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Exit, Voice, and Loyalty in Investment Treaty Arbitration

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Anna T. Katselas*

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I. INTRODUCTION

Nearly twenty years ago, Jan Paulsson, a leading authority on international arbitration, wondered what might become of investor–state arbitration.¹ “Arbitration without privity,” as he termed it, was radically different from that which had come before and could either remain a “marginal feature” of international arbitration or “pre-empt an epochal extension of compulsory arbitral jurisdiction over States”—only time would tell.² When he wrote those words in 1995, there were close to 900 bilateral investment treaties (BITs)—not an insignificant number—but investors had initiated fewer than thirty-five investor–state arbitrations in the International Centre for Settlement of Investment Disputes (ICSID).³ Now, as investors have more widely come to realize the power they hold, Paulsson’s second possibility has evidently come to fruition. There are now nearly 3,000 BITs in force, and investors have initiated close to 500 ICSID arbitrations.⁴ The year 2012 was a record one both in terms of the number of new investor–state disputes filed, fifty-eight, and the size of a single award, U.S. \$1.77 billion (U.S. \$2.3 billion with interest), against the Republic of Ecuador.⁵

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1. Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. 232, 257 (1995). As Paulsson uses the phrase, “arbitration without privity” is arbitration in the absence of a contract between the parties containing their consent to arbitration. States commonly consent to investor–state arbitration in their BITs, but may also do so in a contract with the investor or in national legislation. RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 238 (2008). See also *S. Pac. Props. (Middle E.) Ltd. v. Arab Republic of Egypt*, (ICSID Case No. ARB/84/3), Decision on Jurisdiction II, ¶¶ 89–101 (Apr. 14, 1988), 3 ICSID Rep. 1131 (1995) (finding that Egypt had consented to ICSID jurisdiction in national legislation).
 2. Paulsson, *supra* note 1, at 256.
 3. *List of Concluded Cases*, INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded> (last updated Oct. 11, 2014), *archived at* <http://perma.unl.edu/TWN9-3BS6>; *List of Pending Cases*, INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending> (last updated Oct. 11, 2014), *archived at* <http://perma.unl.edu/K7B5-QRY8>.
 4. According to the United Nations Conference on Trade and Development’s (UNCTAD) World Investment Report 2014, there were 2,902 BITs and 334 other international agreements containing investment protection provisions by the end of 2013. UNITED NATIONS CONFERENCE ON TRADE AND DEV., *WORLD INVESTMENT REPORT 2014: INVESTING IN THE SDGs: AN ACTION PLAN*, at 114, UN Doc. UNCTAD/WIR/2014, U.N. Sales No. E.14.II.D.1 (2014) [hereinafter UNCTAD WIR 2014]; *List of Concluded cases*, *supra* note 3, *List of Pending Cases*, *supra* note 3. An unknown number of additional investment arbitrations have been facilitated by other institutions, such as the Permanent Court of Arbitration, or *ad hoc*. According to UNCTAD, 568 known investor–state disputes had been filed in various forums by the end of 2013. UNCTAD WIR 2014, *supra*, at 124.
 5. See *Occidental Petroleum Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, ¶ 876 (Oct. 5, 2012), <http://www.italaw.com/sites/default/files/case->

The precipitous development of the investment treaty arbitration machine is not unlike a freight train barreling down a steep and treacherous hill. The BIT phenomenon gained momentum rapidly in the 1990s, fueled by globalization and a loss of alternatives to foreign investment as a source of capital.⁶ In the absence of a multilateral agreement on investment, states hurriedly jumped on the BIT train—a club of sorts—to protect investments made by their own nationals in foreign states, to attract inward foreign investment, or both.⁷ Like the barreling freight train, the speed with which states moved involves a tradeoff; they jumped on board and covered an impressive amount of ground in a remarkably short period of time, but not in the most controlled fashion and with considerable uncertainty as to what lay ahead. Paulsson mused in 1995 that many states did not appreciate the full implications of the obligations they had assumed.⁸ Now that states' journey on the BIT train has taken a troubling turn, the remarkable truth of that statement is indubitable. States are increasingly trying to regain control of the train through various steering mechanisms, including amending their BITs and issuing interpretive statements. Some states have denounced the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), and a number have terminated one or more of their BITs and appear to want to jump from the train altogether.⁹ In contrast to the steady uptick in investors' utilization of

documents/italaw1094.pdf, archived at <http://perma.unl.edu/DCN4-2TYB> (a petition to annul the award was pending as of the date of this Article, and enforcement of the award had been stayed pending the annulment decision); United Nations Conference on Trade & Dev., *IIA Issues Note: Recent Developments in Investor-State Dispute Settlement (ISDS)*, at 1, U.N. Doc. UNCTAD/WEB/DIAE/PCB/2013/3 (May 2013), archived at <http://perma.unl.edu/46YX-M5CG> [hereinafter *IIA Issues Note: Recent Developments*]; *List of Concluded Cases*, *supra* note 3; *List of Pending Cases*, *supra* note 3.

6. See Kenneth J. Vandavelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 177–78 (2005). See also Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain* 46 HARV. INT'L L.J. 67, 75–79 (2005) (suggesting lack of other financial assistance led developing countries to sign BITs in hopes of promoting foreign investment).
7. Paulsson remarked that a multilateral agreement on investment, which was then being drafted by an OECD working group, “may be the next great advance” in the field. Paulsson, *supra* note 1, at 256–57. The considerable efforts to negotiate such an agreement were ultimately unsuccessful. See Charles H. Brower, II, *The Functions and Limits of Arbitration and Judicial Settlement Under Private and Public International Law*, 18 DUKE J. COMP. & INT'L L. 259, 306–07 (2008).
8. Paulsson, *supra* note 1, at 257.
9. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966) [hereinafter ICSID Convention]. Pursuant to Article 71 of the ICSID Convention, Venezuela's denunciation became effective on July 25, 2012, six months from the date of its notice. *Venezuela*

investor–state arbitration, states appear to be concluding BITs at a declining rate. Although some level of saturation and an increased interest in regional trade and investment agreements (as opposed to bilateral, investment-specific treaties) are likely factors in the comparatively low rate at which new BITs are being concluded, it is notable that states concluded fewer new BITs in 2012 than they had in any of the preceding twenty-five years.¹⁰

The broadest goal of modern international investment law is one that is very familiar to international lawyers—it is to dethrone power and crown law as the ruler of the game. The regime seeks to prevent states from relying, as the powerful ones occasionally did in the past, on “gunboat diplomacy” to settle international investment disputes.¹¹ It does this principally through the aforementioned BITs and other international investment agreements (IIAs), in which states agree to afford various substantive standards of treatment to investments made by each other’s nationals—such as fair and equitable treatment—as well as to arbitrate treaty disputes brought by those nation-

Submits a Notice Under Article 71 of the ICSID Convention, INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES (Jan. 26, 2012), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement100>, archived at <http://perma.unl.edu/3T79-L8PP>. Bolivia and Ecuador submitted Article 71 notices in 2007 and 2009, respectively. *Bolivia Submits a Notice Under Article 71 of the ICSID Convention*, INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES (May 16, 2007), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement3>, archived at <http://perma.unl.edu/YRK3-N4LT>; *Ecuador Submits a Notice Under Article 71 of the ICSID Convention*, INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES (July 9, 2009), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement20>, archived at <http://perma.unl.edu/F5RZ-WJDC>.

10. UNITED NATIONS CONFERENCE ON TRADE AND DEV., WORLD INVESTMENT REPORT 2013: GLOBAL VALUE CHAINS: INVESTMENT AND TRADE FOR DEVELOPMENT, at 101, U.N. Doc. UNCTAD/WIR/2013, U.N. Sales No. E.13.II.D.5 (2013) [hereinafter UNCTAD WIR 2013]. Related to the regional trend, the European Union’s (EU) recently attained exclusive competence over foreign direct investment is undoubtedly a factor in the slowdown. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 207(1), Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon]. Pursuant to Council Regulation 1219/2012, 2012 O.J. (L 351) 40 (EU), the European Commission plans to eventually replace all of the approximately 1200 BITs that EU Member States concluded with EU-wide investment agreements. See also European Comm’n, *EU Takes Key Step to Provide Legal Certainty for Investors Outside Europe*, EUR. UNION (Dec. 12, 2012), http://europa.eu/rapid/press-release_IP-12-1362_en.htm, archived at <http://perma.unl.edu/MEG2-4DXF> (summarizing the significant impact of Council Regulation 1219/2012).
11. José E. Alvarez, *Contemporary Foreign Investment Law: An “Empire of Law” or the “Law of Empire”?*, 60 ALA. L. REV. 943, 971 (2009).

als (hence the lack of privity).¹² The idea is to provide a neutral alternative to host state courts, which might be biased against foreign investors, and a law-based alternative to diplomatic espousal, which requires the injured national's state to assume the investor's claim and pursue it through diplomatic channels.¹³ The goal is often described as the "depoliticization" of international investment disputes, but it could just as accurately be described as the "legalization" of the disputes—law is to supplant politics, of course.¹⁴

Despite its international character, investment law is similar to many systems of domestic administrative law in that it requires governmental actors to adhere to certain standards of conduct in their dealings with private parties, and creates a private right of action as a means of enforcement. The private right of action is a significant protection for the private parties, but it also gives rise to a material concern. As a practical matter, both systems enable private parties to challenge governmental action that may lie at the heart of a state's sovereignty, such as domestic health, safety, and environmental measures. Given the similarities between the systems and the more developed status of the latter, recent comparative work has explored how principles from the latter might be usefully adapted to the former.¹⁵ This Article builds upon that work in light of a fundamental *difference* between domestic administrative judicial review and investment treaty arbitration. Specifically, and as discussed in more detail below, whereas national courts serve as a check on national agents in American administrative law, investment arbitration tribunals *are* the agents in international investment law. Further, they are not subject

12. BIT provisions promising to afford fair and equitable treatment and to refrain from arbitrary or discriminatory measures are among the most frequently invoked in investor–state arbitration. See Christoph Schreuer, *Fair and Equitable Treatment*, in PROTECTION OF FOREIGN INVESTMENTS THROUGH MODERN TREATY ARBITRATION: DIVERSITY AND HARMONISATION 125 (Anne K. Hoffmann ed., 2010); Christoph Schreuer, *Protection Against Arbitrary or Discriminatory Measures*, in THE FUTURE OF INVESTMENT ARBITRATION 183, 183–98 (Catherine A. Rogers & Roger P. Alford eds., 2009).

13. Vandavelde, *supra* note 6, at 160.

14. Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID REV. 1 (1986).

15. See, e.g., INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW (Stephan W. Schill ed., 2010); William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor–State Arbitrations*, 35 YALE J. INT'L L. 283 (2010); Anna T. Katselas, *Do Investment Treaties Prescribe a Deferential Standard of Review?*, 34 MICH. J. INT'L L. 87, 92–120 (2012); Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (2005); Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121 (2006); Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53 HARV. INT'L L.J. 391 (2012).

to any check comparable to national judicial review. Because international investment tribunals do not operate within a tripartite power structure, that familiar mechanism is unavailable as a means of controlling them.¹⁶

Accordingly, while I and others have sought to illustrate that investment arbitration tribunals could beneficially adapt and apply various limiting principles drawn from domestic administrative judicial review, it is worthwhile to also consider the control problem from a different vantage point.¹⁷ Specifically, it is useful to go beyond analysis of what the tribunals can do to guard against exceeding the bounds of their delegated authority to perpend states' abilities and responsibilities in this regard. In this vein, Jason Yackee has usefully analogized investment arbitration tribunals to domestic administrative tribunals, one component of a broader investment law agency created by states.¹⁸ This Article similarly focuses on states as principals, but views the delegation of authority through a different lens. Rather than an expert administrative agency analogue, the investment arbitration machine is viewed here as an intergovernmental organization or club. The lenses are not altogether dissimilar; however, the membership organization lens highlights the international delegation, as well as the diversity of the organization's members and the fractured nature of the organization itself. It also brings to light an important fact: regardless of any benefits a club may impart to third parties, it must first and foremost provide benefits to its members that the members deem to be worth the costs of membership.

