that do not have the same nationality as the host state.⁸³ Thus, the Tribunal allowed the implementation of the “control test” under section (iii) of the BIT, constituting the first time an ICSID tribunal has endorsed a determination of nationality on a basis other than the company’s seat or place of incorporation.⁸⁴

The expansiveness of this definition of nationality is made clear by the Protocol of the Netherlands-Venezuela BIT raised by the Tribunal. The Protocol provides that “control,” and thus standing under the treaty, exists when the party is either (a) an affiliate of, (b) economically subordinate to, or is (c) owned by a sufficient percentage by a legal person constituted in the territory of the other Contracting Party, making it possible for them to exercise control.⁸⁵ The Tribunal utilized part (c) of the Protocol provision to hold that, because the Dutch holdings company had 100% ownership over the two American subsidiaries, it had the ability to control them, even if that control was not utilized.⁸⁶ The Tribunal held that, even though the Dutch holdings company merely passed capital to its subsidiaries, this indirect investment should not bar it from ICSID standing, citing the broad definition of “investment” in the BIT:

- a. The term “investment” shall comprise every kind of asset and more particularly though not exclusively:
 - (i) movable and immovable property, as well as any other rights in rem in respect of every kind of assets;
 - (ii) rights derived from shares, bonds, and other kinds of interest in companies and joint ventures;
 - (iii) title to money, to other assets as to any performance having an economic value;

⁸¹ Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Venezuela, art. 1(b), Oct. 22, 1991, UNCTAD INV. INSTRUMENTS ONLINE [hereinafter “Netherlands-Venezuela BIT”]; *Mobil Corp. & Others*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶ 152.

⁸² *Mobil Corp. & Others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶¶ 155-56.

⁸³ *Id.* at ¶ 157.

⁸⁴ Roberto Castro de Figueiredo, *Mobil v. Venezuela: the Nationality Requirement Under the ICSID Convention*, 3 PENN ST. Y.B. ARB. & MEDIATION 25, 37-38 (2011) [hereinafter “Castro de Figueiredo”] (“Until the *Mobil* decision was rendered, ICSID tribunals that were required to decide on the fulfillment of the nationality requirement . . . had invariably applied the place of incorporation or seat test in order to determine the nationality of juridical persons”).

⁸⁵ *Mobil Corp. and Others*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶ 159.

⁸⁶ *Id.* at ¶ 160.

- (iv) rights in the field of intellectual property, technical processes, goodwill and know-how;
- (v) rights granted under public law, including rights to prospect, explore, extract and win natural resources.⁸⁷

Because section (a) encompasses “every kind of assets” and did not require the absence of intermediary companies between the investor and the investment, the Tribunal found that the Dutch company had satisfied this aspect of the BIT.⁸⁸

The Tribunal addressed Venezuela’s claim of abuse of the corporate form and acknowledged that the restructuring of the investments’ corporate ownership was in response to increased tax rates and in anticipation of litigation with Venezuela.⁸⁹ However, the Tribunal found that this anticipatory restructuring was “legitimate corporate planning” as maintained by Mobil, rather than an “abuse of right” as argued by Venezuela.⁹⁰ To make this distinction, the Tribunal evaluated the timing of the investments, the timing of incorporation, and the timing of the dispute, and found that the development of the Dutch company was well after the height of the investment, yet before the issuance of the nationalization decree.⁹¹ As a result of this timing, the Tribunal found that “this was a perfectly legitimate goal as far as it concerned future disputes.”⁹² The Tribunal found that, even though it would be an abuse of right to establish a corporation in a favorable jurisdiction after the dispute arose, this incorporation occurred before the defined dispute – i.e. the nationalization of the projects in question.⁹³ Therefore, even though the potential for a dispute was acknowledged and communicated by the parties several years before ultimate nationalization, and even though the incorporation of the Dutch company was an explicit effort to improve the legal protections of the investment in anticipation of litigation, the Tribunal found that it did not constitute an abuse of the corporate form.

Due to this ruling, expansive definitions of nationality and investment like that of the Netherlands-Venezuela BIT have been validated as a method of gaining jurisdiction when it would not have otherwise existed, exposing countries like Venezuela to liability through ICSID when such disputes might have been handled elsewhere and under different terms. The five named claimants within Mobil’s corporate structure that received standing through the Dutch corporation were from the United States or the

⁸⁷ Netherlands-Venezuela BIT, *supra* note 74, at art. 1(a); *Mobil Corporation and Others*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶ 164.

⁸⁸ *Mobil Corp. & Others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶ 165.

⁸⁹ *Id.* at ¶¶ 189-190.

⁹⁰ *Id.* at ¶ 191.

⁹¹ *Id.* at ¶¶ 193-203.