Through the organizational lens, this Article considers the principal-agent control problem utilizing Albert O. Hirschman's *Exit, Voice, and Loyalty* rubric. In his exalted book, Hirschman illustrated the dynamic relationship of consumer exit, an economic concept, and consumer voice, a political one, in the marketplace and beyond.¹⁹ Foundationally, the members of an organization have two possible responses to unsatisfactory organization performance: they may abandon the organization or voice their dissatisfaction in an effort to rectify the problems.²⁰ Hirschman's great insight was that the two forces have a dynamic relationship that can be imagined on a set of scales. With more meaningful opportunity for voice typically comes less pressure on the exit side of the scale. Conversely, limited options for exit

16. For a general discussion of the differences between domestic and international delegation, see John O. McGinnis, *Medellin and the Future of International Delegation*, 118 *YALE L.J.* 1712, 1717–28 (2009).

17. *See, e.g.*, Katselas, *supra* note 15, at 127–33, 141–50; Yackee, *supra* note 15, at 434–48.

18. Yackee, *supra* note 15, at 401–02.

19. ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

20. *Id.* at 19.

intensify demands for greater voice.²¹ Both may spur recuperation of an organization that is in decline; however, that is not a given and organizations are not uniformly sensitive to the two responses.²² Moreover, depending on the type of organization involved and the specific circumstances, exit and voice may complement or counteract each other.²³ Finally, the greater the members' loyalty to the organization, the more likely it is they will choose voice over exit.²⁴

Hirschman's framework has been applied in various legal contexts, particularly international ones, and Anthea Roberts recently touched on it in an article on the role of states' subsequent practice in investment treaty arbitration.²⁵ It has not yet, however, served as a focal point for an analysis in this area. In two remarkable pieces, J.H.H. Weiler and Joost Pauwelyn applied the analysis to show that the transformations of Europe and world trade, respectively, were not clean transitions from power to law as international lawyers might like to believe, but rather were gradual transitions that occurred through a series of incremental, bidirectional interactions between exit (which they analyzed in legal terms) and voice (which they analyzed in political terms).²⁶ In other words, states gradually accepted more law (low exit) on the condition of greater political power (high voice), meaning they increasingly agreed to be bound by firm legal rules as mechanisms for increased political control, such as veto power, which were incorporated into the organizations' designs.²⁷ Though occasional spikes in either exit or voice may serve as catalysts

21. J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2411 (1991).

22. See HIRSCHMAN, *supra* note 19, at 19.

23. *Id.* at 19, 74.

24. *Id.* at 76–82.

25. Weiler, *supra* note 21. See also Karen E. Boroff & David Lewin, *Loyalty, Voice, and Intent to Exit a Union Firm: A Conceptual and Empirical Analysis*, 51 INDUS. & LAB. REL. REV. 50 (1997) (analyzing grievance filings at unionized firms); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000) (analyzing class action issues); Deborah Maranville, *Workplace Mythologies and Unemployment Insurance: Exit, Voice and Exhausting All Reasonable Alternatives to Quitting*, 31 HOFSTRA L. REV. 459 (2002) (analyzing voluntary job resignation and unemployment benefits); Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1 (2005) (analyzing the development and status of the global market); Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179, 191–93 (2010) (discussing how states use exit and voice to respond to treaties); Marc A. Rodwin, *Exit and Voice in American Health Care*, 32 U. MICH. J.L. REFORM 1041 (1999) (analyzing patients' ability to stimulate change in health care); Greg R. Vetter, *Exit and Voice in Free and Open Source Software Licensing: Moderating the Rein over Software Users*, 85 OR. L. REV. 183 (2006) (analyzing the forces affecting the software market).

26. Pauwelyn, *supra* note 25; Weiler, *supra* note 21.

27. See, e.g., Pauwelyn, *supra* note 25, at 5 (claiming that “the world trade system evolved from a combination of high exit and low voice in the text of GATT 1947 to a combination of low exit and high voice in the WTO”).

for needed change, the spikes reflect that the scales are out of balance, an unsustainable condition in the long-term.²⁸ As Pauwelyn aptly illustrated, an organization with too much politics and too little law risks becoming inefficient, whereas an organization with too much law and too little politics risks becoming unsupported.²⁹

One goal of this Article is to illustrate that the investment arbitration club did not evolve to its present state through an incremental process in which states gradually traded their exit options for increased voice. Rather, the club underwent a tumultuous growth spurt during which states rapidly conceded meaningful exit options without appreciating the consequences of their actions and, consequently, without demanding a commensurate increase in voice. As states competitively rushed into BITs—and more BITs—without the benefit of experience with investor–state arbitration, they agreed to a framework of low exit and low voice that did not immediately reveal itself as problematic. Now that states have come to appreciate the implications of their actions, the club finds itself in a particularly trying “teenager’s crisis.”³⁰

Through a reconnaissance of exit and voice as they operate in the economy (as an example), Hirschman sought principally to alert economists to the importance of political forces and political scientists to the importance of economic ones.³¹ The aim of this Article is similarly to conduct a reconnaissance of the forces and their interaction in a particular context, although I seek mainly to alert lawyers to the importance of politics (voice) in investment treaty arbitration. My claim is that a full “depoliticization” of international investment disputes is no more possible than a full depoliticization of any other international legal issue, i.e., it is impossible, but a balance between politics and law is both possible and necessary to attain if the club is to survive.

My approach is similar to the approaches taken by Weiler and Pauwelyn but differs in at least one significant respect. Perhaps because their subjects had evolved considerably more than mine, both scholars treated voice as principally, if not exclusively, available at the law-making stage, and exit as principally, if not exclusively, available

28. HIRSCHMAN, *supra* note 19, at 25. *See also* Pauwelyn, *supra* note 25, at 8 (discussing the flaws of a system skewed toward either extreme).

29. Pauwelyn, *supra* note 25, at 33–34.

30. Brigitte Stern, *The Future of International Investment Law: A Balance Between the Protection of Investors and the States’ Capacity to Regulate*, in *THE EVOLVING INTERNATIONAL INVESTMENT REGIME* 174, 175 (José E. Alvarez & Karl P. Sauvant eds., 2011). *See also* Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 *AM. J. INT’L L.* 45, 49 & n.18 (2013) (stating that international investment law has progressed from infancy to “awkward adolescence”).

31. HIRSCHMAN, *supra* note 19, at 1, 15–20.

at the law-applying stage.³² Related to this, both scholars focused on mechanisms existing within the organizational structure, i.e., legally permissible mechanisms.³³ In an effort to broaden the lens and conduct something closer to a true reconnaissance, I highlight opportunities for exit and voice that exist outside of these constraints. For example, states can speak up when they prescribe legal rules in their BITs, but they can also speak up in protest after an arbitral award is rendered—they have in fact done both. On a very practical level, this Article identifies and begins to assess the effectiveness and interplay of various actions states are taking to rectify the present imbalance, with an eye toward identifying the actions most likely to be successful in the long term.

This Article begins with an overview of the investment treaty arbitration “organization,” which provides background information on the legal regime and explains how and why I am applying Hirschman’s rubric to it. It then considers the availability and operation of exit and voice within the organization, illustrated by examples of recent actions taken by states. The interplay of the two mechanisms and the degree to which loyalty may be a factor in states’ choice between the two is then considered. As will be shown, the fragmented nature of the legal regime at once complicates the limited exit options that remain and creates opportunities for meaningful voice that do not exist in formal multilateral institutions. The members of the investment arbitration club are not functionally limited to exercising their voice through veto. They can prescribe new rules and refine many old ones—insofar, at least, as the rules apply to themselves.

Turning to the question and role of loyalty, this Article posits that the club members most likely to be loyal are those that most obviously benefit from membership, the large capital exporters. Because those states have the strongest interest in seeing to it that the club survives, they will likely need to assume the laboring oar in spurring its recuperation. As the loyal members work to retain and recruit those closer to the fringes of membership, they will need to revamp their membership pitch and make a better case for how the club benefits all, not the few. The ensuing conversations between the differentially situated states may go a long way in bringing about an organization with a better balance between exit and voice, law and politics, and efficiency and supportability. States are encouraged to exercise voice more than they have in the past, and ultimately to rewrite the investment arbitration club’s terms of membership, particularly focusing on: (1) defining the club’s mission; (2) adapting the club to changed circumstances; and (3) achieving a better balance between the costs and benefits of club membership for all members.

32. Pauwelyn, *supra* note 25, at 5–9; Weiler, *supra* note 21, at 2411–12, 2423.

33. Pauwelyn, *supra* note 25, at 4–5; Weiler, *supra* note 21, at 2412.

II. THE INVESTMENT TREATY ARBITRATION ORGANIZATION

A. What Organization?

Normally, when a group of states decides that something cannot be accomplished through a mere exchange of promises, they delegate authority to an international organization that, in theory, can neutrally make decisions which maximize the welfare of all member states and possibly even address distributional issues among them.³⁴ International organizations are typically established by treaty and comprised of permanent secretariats, plenary assemblies involving all member states, and executive organs with more limited functions.³⁵ No such formal, centralized organization governing international investment exists. As is well-known, efforts to negotiate a Multilateral Agreement on Investment (MAI) failed rather dramatically in 1998.³⁶ ICSID has amassed a large membership, but its strikingly modest purpose is to provide “facilities for conciliation and arbitration,” which foreign investors and states may choose to resolve certain disputes.³⁷ Aside from “considering . . . the role of private international investment” in economic development and “recognizing . . . [that] international methods of dispute settlement may be appropriate in certain cases,” the ICSID Convention is silent with respect to policy or purpose.³⁸ ICSID is also nonexclusive, meaning contracting states are free to make investor–state arbitration available in forums other than or in addition to ICSID.

Fortunately for the author, Hirschman did not limit his reconnaissance to formal membership organizations or institutions and illustrated, through examples, that the analysis can be applied to virtually any relationship. While Hirschman directed his work primarily at the relationship between consumers and competitive business enterprises, he also convincingly explained its relevance to numerous other relationships, including those between individuals and the voluntary associations, families, churches, and states to which they belong.³⁹ He further demonstrated that different types of “organizations” (in a

34. Andrew T. Guzman & Jennifer Landside, *The Myth of International Delegation*, 96 CALIF. L. REV. 1693, 1693 (2008).

35. José E. Alvarez, *International Organizations: Then and Now*, 100 AM. J. INT'L L. 324, 324 (2006).

36. See Rafael Leal-Arcas, *The Multilateralization of International Investment Law*, 35 N.C.J. INT'L L. & COM. REG. 33, 66–69 (2009). See also *supra* note 7 (containing sources that explain the failure to negotiate an MAI).

37. ICSID Convention, *supra* note 9, art. 1.

38. *Id.* pmb1.

39. HIRSCHMAN, *supra* note 19, at 3–4, 74–79, 87.

broad sense) are differentially sensitive to exit and voice.⁴⁰ Related to the foregoing, the nature of the organization also affects the extent to which the two options are available to the organization's members.⁴¹ To illustrate these points, consider Hirschman's extreme examples of a competitive business enterprise and a family.⁴² Members (customers) of the former have a very easy exit option—buying from the competition—to which the enterprise is highly sensitive.⁴³ For members of a family, however, the situation is quite the opposite. Exit is extremely difficult if not impossible and, in theory at least, there is a high probability that voice will be effective at spurring change.⁴⁴

Here, while there is no formal international investment organization, there is certainly a “club” of sorts, or a “voluntary association” in Hirschman's terminology, that states have created and joined.⁴⁵ For purposes of this Article, it is a state's consent to investor–state arbitration that is the ticket to membership, and not the conclusion of a BIT generally or the promise of any specific substantive standard of investment protection. This choice is made for the simple reason that states' consents to arbitration are the relevant delegations of authority that created and empowered the organization. Without these consents, investor–state arbitration—the object of much of the criticism levied at the international investment legal regime, as well as many of the proposals for its reform—would not exist.⁴⁶ Practically, this crite-

40. *Id.* at 74.

41. *Id.* at 76.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 3.

46. Numerous observers have noted and discussed the backlash against the international investment legal regime. *See, e.g.*, Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435, 435–37 (2009); Christopher M. Ryan, *Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law*, 29 U. PA. J. INT'L L. 725, 726–35 (2008); Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT'L L. 57, 58–67 (2011); Asha Kaushal, Note, *Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime*, 50 HARV. INT'L L.J. 491, 491–97 (2009). *See also* UNITED NATIONS CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2011: NON-EQUITY MODES OF INTERNATIONAL PRODUCTION AND DEVELOPMENT, at 100, U.N. Doc. UNCTAD/WIR/2011, U.N. Sales No. E.11.II.D.2 (2011) (“Countries continue to conclude [international investment agreements], sometimes with novel provisions aimed at rebalancing the rights and obligations between States and investors and ensuring coherence between [international investment agreements] and other public policies.”); UNITED NATIONS CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2010: INVESTING IN A LOW-CARBON ECONOMY, at 85–88, U.N. Doc. UNCTAD/WIR/2010, U.N. Sales No. E.10.II.D.2 (2010) (noting numerous countries either revised, or had plans to revise, their model BITs and that others had begun to terminate or renegotiate existing BITs).

tion does not eliminate many states that have concluded BITs from the club. While not all BITs provide for investor–state arbitration, the great majority of BITs do; a recent study of 1,660 BITs found that only 108, or 7%, did not provide for such arbitration.⁴⁷ Moreover, and as a number of scholars have observed, BITs tend to be remarkably similar in structure and provide for many of the same substantive standards of treatment, such as fair and equitable treatment and national treatment.⁴⁸ Many BITs are further linked through most-favored nation provisions.⁴⁹

The organization’s character as a voluntary association is significant because, according to Hirschman, voluntary associations are among the few types of organizations where both exit and voice may play important roles, and where neither may be dominant.⁵⁰ The voluntary association lens is also useful because it serves as a reminder that states created the organization and are its principals and members.⁵¹ As John McGinnis has cogently stated, despite numerous new forms of international administration that have resulted from globalization, “legal authority still stems from national sovereignty.”⁵² Investment arbitration tribunals exercise authority delegated by states to settle a class of investor–state disputes that would otherwise be subject to national judicial processes.⁵³ In the study of international delegation, dispute resolution is regarded as an archetypal task that states delegate to international agents for the simple reason that they cannot perform it as efficiently themselves.⁵⁴ Accordingly, and as Anthea Roberts has recognized, “[w]hether [investment] tribunals are viewed as agents or trustees, they are accountable to two or more principals—the treaty parties.”⁵⁵

47. ORG. FOR ECON. CO-OPERATION AND DEV., GOVERNMENT PERSPECTIVES ON INVESTOR–STATE DISPUTE SETTLEMENT: A PROGRESS REPORT 5–6 (2012), *archived at* <http://perma.unl.edu/TY85-G2VH?type=live>.

48. Barnali Choudhury, *Balancing Investor Protections, the Environment, and Human Rights: International Investment Law as a Global Public Good*, 17 LEWIS & CLARK L. REV. 481, 490–95 (2013). See Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BRIT. Y.B. INT’L L. 151, 186 (2003); Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT’L L.J. 427, 433 (2010); David Schneiderman, *Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?*, 2 J. INT’L DISP. SETTLEMENT 471, 473–75, 494 (2011).

49. Choudhury, *supra* note 48, at 491.

50. HIRSCHMAN, *supra* note 19, at 76–77, 120.

51. See Yackee, *supra* note 15, at 398 (noting the desirability of locating an appropriate principal on whose behalf the agent is delegated authority to act).

52. McGinnis, *supra* note 16, at 1714.

53. See ICSID Convention, *supra* note 9, pmb1.

54. See Roberts, *supra* note 25, at 186.

55. Roberts, *supra* note 25, at 196. Roberts’ statement refers to a debate in the literature regarding whether international tribunals, and particularly international courts, should be regarded as agents or trustees. Trustees are a species of agent

More fundamentally, it is a basic assumption applicable to a state's conclusion of any treaty that the state expected to benefit from concluding the treaty.⁵⁶ Despite the lack of a central governing body, the investment arbitration club exists for the same reason that formal multilateral international organizations exist—states thought it would help them accomplish goals they could not accomplish on their own and judged the expected benefits to be worth the anticipated membership costs.⁵⁷ As Weiler recognized, an analysis of how exit and voice operate in a particular organization does not explain states' willingness to be part of the organization in the first place, and is thus incomplete on its own.⁵⁸ The voluntary association lens thus highlights that it is of paramount importance that the club benefits states, quite apart from any benefits it may provide to foreign investors, foreign investment, or even the world at large.⁵⁹ In less abstract terms, it is natural for states to want more out of the club they created and joined, to pay less for membership, or to quit it altogether.⁶⁰

that act for the benefit of a third party, and are typically thought to require a greater level of independence, though others disagree. BLACK'S LAW DICTIONARY 1748 (10th ed. 2014) (defining "trustee" as "[s]omeone who stands in a fiduciary or confidential relation to another; esp., one who, having legal title to property, holds it in trust for the benefit of another and owes a fiduciary duty to that beneficiary"). Compare Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1, 7 (2005), with Emilie M. Hafner-Burton, David G. Victor & Yonatan Lupu, *Political Science Research on International Law: The State of the Field*, 106 AM. J. INT'L L. 47, 85–86 (2012), Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CALIF. L. REV. 899, 902, 942–54 (2005), and Eric A. Posner & John C. Yoo, *Reply to Helfer and Slaughter*, 93 CALIF. L. REV. 957 (2005). Regardless of whether one views some or all international tribunals as trustees, it is clear that states pursue their own goals when they delegate authority to them, and expect to benefit from the delegation. As Karen Alter notes, "[d]elegation to Trustees should not be seen as implying Principals are delegating to selfless saints or for altruistic reasons." Karen J. Alter, *Agents or Trustees? International Courts in Their Political Context* 13 (TranState, Working Paper No. 8, 2004).

56. Salacuse & Sullivan, *supra* note 6, at 77 ("Concluding and maintaining a treaty requires a bargain from which both parties believe they will derive benefits.").
57. Barbara Koremenos, *The Law and Politics of International Delegation: When, What, and Why Do States Choose to Delegate?*, L. & CONTEMP. PROBS., Winter 2008, at 151, 152 ("A state delegates functions to an international body if the expected benefits from the delegation outweigh the expected costs."). See also Guzman & Landside, *supra* note 34, at 1695 (noting that delegation comes with costs as well as benefits).
58. Weiler, *supra* note 21, at 2429.
59. See *supra* note 57.
60. See Yackee, *supra* note 15, at 448 (applying an agency analogy and suggesting "that there is nothing inherently wrong with states correcting the course of the [international investment law] ship"). See also Jürgen Kurtz, *Australia's Rejection of Investor-State Arbitration: Causation, Omission and Implication*, 27 IC-SID REV. 65 (2012) (discussing Australia's policy shift away from investor-state arbitration provisions).

B. A Look Inside the Club

Viewing the investment arbitration machine as a goal-based organization created by states raises questions about its establishment, foundation, structure, mission, and future direction. It also prompts comparisons to related formal multilateral organizations, most notably the World Trade Organization (WTO).

Failing a multilateral agreement, the investment arbitration club came to be through thousands of bilateral treaties.⁶¹ Capital-exporting states led the way in creating and shaping BITs, which they began concluding after World War II in light of fears that then-existing international investment law was not adequate to protect their nationals' foreign investments.⁶² The United States moved forward first by introducing investment protection measures, including equitable treatment provisions, into its Friendship, Commerce, and Navigation treaties, which were originally limited to the establishment of trade relations with other states.⁶³ In 1959, Germany concluded the first BIT with Pakistan after it had lost much of its foreign investment in the aftermath of the war.⁶⁴

With respect to the organization's foundation, it is worth noting that capital-exporting states' interest in BITs is obvious, while capital-importing states' interest in the treaties is not.⁶⁵ Developing countries have historically viewed foreign investment with deep skepticism.⁶⁶ The most common explanation for developing countries' willingness to conclude such far-reaching treaties is a belief that BITs will spur increased inward foreign investment, an assumption that

61. 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 (1998) (presenting one theory as to why developing countries uniformly spoke against affording expansive investment protection before the United Nations but individually committed to provide such expansive protection in numerous BITs).

62. Vandeveld, *supra* note 6, at 161–74.

63. See DOLZER & SCHREUER, *supra* note 1, at 120; Salacuse, *supra* note 48, at 433, 457.

64. Salacuse, *supra* note 48, at 433. Pakistan, for its part, reportedly viewed BITs at that time as “pieces of paper, something for the press, a good photo opportunity.” Lauge Skovgaard Poulsen & Damon Vis-Dunbar, *Reflections on Pakistan's Investment Treaty Program After 50 Years: An Interview with the Former Attorney General of Pakistan, Makhdoom Ali Khan*, INVESTMENT TREATY NEWS, Apr. 2009, at 3, archived at <http://perma.unl.edu/T5TK-A54H>.

65. See Salacuse, *supra* note 48, at 436–44.

66. Jason Webb Yackee, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties*, 33 BROOK. J. INT'L L. 405, 411 (2008) (quoting former U.S. Assistant Secretary of State William L. Thorpe's statement that, “[a]s engineers and technicians we are more than welcome; our skills are eagerly sought; but as businessmen, as entrepreneurs, we are often not so welcome. Sometimes we feel that at the same moment that our capital is sought, every obstacle is being put in the way of its use on a fair and equitable basis.”).

has not clearly proven to be true.⁶⁷ The heyday of BIT conclusions occurred in the wake of the Washington Consensus, which identified the liberalization of inward foreign investment as an important driver of economic development—developing states’ ultimate goal—and at a time when other sources of capital were very limited.⁶⁸ The willingness of capital-importing states to enter into the treaties had likely also been bolstered when The United Nations Conference on Trade and Development (UNCTAD) recommended “both adherence to and use of the [ICSID] Convention” in 1968.⁶⁹ It is further relevant that the investment arbitration industry did not gear up for some time, and therefore states did not immediately appreciate the magnitude of the litigation risk they had assumed when they consented to investor–state arbitration in BITs. Accordingly, even after the fervor dissipated and the Washington Consensus became less well-regarded, BITs continued to be concluded in large numbers for a period of time, possibly as a “mere formality in diplomatic affairs.”⁷⁰ If states were not convinced of the value of having BITs when they concluded some or all of the treaties, they also did not appear to perceive much risk in having them.