⁹² *Id.* at ¶ 204.

⁹³ *Mobil Corp. & Others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, at ¶ 205.

Bahamas, two states that do not have bilateral investment treaties with Venezuela.⁹⁴ In addition, even amongst the states Venezuela has executed bilateral investment treaties with, there are clear advantages to the various components in the Dutch treaty as compared to others, as alternative treaties do not normally have such lenient investment and nationality provisions.⁹⁵ This is further evidenced by the reappearance of the Netherlands-Venezuela BIT in *CEMEX v. Bolivarian Republic of Venezuela*.

2. *CEMEX v. Bolivarian Republic of Venezuela*

Within the same year as the Mobil decision on jurisdiction, the Tribunal in *CEMEX v. Venezuela* handed down a jurisdictional ruling against Venezuela in a case that also arose out of the nationalization of an investment project, but in the cement industry. Claimants CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. were companies incorporated under the laws of the Netherlands, and brought the claim after Venezuela nationalized their cement production and forcibly occupied CEMEX plants without compensation for the takings.⁹⁶ Venezuela maintained that this nationalization was part of a 2008 restructuring of major cement companies in the country.⁹⁷

The corporate structure of CEMEX and the related companies reflected the structure detailed in Mobil: a hierarchy of subsidiaries formed in various countries. The claimants sit in the middle of this chain:

[A] Mexican company, Cemex, S.A.B. de C.V. (“Cemex”) owns 100% of Cemex Espana S.A., which owns 100% of one of the Claimants, a Dutch company called Cemex Caracas. In turn, Cemex Caracas owns 100% of one of the Claimants, another Dutch Company called Cemex Caracas II. Cemex Caracas II owns 100% of Vencement Investments (“Vencement”) a company incorporated in the Cayman Islands. Finally, as of 2002, Vencement owns 75.7% of Cemex Venezuela (CemVen), the cement company that was operating in the territory of the Respondent.⁹⁸

⁹⁴ ICSID Database of Bilateral Investment Treaties, INT’L CTR. FOR SETTLEMENT INV. DISP., <https://icsid.worldbank.org/ICSID/FrontServlet> (last visited Oct. 18, 2012) (Since 1990, Venezuela has executed 24 bilateral investment treaties with the following countries: Argentina, Barbados, Belgium-Luxembourg, Brazil, Canada, Chile, Costa Rica, Czech Republic, Denmark, Ecuador, France, Germany, Italy (2), Lithuania, Netherlands, Paraguay, Peru, Portugal, Spain, Sweden, Switzerland, United Kingdom, and Uruguay).

⁹⁵ Castro de Figueiredo, *supra* note 84, at 38 (“most international investment treaties providing for ICSID arbitration adopt the place of incorporation or seat test as the governing nationality criterion. Only a few international investment treaties, such as the Netherlands-Venezuela BIT, provide for the control test”).

⁹⁶ *CEMEX Caracas Invs. B.V. and CEMEX Caracas II Invs. B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, ¶ 29 (Dec. 30, 2012), *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1831_En&caseId=C420.

⁹⁷ *Id.* at ¶ 142.

⁹⁸ *Id.* at ¶ 19.

As in Mobil, the claimants in CEMEX brought their claims under the Netherlands-Venezuela BIT, as well as the Venezuelan Investment Law.⁹⁹ After an extensive contextual analysis and investigation into the legislative history of the Venezuelan Investment Law, the Tribunal held that it did not provide clear and unambiguous consent to ICSID jurisdiction, and instead relied on the Netherlands-Venezuela BIT.¹⁰⁰

As argued in Mobil, Venezuela maintained that the CEMEX investment in the cement venture was indirect, rather than direct, placing CEMEX outside the scope of the Netherlands-Venezuela BIT.¹⁰¹ In an argument informed by the outcome in Mobil, Venezuela acknowledged that CEMEX and its Cayman Islands subsidiary Vencement qualified as Dutch nationals under the BIT's expansive definition of nationality and investment.¹⁰² However, Venezuela argued that the treaty does not grant standing to a national who did not personally make the investment in the territory of the Contracting State involved in the claim.¹⁰³ Venezuela maintained that, if reference to indirect investment is not explicitly given, the treaty does not extend standing to that form of investment.¹⁰⁴ This narrow reading of the treaty would grant standing only to the party that made the ultimate transfer of assets to the entity performing the investment within the Contracting State that is party to the claim.¹⁰⁵ Thus, Venezuela argued that the appropriate claimants, subsidiaries CemVen and Vencement, were not included as parties, depriving the claimants of the requisite standing to gain ICSID jurisdiction.¹⁰⁶