The establishment of the organization through thousands of bilateral treaties means, of course, that multilateral negotiations—where

67. Salacuse, *supra* note 48, at 441–42. *See, e.g.*, DOLZER & SCHREUER, *supra* note 1, at 8 (noting that there is scant evidence that the conclusion of a BIT causes an increase in foreign investment); Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 337, 340 (2007) (suggesting that the availability of investment treaty arbitration may not directly trigger foreign direct investment but is one factor in the decisional matrix); Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT’L L. 397, 400 (2011) (arguing that BITs do not meaningfully influence foreign investors’ decisions to invest in particular countries). *But see, e.g.*, Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 WORLD DEV. 1567, 1582 (2005) (arguing that BITs have significant positive impacts on foreign direct investment).

68. U.N. DEP’T OF ECON. & SOC. AFFAIRS, FOREIGN INVESTMENT IN DEVELOPING COUNTRIES, U.N. Doc. E/4446, U.N. Sales No. E.68.II.D.2 (1968); Sergio Puig, *Emergence and Dynamism in International Organizations: ICSID, Investor–State Arbitration & International Investment Law*, 44 GEO. J. INT’L L. 531, 542 (2013); Salacuse, *supra* note 48, at 442–43, 449. *See* John Williamson, *A Short History of the Washington Consensus*, 15 LAW & BUS. REV. AM. 7, 10 (2009).

69. Puig, *supra* note 68, at 542.

70. *Id.* at 564. Some degree of path dependence was also likely at work. *See* Hafner-Burton, Victor & Lupu, *supra* note 55, at 82; Katerina Linos, *Path Dependence in Discrimination Law: Employment Cases in the United States and the European Union*, 35 YALE J. INT’L L. 115 (2010); Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251 (2000) (explaining that legal designs generally are commonly influenced by various factors, including political will and path dependence).

all members would have had a seat at the table and at least some voice in the organization's powers and limits—never occurred. Related to this, Andrew Guzman observed in 1998 that developing countries stood together before the United Nations in their opposition to the customary international law “Hull rule,” which required “prompt, adequate and effective” compensation for expropriation, while at the same time they individually concluded over a thousand BITs which went well beyond the Hull rule in terms of affording protection to foreign investment.⁷¹ Guzman explained this seemingly paradoxical behavior as a prisoner's dilemma in which it was optimal for developing states to oppose the Hull rule as a group but defect individually in order to gain an advantage over other developing states that had not concluded BITs or otherwise eliminate an advantage possessed by developing states that had concluded BITs.⁷² In other words, there was fierce competition to attract inward foreign investment, and BITs were viewed as an important, if not *the*, way to do it.

The bilateral treaties and the race to conclude them are also significant factors in the relatively undeveloped structure and mission of the organization. Regarding the former, early BITs did not provide for investor–state dispute settlement, making states' promises to afford the imprecise substantive standards of treatments much less significant in terms of litigation risk than they have proven to be in conjunction with investors' ability to seek compensation from host states via arbitration. Again, capital-exporting states led the way in seeking investor–state dispute settlement, and again, they did so when they were predominantly concerned with obtaining protections for their nationals' foreign investments; these states did not then appear to contemplate being a respondent in investor–state arbitration. The capital exporters obtained a significant victory in this regard with the ICSID Convention through, notably, a trade of silence on the issue of host states' substantive legal obligations with respect to foreign investment.⁷³

As noted above, the ICSID Convention is a conspicuously skeletal instrument. It does not define “investment” or the scope of the parties' consent to arbitration, leaving those decisions to the contracting states.⁷⁴ In many BITs, states modeled their investor–state dispute settlement provisions after the state–state dispute settlement provi-

71. Guzman, *supra* note 61, at 641–42.

72. *Id.* at 666–67. See also Zachary Elkins, Andrew Guzman & Beth Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 2008 U. ILL. L. REV. 265 (2008) (positing developing nations establish BITs to remain competitive with similarly-situated host countries).

73. Andreas F. Lowenfeld, *The ICSID Convention: Origins and Transformation*, 38 GA. J. INT'L & COMP. L. 47, 48 (2009); Puig, *supra* note 68, at 542–43.

74. ICSID Convention, *supra* note 9, art. 25 (providing that ICSID's jurisdiction extends to “any legal dispute arising directly out of an investment” between a con-

sions, without apparently considering the significant differences between the two provisions or the dramatic increase in litigation risk the former created. The 2005 BIT between Germany and Egypt, for instance, contains an investor–state dispute settlement provision that is little different from the state–state dispute settlement provision in the same treaty or, for that matter, the state–state dispute settlement provision in Germany’s first BIT with Pakistan.⁷⁵ Further, and as mentioned previously, because there was a lag between the heyday of BIT conclusions and the gearing up of the investment arbitration industry, states continued to conclude BITs before they had an opportunity to fully feel the impacts of investor–state arbitration provisions.

With respect to mission, the ICSID Convention is again conspicuously silent, especially when compared to other agreements establishing international organizations—most notably the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement).⁷⁶ The WTO Agreement’s ambitious, expressly stated objectives include “raising standards of living, ensuring full employment,” and expanding trade in goods and services “in accordance with the objective of sustainable development, seeking both to protect and preserve the environment.”⁷⁷ The need for efforts to ensure that developing, and especially least-developed, countries obtain a share of growth in international trade “commensurate with the needs of their economic development” is explicitly stated.⁷⁸ Further direction is provided to the Dispute Settlement Body (DSB) in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).⁷⁹ That agreement makes clear, for instance, that the DSB’s role is to achieve a “satisfactory settlement” of disputes and that, absent a mutually agreeable solution, the objective is usually to secure withdrawal of a trade measure found to be inconsistent with WTO substantive law, which is also considerably more specific than the substantive law

tracting state and a national of another contracting state, where the parties have consented in writing to ICSID jurisdiction).

75. Agreement Between the Arab Republic of Egypt and the Federal Republic of Germany Concerning the Encouragement and Reciprocal Protection of Investments, Egypt-Ger., arts. VIII–IX, June 16, 2005, 2637 U.N.T.S. 183; Treaty for the Promotion and Protection of Investments, Pak.-Ger., art. XI, Nov. 25, 1959, 24 U.N.T.S. 6575.

76. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement].

77. *Id.* pmbl.

78. *Id.*

79. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]. See also PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* 51 (2d ed. 2008) (providing a detailed analysis of the institutional structure of the WTO).

governing international investment.⁸⁰ In short, members of the WTO have significant information about the club they joined, and the WTO's dispute settlement bodies have considerable guidance as to their functions and roles.⁸¹ By comparison, states' membership in the investment arbitration club does not necessarily signify any policy agreement beyond an acknowledgment that it may sometimes—in undefined “certain” cases—be appropriate to settle investor–state disputes in an international, rather than domestic, forum. The ICSID Convention's reference to “the need for international cooperation for economic development,” and “the role of private investment therein,” is not particularly specific, and many BITs, particularly early ones, contain only skeletal statements of object and purpose.⁸² To preview one way in which states are increasingly exercising greater voice in the investment arbitration club, the object and purpose statements in a number of recent BITs are phrased not in narrow terms of investment protection and promotion but instead in terms of economic cooperation and growth that reflect the treaty parties' broader goals.⁸³

80. DSU, *supra* note 79, art. 3. WTO substantive law is set forth in a number of “covered agreements” and is also quite specific relative to the “standards of protection” which comprise substantive international investment law.

81. See Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631, 650–51 (2005).

82. ICSID Convention, *supra* note 9, pmbl.

83. See, e.g., Treaty Between the Federal Republic of Germany and the Republic of Botswana Concerning the Encouragement and Reciprocal Protection of Investments, Ger.-Bots., pmbl., May 23, 2000, 2470 U.N.T.S. 327 (“desiring to intensify economic co-operation between both States” and “recognizing that the encouragement and contractual protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both nations”); Agreement Between the Government of the Republic of Indonesia and the Government of the Republic of India for the Promotion and Protection of Investments, Indon.-India, pmbl., Feb. 8, 1999, *archived at* <http://perma.unl.edu/YTT9-VFFW?type=pdf> (“[d]esiring to create conditions favourable for fostering greater investment by investors of one Contracting Party in the territory of the other Contracting Party” and “[r]ecognising that the encouragement and mutual protection of such investment will be conducive to the stimulation of individual business initiative and will increase prosperity in both Contracting Parties”); Agreement Between the Government of Australia and the Government of the Argentine Republic on the Promotion and Protection of Investments, Austl.-Arg., pmbl., Jan. 11, 1997, 1985 U.N.T.S. 86 (“DESIRING to intensify economic cooperation between both countries” and “RECOGNISING that the promotion and protection of such investments . . . will be conducive to the stimulation of individual business initiative to the benefit of both countries”); Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ecuador, pmbl., Aug. 27, 1993, S. TREATY DOC. NO. 103-15 (1993) (“[d]esiring to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party” and “[r]ecognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties”).

An important corollary to the limited nature of the club's charter is limited direction and control at an organizational level regarding the scope and objectives of the delegation of authority. It is useful at this juncture to return briefly to the comparison between investment treaty arbitration and domestic administrative judicial review. As noted previously, there are a number of similarities between the systems, including the private right of action, imprecise substantive standards, and, frequently, the nature of the challenged governmental action. This has led to useful comparisons, but it is evident and important to note that the entities occupy very different institutional roles and operate under disparate constraints. Specifically, whereas investment arbitration tribunals are states' agents, domestic courts performing administrative judicial review serve as a check on executive branch agents within a tripartite system of government.⁸⁴ Again, John McGinnis explained it well that Americans "do not regard the actions of [domestic] courts in interpreting a law as a delegation of legislative or executive power because of the position of courts in our system of separation of powers."⁸⁵ Investment arbitration tribunals do not occupy a comparable position and, furthermore, the mechanisms of accountability that exist in our domestic system are absent in the international realm.⁸⁶ Thus, attention to the bipartite principal-agent relationship takes on increased importance.

Largely as a result of the race to conclude BITs, the investment arbitration club amassed a large membership in a relatively short period of time. Canada's recent ratification of the ICSID Convention brings the Convention's total membership to 150; an additional number of states may have consented to investor-state arbitration in only some other forum.⁸⁷ To put that number in context, 193 states are members of the United Nations.⁸⁸

The club is therefore large and is also going through a period of transition as a result of changed circumstances and members' experiences so far. Investment flows have changed and increased dramatically since the club's early days and many former capital-importing states are now also significant exporters of capital; UNCTAD reports developing and transition economies generated a record 39% of global

84. U.S. CONST. art. III. See *Fed. Comm'ns Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009) (discussing the judiciary's role in reviewing administrative action).

85. McGinnis, *supra* note 16, at 1726.

86. *Id.* at 1720–25.

87. *List of Contracting States and Other Signatories to the Convention*, INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES (Apr. 11, 2014), <https://icsid.worldbank.org/ICSID/Servlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English>, archived at <http://perma.unl.edu/XYQ9-CFFA>.

88. *Member States of the United Nations*, UNITED NATIONS (July 5, 2014), <http://www.un.org/en/members/>, archived at <http://perma.unl.edu/5W4-34QD>.

FDI outflows in 2013, compared to only 7% fifteen years earlier.⁸⁹ Traditional “North–South” BITs between capital-exporting and capital-importing countries have not been the only game in town for some time.⁹⁰ “North–North” BITs between two capital exporters whose nationals invest in each other have become more common, and “South–South” BITs between two capital-importing countries have proliferated.⁹¹ A related change is that nearly 100 states, including some significant capital exporters, have now been respondents in one or more investor–state disputes, some of which have challenged host state laws and policies of general application, culminated in substantial pecuniary awards, or both. These sovereignty and financial costs, which are not distributed equally, appear to be costs that states did not anticipate fully when they joined the club. Not surprisingly, the most frequent respondents, Argentina, Venezuela, and Ecuador, are among the states that have taken steps to distance themselves from the club.⁹² Bolivia, Ecuador, and Venezuela have each denounced the ICSID Convention.⁹³ Argentina remains a member of ICSID for the time being but has taken the controversial position that it is not required to pay an ICSID award until the prevailing foreign investor pursues formal proceedings in an Argentine court, a position that some, including the U.S. government, view as noncompliance.⁹⁴ Less dramatic than either of the above, but arguably more significant, Australia, which is a significant capital exporter and has been a respondent in only a handful of investment arbitrations, announced in 2011 it would no longer seek to include investor–state dispute settlement provisions in its future trade agreements, something it had previously

89. UNCTAD WIR 2014, *supra* note 4, at ix, 5.

90. See Salacuse & Sullivan, *supra* note 6.

91. Lauge Skovgaard Poulsen, *The Significance of the South–South BITs for the International Investment Regime: A Quantitative Analysis*, 30 *Nw. J. INT'L L. & Bus.* 101 (2010); Salacuse & Sullivan, *supra* note 6, at 77. Depending on what countries are considered “South” countries, such BITs may make up approximately 40% of the global BIT network. Poulsen reaches this conclusion by counting both transition and developing countries as “South” countries. *Id.* at n.2.

92. *IIA Issues Note: Recent Developments*, *supra* note 5, at 4.

93. Pursuant to Article 71 of the ICSID Convention, Venezuela’s denunciation became effective on July 25, 2012, six months from the date of its notice. *Venezuela Submits a Notice Under Article 71 of the ICSID Convention*, *supra* note 9. Bolivia and Ecuador submitted Article 71 notices in 2007 and 2009, respectively. *Bolivia Submits a Notice Under Article 71 of the ICSID Convention*, *supra* note 9; *Ecuador Submits a Notice Under Article 71 of the ICSID Convention*, *supra* note 9.

94. Charles B. Rosenberg, *The Intersection of International Trade and International Arbitration: The Use of Trade Benefits to Secure Compliance with Arbitral Awards*, 44 *Geo. J. INT'L L.* 503, 510–15 (2013). The United States government, for one, rejects Argentina’s position and has taken the position that Argentina has failed to comply with its obligations under the ICSID Convention; on May 28, 2012, the United States suspended Argentina’s preferential trade status under the Generalized System of Preferences in an effort to force Argentina to satisfy its arbitral awards. *Id.* at 504.

done “at the behest of foreign investors.”⁹⁵ Yet another change from the club’s early days is that UNCTAD now frequently expresses concern about the current state of international investment law and highlights opportunities for reform.⁹⁶

On top of all this, whether BITs contribute meaningfully to an increase in foreign investment, much less spur economic development, remains an open question.⁹⁷ Brazil, for instance, has become a top destination for foreign investment despite never having ratified a single BIT.⁹⁸ It is generally accepted that BITs contribute to a favorable investment climate, but the costs states are willing to pay for that benefit may quite reasonably be less than the costs they would be willing to pay for greater benefits in terms of foreign investment and economic development, especially if they do not see a strong need to improve their investment climate and have well-functioning judicial institutions.⁹⁹ This underscores both that the costs and benefits of

95. AUSTRALIAN GOV'T, DEP'T OF FOREIGN AFFAIRS & TRADE, GILLARD GOVERNMENT TRADE POLICY STATEMENT: TRADING OUR WAY TO MORE JOBS AND PROSPERITY 14 (2011). The statement relays the Gillard Government’s view that such provisions “would confer greater legal rights on foreign businesses than those available to domestic businesses.” *Id.* It further states that, “[i]n the past, Australian Governments have sought the inclusion of investor–state dispute resolution procedures in trade agreements with developing countries at the behest of Australian businesses. The Gillard Government will discontinue this practice.” *Id.* See also Kurtz, *supra* note 60, at 65 (stating that Australia became part of a group of States “now engaged in a remarkable process of transforming the investment treaty network” when its government “publicly announced in a Trade Policy Statement that it would no longer include investor–State dispute resolution procedures in future trade agreements”).

96. See, e.g., UNCTAD WIR 2014, *supra* note 4, at 126–32 (discussing four paths of reform); UNCTAD WIR 2013, *supra* note 10 at 105, 107–17 (“The current IIA regime is known for its complexity and incoherence, gaps and overlaps.”).

97. See *supra* note 67.

98. *Come and Get Me: Argentina Is Putting International Arbitration to the Test*, ECONOMIST, Feb. 18, 2012, <http://www.economist.com/node/21547836>, archived at <http://perma.unl.edu/M5KT-EYGL>; *Full List of Bilateral Investment Agreements Concluded, 1 June 2013* by Brazil, UNITED NATIONS CONF. ON TRADE & DEV. (June 1, 2013), http://unctad.org/Sections/dite_pcb/docs/bits_brazil.pdf, archived at <http://perma.unl.edu/C3VU-YF2P> (showing no ratifications).

99. *Come and Get Me: Argentina Is Putting International Arbitration to the Test*, *supra* note 98 (stating that Australia will remain a popular destination for investment without arbitration due to its reliable local courts and rich natural resources). See also Salacuse & Sullivan, *supra* note 6, at 111–12 (concluding that nations likely will negotiate more BITs in the years ahead but that the “role of BITs as a source of international law applicable beyond the two parties to the BIT itself . . . could portend the development—indeed perhaps the current existence—of a multilateral international investment regime built on sources of law other than treaties”); Kenneth J. Vandavelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 COLUM. J. TRANSNAT’L L. 501, 526 (1998) (noting that the question remains whether the policies that a BIT requires should be codified in a BIT).

club membership are not equal and that a central entity capable of addressing the distributional inequalities does not presently exist.

The respective value of BITs is relevant for the additional reason that it is likely a significant factor in states' respective degrees of loyalty to the organization. As illustrated by the examples of a competitive business enterprise and a family, a member's loyalty to an organization generally increases the likelihood that voice will be selected over exit. Another factor in the degree of loyalty is whether the organization is not merely two-dimensional (in terms of membership costs and benefits) but instead also includes a third "public good dimension."¹⁰⁰ Hirschman opines that such a dimension is a common feature of membership organizations and illustrates it well with the example of a national political party:

If I disagree with an organization, say, a political party, I can resign as a member, but generally I cannot stop being a member of the society in which the objectionable party functions. If I participate in the making of a foreign policy of which I have come to disapprove, I can resign my official policy-making position, but cannot stop being unhappy as a citizen of a country which carries on what seems to me an increasingly disastrous foreign policy. In both these examples, the individual is at first both producer and consumer of such public goods as party policy and foreign policy; he can stop being producer, but cannot stop being consumer.¹⁰¹

Whether the organization contains a public good dimension, and states' loyalty to it more broadly, will be revisited later in this Article. For present purposes, the "organization" is a voluntary membership association that formed rapidly without all the players at the table and launched into operation with little structure and an unclear mission. When states rushed to join the club, they rapidly and relatively blindly agreed to a combination of low exit and low voice, in contrast to the course they followed in joining and refining other organizations, where a transition from high exit and low voice to low exit and high voice occurred gradually over time.¹⁰² The organization exists today in an environment very different from the one in which it was created and has unclear benefits and unanticipated membership costs. In light of these characteristics and the present imbalance of exit and voice, it is suggested that three important recuperative goals for states to pursue include: (1) defining the club's mission; (2) adapting the club to changed circumstances; and (3) balancing the costs and benefits of membership. States' options for spurring change through exit and voice are explored next in Part III.

100. HIRSCHMAN, *supra* note 19, at 102.

101. *Id.*

102. *Cf.* Pauwelyn, *supra* note 25, at 5-7, 23-29; Weiler, *supra* note 21, at 2408.

III. EXIT, VOICE, AND LOYALTY

A. Exit: A Long, Difficult, and Open Road to the Door

1. *The Three Types of Exit and the Unavailability of Selective Exit*

As described by Hirschman, the economist's exit is neat and impersonal, and the recuperation automatic.¹⁰³ The latter comes by way of Adam Smith's Invisible Hand "as an unintended by-product of the customer's decision to shift."¹⁰⁴ The mechanics of exit are very different in the legal, political, and economic realm occupied by international investment treaties. As will be shown, a full "formal" or "total" exit from the investment arbitration club requires the resigning state to travel a long, difficult, and very open road, terminating treaties all along the way. This is attributable to several factors, including the fragmented nature of the legal framework, the legal exit costs imposed in BITs, and the inherently political nature of treaty termination. And while "partial" exit options exist due to the fragmented nature of the legal regime, they are not of a degree or nature sufficient to alleviate any significant amount of pressure on the voice side of the scale. "Selective" exit is not an available option from the club as it is defined here.

It is useful to briefly revisit Weiler and Pauwelyn's respective interpretations of exit and explain how and why my interpretation differs for purposes of the investment arbitration club. In the context of the European Community, Weiler concluded that Member State withdrawal, which he termed "formal" or "total" exit, would not benefit from legal analysis because it was widely regarded to be illegal, and therefore focused on "selective" exit, which he defined as the Member States' practice of retaining their memberships while seeking to evade their obligations, by either omission or commission.¹⁰⁵ Pauwelyn similarly focused on possibilities within the constraints of WTO membership, defining exit as "the lack of law or discipline or the thickness of a system's legal-normative structure, which offers easy options to defect from the cooperative regime."¹⁰⁶

For a number of reasons, it is important to go beyond selective exit in this context to also consider partial and total exit options, i.e., treaty termination possibilities. For one thing, having defined the club in terms of states' consent to investor-state arbitration, an analysis of states' options to selectively avoid the requirement to arbitrate

103. HIRSCHMAN, *supra* note 19, at 15.

104. *Id.*

105. Weiler, *supra* note 21, at 2412.

106. Pauwelyn, *supra* note 25, at 5.

disputes they have consented to arbitrate would not go very far; however, as discussed below, it is significant in evaluating the overall difficulty of exit. As understood here, selective exit is a surreptitious activity. It is the act of evading or shirking obligations when the chances of getting caught, or at least of getting caught and incurring any significant repercussions, are low. It is not, by contrast, the act of protesting the obligations, which is an exercise of voice that will be addressed later in this Part, or of formally terminating them, which is an exercise of either partial or total exit. As Weiler explains, selective exit is a much more common temptation than total exit in the life of many international organizations.¹⁰⁷ Indeed, it would seem the availability of selective exit would lessen the likelihood of partial or total exit in many cases, given that the latter are inherently public acts that may be regarded as disrespectful of international law and have significant legal repercussions or political repercussions, or both.¹⁰⁸

Selective exit is not an available option in the investment arbitration club because, once a state consents to investor–state arbitration, it becomes all but impossible for the state to surreptitiously evade the requirement to arbitrate disputes within the scope of its consent or, down the line, to surreptitiously evade the requirement to satisfy an arbitral award. This fact renders it important to step back for a moment from the club as I have defined it. Before states consented to investor–state arbitration, selective exit from the broader “investment treaty” club was not only possible, but quite easy, given the combination of imprecise substantive standards and weak enforcement (state–state arbitration being the only option). The inclusion of investor–state arbitration was a game-changer that does not appear to have been immediately recognized as such, as it did not occur gradually and was not accompanied by a contemporaneous increase in states’ voice, such as limits on arbitrability or more specific substantive standards of investment protection. Accordingly, whereas states gradually relinquished selective exit as they acquired greater voice in other organizations, they effectively checked it at the door to the investment arbitration club.¹⁰⁹ It is tempting to view that closure as a significant victory for law over power, as it rendered the law much more “real.”¹¹⁰ One objective of this Article, however, is to illustrate that law cannot

107. Weiler, *supra* note 21, at 2412. *See also* Laurence Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1587 (2005) (“Particularly given the international legal system’s relatively anarchic environment, in which surreptitious shirking of treaty obligations is often plausible, a state’s decision to follow the rules of the game, publicize a future withdrawal, and open itself to scrutiny demonstrates a kind of respect for international law.”).