The Tribunal analogized the Netherlands-Venezuela BIT definition of "investment" to that of the Germany-Argentina BIT addressed in Siemens v. Argentina, a case in which the Tribunal held that when there is broad drafting with non-exhaustive examples of investments, absence of a distinction should not be considered a limiting condition on standing under the provision.¹⁰⁷ Thus, the Tribunal concluded that when the provision does not acknowledge the possibility of intermediary companies between the national-investor and the investment, it should serve as an allowance of such an investment structure, not a prohibition on standing for indirect investments.¹⁰⁸ As a result, if the BIT covers indirect investments, it also grants protection to the indirect investor, such as CEMEX and CEMEX II.¹⁰⁹

This ruling reaffirmed the power of the Netherlands-Venezuela BIT. The broad definition of nationality settled in Mobil validated the use of bilateral investment treaties to give standing to entities controlled by nationals, thus going beyond the traditional international law methods of determining nationality. CEMEX additionally provided that bilateral investment treaties can be used to expand the definition of investments at the

⁹⁹ *Id.* at ¶ 59.

¹⁰⁰ *Id.* at ¶ 138.

¹⁰¹ CEMEX Caracas Invs. B.V. and CEMEX Caracas II Invs. B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/15, Decision on Jurisdiction, at ¶¶ 142-44.

¹⁰² *Id.* at ¶ 145.

¹⁰³ *Id.* at ¶ 146.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at ¶ 147.

¹⁰⁶ CEMEX Caracas Invs. B.V. and CEMEX Caracas II Invs. B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/15, Decision on Jurisdiction, at ¶ 147.

¹⁰⁷ *Id.* at ¶ 152.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at ¶ 156.

will of the parties, transforming investment arbitration jurisdiction from a uniform rule to a private contract matter.

III. DENUNCIATION: APPROPRIATE MEANS TO THE DESIRED END?

Having established the procedural defects that spurred Venezuela's denunciation of the ICSID Convention, the question still left unanswered is whether the means will actually accomplish the desired ends. As previously established, consent to ICSID jurisdiction is not established by mere status as a signatory to the Convention, and can instead be the product of a variety of legal instruments.¹¹⁰ This, in turn, means that revocation of consent must address each of the potential sources of consent.

The ICSID Convention allows for denunciation, as well as a six-month grace period for the denunciation to take effect.¹¹¹ Uncertainty about the meaning of this six-month period led to questions about the claims that arise during and after the period.¹¹² Thus, nine cases were rapidly filed against Venezuela in the first half of 2012.¹¹³ However, the rush to file claims might not have been necessary. Under Article 72 of the Convention, notice of denunciation under Article 71 "shall not affect the rights or obligations under this convention of that State . . . arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary."¹¹⁴ Therefore, just as with establishing jurisdiction, the method for denying jurisdiction is best analyzed by determining when consent was perfected. As evidenced by the ongoing cases before ICSID tribunals by Bolivia, Ecuador and Venezuela, denunciation has no effect on claims already in progress.¹¹⁵ Consent was either stipulated or decided by the tribunal, and post-hoc denunciation has little bearing when the crucial initiation time has already passed.

When analyzing the effective date of such revocation of consent, Article 72 modifies the six-month waiting period provided for in Article 71.¹¹⁶ The date of the denunciation's effect is not at the end of the six-month waiting period, but rather at the time of receipt, and it is only the rights and obligations of the denouncing state that remain in effect for the six-month period after receipt of the denunciation.¹¹⁷

Because unilateral revocation is prohibited once consent to ICSID jurisdiction is procured, investors who have already availed themselves of an offer either through national legislation or a bilateral investment treaty and have taken the appropriate steps to

¹¹⁰ See Schreuer, *supra* note 5, at 422.

¹¹¹ ICSID Convention, *supra* note 13, at art. 71 ("Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.").

¹¹² Sergey Ripinsky, *Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve*, INV. TREATY NEWS (April 13, 2012), <http://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/>.

¹¹³ ICSID Case Database, INT'L CTR. FOR SETTLEMENT INV. DISP., <https://icsid.worldbank.org/ICSID/FrontServlet> (last visited Oct. 13, 2012) (follow "cases" and then "search cases," narrow search to "Venezuela").

¹¹⁴ ICSID Convention, *supra* note 13, at art. 72.

¹¹⁵ See ICSID Database, *supra* note 4.

¹¹⁶ Schreuer, *supra* note 41, at 355.

¹¹⁷ *Id.*

perfect consent would still have access to ICSID, despite Venezuela's denunciation of the ICSID convention.¹¹⁸ Even if a dispute has not yet arisen, if these aforementioned requirements have been met to procure consent, those parties would be able to bring claims that arise in the future.