108. Helfer, *supra* note 107, at 1587.

109. *See supra* note 102.

110. Weiler, *supra* note 21, at 2423.

exist without politics, and vice versa.¹¹¹ The closure of the selective exit door without a corresponding increase in voice is thus cause for concern.

A second and related reason to consider partial and total exit options in this context is that they are more of a possibility (illustrated most clearly by the fact that they are occurring) than they are in either the European context or the WTO. That is likely due both to the unavailability of selective exit and to the greater political tenability of formal exit from the investment arbitration club relative to many other international organizations. Given the club's beginnings and fragmented nature, as well as the backlash against it, the political ramifications of terminating an investment treaty are likely less than the ramifications of terminating many other treaties, where the act would signify the state's withdrawal from a highly-regarded, multilateral organization, or at least one that is more clearly important for political or economic reasons.¹¹²

Finally, considering partial and total exit options is consistent with Hirschman's objective of conducting a reconnaissance of how exit and voice operate within a particular organization. The goal is not merely to assess what is legal and illegal given, as Weiler recognized, that legal considerations will not always be (and perhaps rarely will be) the decisive factor in terminating treaties.¹¹³ The goal is instead to step back and see the forest for the trees, i.e., to see what is occurring in terms of exit and voice, and then to assess whether the forces are in balance and their respective potential, if any, to spur recuperation of the organization. Related to this, it is significant that some states are exercising their partial and total exit options, because it means not only that the law is hard in terms of its binding nature (such that selective exit is unavailable), but also in terms of its normative weight, or "thickness," as Pauwelyn describes it.¹¹⁴ As has been illustrated elsewhere, international investment law is indeed hard in that investment treaty disputes may implicate significant issues of public importance that go to the heart of state sovereignty and have culminated in substantial pecuniary awards.¹¹⁵ If the law were not

111. See Pauwelyn, *supra* note 25, at 33 (explaining that an organization with too much law or too little politics runs the risk of being unsupported).

112. Of course, the actual political salience of an investment treaty termination will vary according to a number of factors, including the states involved and the events leading up to the termination. Helfer, *supra* note 107, at 1585, 1608.

113. Weiler, *supra* note 21, at 2412.

114. Pauwelyn, *supra* note 25, at 5.

115. *IIA Issues Note: Recent Developments*, *supra* note 5 (noting the record-setting pecuniary award in an investment treaty dispute in *Occidental Petroleum Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, ¶ 876 (Oct. 5, 2012), <http://www.italaw.com/sites/default/files/case-documents/italaw1094.pdf>, archived at <http://perma.unl.edu/DCN4-2TYB>); Rudolf Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law*, 37 N.Y.U. J.

“hard” in a normative sense, then it would matter little if it were “hard” in terms of being binding, and the closure of the selective exit door would be inconsequential. That is not the case here.

2. *The Long Road to Formal Exit*

Perhaps because treaty termination may inherently be regarded as disrespectful of international law, it has received little attention by legal and international relations scholars.¹¹⁶ That is certainly true in the investment treaty context. The operational point has been made that denunciation of the ICSID Convention, which is permitted upon written notice and takes effect six months thereafter, is not alone sufficient to terminate the availability of investor–state arbitration in the many BITs containing a state’s consent to other forms of arbitration.¹¹⁷ This underscores that a state’s membership in ICSID does not constitute the relevant delegation of authority that must be undelegated in order to sever the principal–agent relationship. That delegation is generally contained in BITs, although it may also be contained in other instruments, such as legislation or contracts.

As a legal matter, therefore, a state’s ability to resign its membership in the investment arbitration club depends on the specific instrument—or, realistically, instruments—in which it consented to such arbitration. In BITs, unilateral termination is typically permitted after the treaty has been in force for a specified number of years, often ten or fifteen, and generally takes effect following a specified waiting period after notice is provided, commonly six months or a year.¹¹⁸ This structure is used for the simple reason that investments, unlike trade transactions, are typically long-term endeavors.¹¹⁹ Unilateral termination may be available at any time following the initial in-force

INT’L L. & POL. 953, 964 (2005) (noting that investment treaty disputes can tread on delicate issues typically within the *domaine réservé* of states); Katselas, *supra* note 15, at 114–20 (2012) (comparing investment treaty arbitration to U.S. administrative law).

116. Helfer, *supra* note 107, at 1585, 1608, 1611 (discussing the lack of attention to the topic generally).

117. ICSID Convention, *supra* note 9, art. 71; Diana Marie Wick, *The Counter-Productivity of ICSID Denunciation and Proposals for Change*, 11 J. INT’L BUS. & L. 239, 272–73 (2012).

118. *See, e.g.*, Treaty Between the Government of the United States of America and the Government of Mozambique Concerning the Encouragement and Reciprocal Protection of Investment, United States–Mozam., art. XVI, Dec. 1, 1998, S. TREATY DOC. NO. 106-31 (2000) (entered into force Mar. 3, 2005), *archived at* <http://perma.unl.edu/TX2-RAEV> [hereinafter United States–Mozambique BIT] (may be terminated after ten years with a one-year waiting period); Agreement Between the Government of Australia and the Government of the Argentine Republic on the Promotion and Protection of Investments, and Protocol, Austl.–Arg., art. 15, Jan. 11, 1997, 1985 U.N.T.S. 86, *archived at* <http://perma.unl.edu/6JW-P7DD> (same).

119. *See* Helfer, *supra* note 107, at 1625.

period or only at specified intervals thereafter, e.g., the same period as the initial one.¹²⁰ Of course, if the parties mutually consent, Article 54(b) of the Vienna Convention on the Law of Treaties (VCLT) permits treaty termination at any time.¹²¹

Aside from the timing constraints on termination, most BITs contain continuing effects or “survival” clauses which extend the treaty’s provisions, including the availability of investor–state arbitration, for investments made, acquired, or approved while the treaty was in effect for specified periods following termination, such as ten, fifteen, or twenty years.¹²² Jeswald Salacuse has referred to this as the regime’s “sticky” quality.¹²³ In practical effect, therefore, states may remain obligated to arbitrate investor–state disputes long after they decide to withdraw the consent given in a particular instrument.¹²⁴ Bolivia is a notable example. It became the first state to denounce the ICSID Convention in 2007.¹²⁵ That denunciation removed (or will eventually remove, as noted below¹²⁶) the possibility of ICSID arbitration, but reference must be made to Bolivia’s BITs to determine if foreign investors have other options.¹²⁷ Bolivia’s BIT with the United States, for example, is not limited to ICSID arbitration. The treaty provides for ICSID arbitration if it is available, but also provides for ICSID Additional Facility arbitration, UNCITRAL arbitration, or, if the parties agree, arbitration in any other arbitration institution pursuant to any other arbitration rules.¹²⁸

120. Compare United States–Mozambique BIT, *supra* note 118, art. XVI (permitting termination any time after the initial period), with Agreement on the Encouragement and Reciprocal Protection of Investments Between the Republic of Ecuador and the Kingdom of the Netherlands, Ecuador–Neth., art. 14, June 27, 1999, 2240 U.N.T.S. 19 (entered into force July 1, 2001), *archived at* <http://perma.unl.edu/J23F-P26L> [hereinafter Ecuador–Netherlands BIT] (permitting termination only every ten years).

121. Vienna Convention on the Law of Treaties, art. 54(b), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT].

122. See Salacuse, *supra* note 48, at 472 and n.215 (2010) (listing examples).

123. *Id.* at 471–72.

124. The basic purpose of exit costs such as these is to promote legal stability. See Timothy Meyer, *Power, Exit Costs, and Renegotiation in International Law*, 51 HARV. INT’L L.J. 379, 404 (2010).

125. See *supra* note 93.

126. See *infra* note 127.

127. See *supra* note 117 and accompanying text. It should be noted that at least one attempt has been made to establish ICSID jurisdiction in the absence of a state’s consent through a Most Favored Nation clause, where the state had consented to such jurisdiction in another treaty. *Plama Consortium Ltd. v. Republic of Bulg.*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (Feb. 8, 2005), 44 I.L.M. 721 (2005). The tribunal in *Plama* rejected the attempt. *Id.* ¶¶ 183, 184, 223, 227.

128. Treaty Between the Government of the United States of America and the Government of the Republic of Bolivia Concerning the Encouragement and Reciprocal

On June 10, 2011, Bolivia gave notice that it was terminating its BIT with the United States, which took effect one year later on June 10, 2012.¹²⁹ Under the treaty's ten-year continuing effects clause, U.S. investors may continue to initiate arbitration under the ICSID Additional Facility, assuming it remains available, or in accordance with UNCITRAL, if it does not, until June 10, 2022, for investments established or acquired prior to June 10, 2012.¹³⁰ Further, as Bolivia remains a party to at least fifteen other BITs, nationals of the states covered by those treaties can, as of now, continue to initiate non-ICSID investment arbitration against the state indefinitely, assuming those treaties contain investor-state dispute settlement provisions similar to the one in the Bolivia-United States BIT.¹³¹ The most significant difference between ICSID and ICSID Additional Facility arbitration is that the ICSID Convention's enforcement and recognition provisions do not apply to the latter, and the awards are not insulated from scrutiny by domestic courts.¹³² Accordingly, it has been speculated that Bolivia denounced the ICSID Convention in part to gain the ability to challenge investor-state arbitration awards.¹³³ The prospect of domestic court review is generally regarded as a disadvantage for investors, given that a salient feature of ICSID arbitration is its self-contained nature.¹³⁴ ICSID Additional Facility arbitration is not uncommon, however, and has been used for North American Free Trade Agreement (NAFTA) disputes, for example, because not all NAFTA parties have ratified the ICSID Convention.¹³⁵

Protection of Investment, U.S.-Bol., art. IX(3), *adopted* Apr. 17, 1998, T.I.A.S. No. 12,943 (entered into force June 6, 2001) [hereinafter U.S.-Bolivia BIT].

129. U.S.-Bolivia BIT, *supra* note 128, art. XVI(2); Notice of Termination of United States-Bolivia Bilateral Investment Treaty, 77 Fed. Reg. 30,584 (proposed May 23, 2012).
130. U.S.-Bolivia BIT, *supra* note 128, art. XVI(1).
131. *See Bolivia, Plurinational State of, Bilateral Investment Treaties (BITs)*, UNITED NATIONS CONF. ON TRADE & DEV., <http://investmentpolicyhub.unctad.org/IIA/CountryBits/24#iiaInnerMenu> (last visited Sept. 26, 2014), *archived at* <http://perma.unl.edu/T5ZU-TVPA>.
132. The Additional Facility Rules are available at *Additional Facility Rules*, INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES (Apr. 2006), <https://icsid.worldbank.org/ICSID/ICSID/AdditionalFacilityRules.jsp>, *archived at* <http://perma.unl.edu/UDD5-4E2M>. *See* DOLZER & SCHREUER, *supra* note 1, at 225. Additional Facility arbitration is available when only one side is a party to the ICSID Convention. *Id.* *See* Wick, *supra* note 117, at 274-85, for a comparison of the types of arbitration.
133. *See* Wick, *supra* note 117, at 285.
134. *See* Leon E. Trakman, *The ICSID Under Siege*, 45 CORNELL INT'L L.J. 603, 605 (2013) (expressing concern that domestic courts may dilute international investment law through consideration of domestic law and policies).
135. Up until December 1, 2013, when Canada became a party to the ICSID Convention, the United States was the only NAFTA party that was also a party to the ICSID Convention. North American Free Trade Agreement, U.S.-Can.-Mex.,

Bolivia's denunciation of the ICSID Convention attracted a great deal of attention, as did Ecuador and Venezuela's subsequent denunciations. As a practical matter, however, those denunciations did not effectuate exits from the investment arbitration club so much as shifts from one "product"—ICSID arbitration—to arbitration "products" offered by ICSID's "competition." This is the first partial exit option available to states, and it is the one most analogous—yet still a long way from—the economist's silent marketplace shift. While both the motivation for and wisdom of the states' product shifts may be debated, the salient point for present purposes is that they are not tantamount to resignations from the investment arbitration club. Notably, as discussed below, both Bolivia and Venezuela have, as of now, left the great majority of their BITs in force. Moreover, the states have pledged, along with ten other Latin American states, to support the establishment and use of a regional forum for the settlement of international investment disputes.¹³⁶ Collectively, these actions may suggest that the states are dissatisfied with ICSID arbitration but are considering the possibility of remaining in the club if a better—from their point of view—product comes on the market.

Importantly, denunciation of the ICSID Convention does not relieve the denouncing state of any of its obligations under an existing BIT including, for example, the substantive obligation to provide fair and equitable treatment to covered foreign investments. By contrast, a state's unilateral or mutual termination of a BIT, such as Bolivia's termination of its BIT with the United States, will, eventually, eliminate all of the parties' obligations to one another under the applicable treaty.¹³⁷

This is the second partial exit option available to states, and it is at once broader in scope and narrower in application than the first option. In effect, it is a severance of club relations with one other member that terminates not only the mutual procedural obligation to

Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA]; DOLZER & SCHREUER, *supra* note 1, at 225.

136. *Declaration of the 1st Ministerial Meeting of the Latin American States Affected by Transnational Interests*, MINISTERIO DE RELACIONES EXTERIORES Y MOVILIDAD HUMANA (Apr. 22, 2013), http://cancilleria.gob.ec/wp-content/uploads/2013/04/22abr_declaracion_transnacionales_eng.pdf, archived at <http://perma.unl.edu/4T8L-9ER6>.

137. The ICSID Convention establishes ICSID as an available forum for the resolution of investor–state disputes but does not impose any substantive obligations on states vis-à-vis foreign investors or foreign investments. ICSID Convention, *supra* note 9, art. 1. Those obligations, as well as states' consents to settle investment disputes, are typically contained in BITs. Accordingly, a state's denunciation of the ICSID Convention operates only to remove ICSID as an available arbitral forum; the state must terminate its BITs to eliminate its substantive international investment obligations as well as to withdraw its consent to other dispute settlement mechanisms. See Wick, *supra* note 117, at 248.

arbitrate investor–state disputes but also the mutual substantive obligations existing under the applicable treaty. Viewed in one light, it is a singularly cast and singularly effective blackball of another club member. A state’s decision to terminate a single BIT may be motivated by any number of factors, including disaffection with particular actions taken by the other state or the other state’s investors, or both. Bolivia, for instance, terminated its BIT with the United States shortly after an ICSID tribunal resumed proceedings in a dispute registered by U.S. investors more than two years after Bolivia had denounced the ICSID Convention.¹³⁸ This suggests Bolivia may have been willing to leave its BIT with the United States in force—as it had for more than four years following its denunciation of the ICSID Convention—until that breaking point. An isolated termination may also reflect a state’s dissatisfaction with a particular BIT. Venezuela terminated its BIT with the Netherlands, reportedly to the Netherlands’ surprise, after a number of companies “nationality shopped” by using Dutch corporate vehicles to route their investments into Venezuela due to the treaty’s particularly broad provisions.¹³⁹ As of the date of this Article, at least fifteen Bolivian BITs and twenty-seven Venezuelan BITs remained in force.¹⁴⁰

The foregoing partial exit options are available as a result of the regime’s fragmented nature. The full suite of a state’s investment arbitration obligations is likely to be spread across ten or twenty treaties. This creates partial exit options that would not exist under a consolidated legal framework, but, conversely, it complicates the full exit option because the exiting state must terminate many treaties instead of one and pay separately the attendant exit costs.

At least 180 states have executed BITs, and of those states, a small number appear to have embarked on the long and open road toward full, formal club resignation. Of these states, Ecuador has done so

138. Pan Am. Energy LLC v. Plurinational State of Bol., ICSID Case No. ARB/10/8 (proceeding is pending pursuant to the parties’ agreement on June 21, 2014 to suspend the proceeding until August 21, 2014). See also Petr Polasek & Ryan Mellske, *Termination of Bolivia–United States Bilateral Investment Treaty*, LATIN ARB. L., www.latinarbitrationlaw.com/termination-of-bolivia-united-states-bilateral-investment-treaty/ (last visited July 4, 2014), archived at <http://perma.unl.edu/AMQ9-UHT3> (giving a brief summary of the termination of the Bolivia–United States BIT).

139. Luke Eric Peterson, *Venezuela Surprises the Netherlands with Termination Notice for BIT: Treaty Has Been Used by Many Investors to “Route” Investments into Venezuela*, INVESTMENT ARB. REP. (May 16, 2008), www.iareporter.com/articles/20091001_93, archived at <http://perma.unl.edu/C5XF-AAK7>.

140. See *Bolivia, Plurinational State of, Bilateral Investment Treaties (BITs)*, supra note 131; *Venezuela, Bolivarian Republic of, Bilateral Investment Treaties (BITs)*, UNITED NATIONS CONF. ON TRADE & DEV., <http://investmentpolicyhub.unctad.org/IIA.CountryBits/228#iiaInnerMenu> (last visited Sept. 26, 2014), archived at <http://perma.unl.edu/LM6J-RWA7>.

most theatrically and is by far the furthest along. In 2008, then relatively new President Rafael Correa, who had denounced the Washington Consensus in his inaugural address and begun ushering in a number of new leftist policies, announced he had no faith in ICSID and further that Ecuador had “handed over its sovereignty” when it signed the ICSID Convention.¹⁴¹ In the same year, Ecuador denounced its BITs with Cuba, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania, and Uruguay.¹⁴² The year 2009 witnessed Ecuador’s denunciation of the ICSID Convention.¹⁴³ In March 2013, armed with a decision of the Ecuadorian Constitutional Court finding the dispute resolution provisions in thirteen additional BITs to be in conflict with a provision of the state’s 2008 constitution, President Correa announced his intention to seek termination of the state’s remaining BITs.¹⁴⁴ Most recently, in October 2013, Ecuador established a commission to audit the majority of its BITs.¹⁴⁵ If Ecuador stays the course, the state will eventually make a full exit; nonetheless, it will be many years before the state is completely free of the obligation to arbitrate investor–state disputes under its BITs. Ecuador’s BIT with the Netherlands, for instance, provides for UNCITRAL arbitration, may only be terminated at ten-year intervals, and contains a fifteen-year continuing effects clause.¹⁴⁶ Assuming Ecuador terminates that BIT when it is next legally able to do so in July 2021, the treaty will remain applicable to investments made by Dutch investors prior to that date until July 2037.¹⁴⁷

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141. See Ignacio A. Vincentelli, *The Uncertain Future of ICSID in Latin America*, 16 LAW & BUS. REV. AMERICAS 409, 422 (2010); Gabriela Molina, *Ecuador Wary of World Bank Arbitration in Occidental Case*, USA TODAY, May 11, 2008, http://usatoday30.usatoday.com/money/economy/2008-5-11-3404362337_x.htm, archived at <http://perma.unl.edu/HL9M-2UQ7>.
142. UNCTAD WIR 2013, *supra* note 10, at 108 & 201 n.57.
143. See *supra* note 10.
144. UNCTAD WIR 2013, *supra* note 10, at 201 n.57; *2011 Investment Climate Statement—Ecuador*, U.S. DEP’T OF STATE (Mar. 2011), <http://www.state.gov/e/eb/rls/othr/ics/2011/157270.htm>, archived at <http://perma.unl.edu/V2RB-W4UN>.
145. *Ecuador Establishes Commission to Audit Its Bilateral Investment Treaties*, ALLEN & OVERY (Nov. 13, 2013), <http://www.allenoverly.com/publications/en-gb/Pages/Ecuador-establishes-Commission-to-audit-its-Bilateral-Investment-Treaties.aspx>, archived at <http://perma.unl.edu/TXG2-4467>.
146. Ecuador–Netherlands BIT, *supra* note 120, arts. 11, 14.
147. *Id.* It has been reported by at least one law firm that Argentina may denounce the ICSID Convention and that President Cristina Fernández de Kirchner will ask Argentina’s Congress to pass a law providing for the termination of the state’s BITs; if such a law is passed, Argentina would need to embark on the long road toward full exit behind Ecuador. Hogan Lovells, *If Argentina Withdraws from the ICSID Convention: Implications for Foreign Investors*, INT’L ARB. ALERT (Feb. 4, 2013), <http://ehoganlovells.com/cv/675f9a9cdbcdf1cb602217222c2aaef2d834bd2>, archived at <http://perma.unl.edu/KBP8-GKHG>.

President Correa and his policies are very popular in Ecuador but polemical abroad. The state is the third most frequent respondent in investor–state arbitration and has been hit with the largest award to date in the *Occidental Petroleum* dispute.¹⁴⁸ This is relevant because it has been suggested that actions such as Ecuador’s do not illustrate any systemic problem with ICSID arbitration but are instead predicated on individual net cost–benefit analyses (which might differ significantly from the net cost–benefit analyses of many other club members).¹⁴⁹ It cannot be said, however, that all states that have embarked on the exit road are similarly situated. South Africa has been a respondent in all of two known investor–state arbitrations, both of which it settled, yet recently announced its intention to terminate all of its “first-generation” BITs, which it concluded following apartheid.¹⁵⁰ The state has terminated five of these treaties so far, including those with Luxembourg and Belgium, Germany, Spain, Switzerland, and the Netherlands.¹⁵¹

South Africa embarked on the exit road following the settlement of its second investor–state arbitration, which was initiated by investors from Italy and Luxembourg and arose out of the state’s Mining and Petroleum Resources Development Act (MPRDA).¹⁵² The MPRDA is a component of the state’s Black Economic Empowerment Policy and requires, among other things, equity in mining companies to be owned by “Historically Disadvantaged Persons.”¹⁵³ In response to criticism of the state’s decision to terminate its first-generation BITs, South African Trade and Industry Minister Rob Davies issued a letter affirming South Africa’s commitment to continue strengthening its investment protection regime for all investors “in a transparent and

148. *IIA Issues Note: Recent Developments*, *supra* note 5, at 1, 4.