In contrast, an offer of consent to ICSID jurisdiction in a bilateral investment treaty that is not acted upon by the investor does not create any obligation for the State under the ICSID Convention.¹¹⁹ However, these bilateral investment treaties still exist as an offer for consent to jurisdiction, and are valid if acted upon by the investor despite the denunciation of the ICSID convention, and as a result, the consent would arise out of the bilateral investment treaty alone, rather than under the ICSID Convention.¹²⁰

Expansive instruments like the Netherlands-Venezuela BIT further exemplify the resilient, binding nature of bilateral investment treaties in the face of ICSID denunciation. First, Article 9, paragraph 2 of the treaty provides for submission of disputes arising under the treaty to ICSID under the Additional Facility Rules "as long as the Republic of Venezuela has not become a Contracting State of the Convention."¹²¹ Thus, even in light of denunciation, the treaty binds Venezuela to ICSID jurisdiction, although under a different set of rules. Second, model Dutch treaties have a standard duration of 15 years, and parties to the treaty are prohibited from one-sided change or withdrawal from the treaty.¹²² The Netherlands-Venezuela BIT has this restriction, as well as periods of 15 year renewals, meaning that Venezuela will have to wait until 2021 to amend its treaty with the Netherlands.¹²³

Due to the power of bilateral investment treaties to alter and enhance the jurisdictional boundaries under the ICSID Convention, it is clear that States wishing to cut ties with the facility must also address the instruments that give the Centre consent to preside over the disputes. Denunciation does not relieve Venezuela of its current ICSID cases, nor does it negate consent given in bilateral investment treaties, thus failing to effectively stem the tide of future claims arising out of investments. Thus, despite the drastic nature of denunciation, it appears that Venezuela is still subject to claims of investors who have bought into favorable bilateral investment treaties that are still binding on the State.

¹¹⁸ See Sinclair, *supra* notes 33-34; Schreuer, *supra* note 41, at 362-63 ("The binding and irrevocable nature of consent to the jurisdiction of ICSID is a manifestation of the maxim *pacta sunt servanda* and applies to undertakings to arbitrate in general. It applies not only where the consent to jurisdiction is contained in a compromissory clause contained in an investment contract but also where an offer of consent is contained in national legislation or a treaty that has been accepted by the investor"); see Gomez, *supra* note 3, at 212 (stating that investment lawyers have advised clients to perfect consent and act upon BITs and investment laws before denunciation takes effect).

¹¹⁹ *Id.* at 364.

¹²⁰ *Id.*; but see Diana Marie Wick, *The Counter Productivity of ICSID Denunciation and Proposals for Change* 11 J. INT'L BUS. & L. 239, 261, 264 (2012) (stating that there is disagreement whether investors can perfect consent during the six-month grace period, and if BITs can still be the basis of consent to ICSID jurisdiction absent signatory status. While cases have been filed during and after the grace period, such filing does not reflect a decision on jurisdiction, a topic that an ICSID tribunal has yet to address).

¹²¹ Netherlands-Venezuela BIT, *supra* note 74, at art. 9(2); Diana Marie Wick, *The Counter Productivity of ICSID Denunciation and Proposals for Change*, 11 J. INT'L BUS. & L. 239, 248 (2012).

¹²² Gateway to Treaty Shopping, *supra* note 53, at 17.

¹²³ Netherlands-Venezuela BIT, *supra* note 74, at art. 14(1-3) (The Netherlands-Venezuela BIT was executed in 1991, and presumably extended in 2006 to be effective in the 2007 ICSID arbitration cases).

IV. CONCLUSION

The system of international investment arbitration set forth by the International Centre for the Settlement of Investment Disputes advances a valuable and necessary alternative to diplomatic protectionism for the resolution of investment disputes by giving foreign investors standing on an international level. In this sense, the balance of the institution's history can be deemed a positive impact on international relations. However, one must question whether increased treaty shopping has expanded the Centre's jurisdiction past a mutually beneficial scope.

With rulings like *Mobil* and *CEMEX*, ICSID tribunals have officially endorsed the manipulation of jurisdictional standards through bilateral investment treaties, diluting any coherent standard in favor of private contract law. While this contractual fluidity of corporate identity can serve the original goal of the Centre by preventing diplomatic protection, it places nations at a distinct disadvantage. Tribunal deference to bilateral investment treaties has potentially expanded the jurisdiction of the Centre to match the breadth of the definitions of investment and nationality posed in those treaties.

This web of connections created by bilateral investment treaties can be difficult to retreat from once enacted, placing nations in the precarious position of either exiting international agreements or being subject to an arbitral body that has stacked the deck against them. Therefore, in the case of countries like Venezuela who have attracted a substantial ICSID caseload, denunciation may serve as the first severed tie in an attempt to free itself from ICSID's jurisdictional web.