149. See Trakman, *supra* note 134, at 611 (citing Andreas von Staden, *Towards Greater Doctrinal Clarity in Investor–State Arbitration: The CMS, Enron, and Sempra Annulment Decisions*, 2 CZECH Y.B. INT’L L. 207 (2011)).

150. UNCTAD WIR 2013, *supra* note 10, at 108; Adam Robert Green, *South Africa: Govt. Begins Shedding ‘First Wave’ Investment Treaties*, THIS IS AFR. (Oct. 18, 2012), <http://allafrica.com/stories/201210191188.html>, archived at <http://perma.unl.edu/RL2G-RUMW>.

151. Jonathan Lang, *Bilateral Investment Treaties—A Shield or Sword?*, BOWMAN GILFILLAN AFR. GROUP, <http://www.bowman.co.za/FileBrowser/ArticleDocuments/South-African-Government-Canceling-Bilateral-Investment-Treaties.pdf> (last visited July 27, 2014), archived at <http://perma.unl.edu/JC2G-QMTL>; *South Africa, Bilateral Investment Treaties (BITs)*, UNITED NATIONS CONF. ON TRADE & DEV., <http://investmentpolicyhub.unctad.org/IIA/CountryBits/195#iaInnerMenu> (last visited Sept. 26, 2014), archived at <http://perma.unl.edu/YF2-Y5PH>.

152. *Piero Foresti v. Republic of S. Afr.*, ICSID Case No.ARB(AF)/07/1, Award (Aug. 4, 2010), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1651_En&caseId=C90, archived at <http://perma.unl.edu/AHX8-CB6N>.

153. Mineral and Petroleum Resources Development Act 28 of 2002 (S. Afr.), archived at <http://perma.unl.edu/8N9-KJ9Q>.

nondiscriminatory manner” rather than provide it only to “some. . . covered under outdated [BITs]” concluded when investors were uncertain about the country’s future economic direction.¹⁵⁴ Davies also asserted that “[e]vidence the world over has amply demonstrated that there is no correlation between the investment treaties and [FDI] flows,” and that “governments around the world have reviewed and adjusted their approach to investment treaties” given their imprecision and imposition on host states of “unacceptable risks.”¹⁵⁵ At a South Africa–EU Business Forum in July 2013, Davies further referenced a growing trade deficit with the EU, which prompted Karel De Gucht, the European commissioner for trade, to defend the trade relationship as “mutually beneficial” and to further reference an agreement under which the EU had agreed to an asymmetric opening of agricultural markets to South Africa.¹⁵⁶ Canada’s minister for international trade has similarly decried South Africa’s decision, calling it an action that “protectionist” countries take and warning that Canadian investors are a “cautious lot.”¹⁵⁷

Finally, Australia has not terminated any of its BITs but announced in April 2011 it will no longer seek to include investor–state dispute settlement provisions in its investment agreements.¹⁵⁸ Australia’s action is less drastic than the actions of Ecuador and South Africa and is effectively a threat of exit. It is significant, however, not only because Australia had never been a respondent in investor–state arbitration at the time but also, and perhaps more significantly, because Australia is a significant capital exporter. In explanation, the Australian government went beyond the investor–state arbitration issue to state that it supports the principle of national treatment but not provisions that would: “confer greater legal rights on foreign businesses than those available to domestic businesses”; constrain Australia’s ability “to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate be-

154. Rob Davies, *Letter: Termination of Bilateral Investment Treaties Won’t Harm Relations*, BUS. DAY (July 19, 2013, 12:01 PM), <http://www.bdlive.co.za/opinion/letters/2013/07/19/letter-termination-of-bilateral-investment-treaties-wont-harm-relations>, archived at <http://perma.unl.edu/W5WP-ZPWV>.

155. *Id.*

156. Mark Allix, *South Africa Gets Tongue-Lashing at SA–EU Business Forum*, BUS. DAY (July 13, 2013, 14:45), <http://www.bdlive.co.za/business/trade/2013/07/17/south-africa-gets-tongue-lashing-at-sa-eu-business-forum>, archived at <http://perma.unl.edu/3BRH-35E8>.

157. Adam Green, *Canada ‘Very Disappointed’ at South Africa’s Investment Treaty Termination*, THIS IS AFR. (May 30, 2013), <http://www.thisisafricaonline.com/Business/Legal-Bulletin/Canada-very-disappointed-at-South-Africa-s-investment-treaty-termination>, archived at <http://perma.unl.edu/HVP2-Y5AH>. Canadian companies invest quite heavily in South Africa, and Canadian investment in the South African mining sector, for instance, has grown significantly since 2005. *Id.*

158. *See supra* note 95.

tween domestic and foreign businesses”; or, finally, “limit [Australia’s] capacity to put health warnings or plain packaging requirements on tobacco products or its ability to continue the Pharmaceutical Benefits Scheme.”¹⁵⁹ Two months after its announcement but likely anticipated for some time, Australia became a respondent in its first-ever investor–state arbitration, brought by Philip Morris Asia Ltd. under the 1993 Hong Kong–Australia BIT.¹⁶⁰ That dispute, not surprisingly, arose out of Australia’s stringent Tobacco Plain Packaging Act of 2011; it has been pending for more than three years.¹⁶¹

3. *The Operation of Exit*

The foregoing illustrates that selective exit is unavailable, and that a range of rather wieldy partial and total exit options are legally available to the members of the investment arbitration club. States may shift from one investment arbitration product to another, partially exit by terminating only some of their treaties, or fully exit by terminating all of their treaties. The first of the three options is the closest in substance to the economist’s imagined marketplace shift; however, none of the options operate silently, neatly, or freely in the investment arbitration context. A state’s decision to denounce the ICSID Convention or terminate a BIT is inherently vocal and political, albeit more politically tenable than treaty terminations in other contexts, given that the state must provide notice and, realistically, an explanation of the reasons for its decision. In short, exit is difficult. This portends the power of and need for a commensurate amount of voice.

As a means of spurring organizational recuperation, the effect of exit is unclear. It is possible that some arbitration tribunals may pay greater heed to states’ interests generally as a result of one or more of the aforementioned acts, but that is impossible to determine or measure with any degree of reliability. Any resulting improvement in the club would come about in a roundabout, subjective way that may not be immediately recognized. As a general matter, exit is a less sophisticated means of spurring recuperation than voice.¹⁶² To be at all effective as a recuperative mechanism, it would also seem that exit must register as a valid and vexing complaint against the club. The fragmented nature of the legal regime creates a challenge in this re-

159. *See supra* note 95.

160. Written Notification of Claim Pursuant to Agreement Between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments, AUSTRALIAN GOV’T: DEP’T OF FOREIGN AFFAIRS & TRADE 3–15 (June 22, 2011), <https://www.dfat.gov.au/foi/downloads/dfat-foi-11-20550.pdf>, archived at <http://perma.unl.edu/FVD4-TVfQ>.

161. Procedural Order No. 7, Philip Morris Asia Ltd. v. Australia, Case No. 2012-12 (Permanent Ct. Arbitration Dec. 31, 2012), http://www.pca-cpa.org/showfile.asp?fil_id=2091, archived at <http://perma.unl.edu/9LM5-RE6G>.

162. Weiler, *supra* note 21, at 2411.

spect, although at least some of the acts may serve to highlight the potential for the organization to infringe on matters typically within the *domaine réservé* of states.¹⁶³ Perhaps most significantly, the acts may help to elevate the level and significance of the debate regarding the costs and benefits of BITs, which could lead to more balanced and carefully drafted future treaties. Threats of exit have certainly been used as a strategy to increase states' voice in international organizations in the past, and acts such as South Africa's and Australia's could operate to increase their bargaining power in the negotiation of new BITs and IIAs if the states choose that course rather than continuing on the exit road.¹⁶⁴ Indeed, Australia's newly-elected government signed a free trade agreement with Korea in April 2014 that contains an investor–state arbitration provision; the government signed a free trade agreement with Japan in the same month that does not include one.¹⁶⁵ This suggests that Australia may be willing to use investor–state arbitration as a bargaining chip in its treaty negotiations.

Finally, another challenge to exit's potential effectiveness as a recuperative mechanism is that the number of investor–state disputes has continued to rise even as the rate at which new BITs are concluded has continued to fall. With respect to the marketplace, Hirschman observed exit may fail to cause revenue loss if a company acquires new customers as it loses old ones.¹⁶⁶ That typically occurs when a product takes time to reveal its faults.¹⁶⁷ That force is somewhat at work in the investment arbitration club, given the investment arbitration industry developed sometime after the heyday of BIT conclusions and is now stronger than ever. Accordingly, although investment arbitrators are likely aware of all the acts discussed here, they may not perceive those acts as a potential sign that the club is in trouble. The legal regime's "sticky" quality is also a factor.¹⁶⁸

163. Dolzer, *supra* note 115.

164. Helfer, *supra* note 107, at 1583–84.

165. Australia–Korea Free Trade Agreement, Austl.-Kor., ch. 11, § B, Apr. 8, 2014, archived at <http://perma.unl.edu/G6TJ-Z6TG>. See Simon Lester, *Improving Investment Treaties Through Exceptions Provisions: The Australian Example*, INVESTMENT TREATY NEWS (May 14, 2014), <http://www.iisd.org/itn/2014/05/14/improving-investment-treaties-through-general-exceptions-provisions-the-australian-example/>, archived at <http://perma.unl.edu/VJA4-2TNM> (reporting that Australia protected its regulatory space through a general exceptions provision). See also Luke Nottage, *Why No Investor–State Arbitration in the Australia–Japan FTA?*, E. ASIA F. (Apr. 9, 2014), <http://www.eastasiaforum.org/2014/04/09/why-no-investor-state-arbitration-in-the-australia-japan-fta/>, archived at <http://perma.unl.edu/SNF3-WPFP> (reporting that Japan, the net capital exporter in the relationship, presumably did not push very hard for investor–state dispute settlement).

166. HIRSCHMAN, *supra* note 19, at 26.

167. *Id.*

168. Salacuse, *supra* note 48, at 471–72.

B. Voice: From Protest to Prescription

In contrast to exit, a state's options to voice its disaffection with the investment arbitration club are essentially limitless. A state may, among other things, express its views in intergovernmental dialogues, such as the ongoing Organization for Economic Co-operation and Development Freedom of Investment Roundtable discussions, declare on a talk show that it will not recognize ICSID arbitration awards à la the late Venezuelan President Hugo Chavez, or amend or replace its existing BITs.¹⁶⁹ In the investment arbitration area, as illustrated above, while a state cannot practically exercise any of its limited exit options without exercising its voice at the same time, the converse is not true. A state may “kick up a fuss” while retaining full or partial membership, and a number of states are doing so.¹⁷⁰ This section examines the availability and operation of three channels for voice in this context. As will be shown, the fragmented nature of the legal regime creates both challenges and opportunities in this respect as well.

1. Protest

Perhaps the most obvious way for a state to voice its displeasure with a legal regime is through noncompliance. Treaty breach, or “defection” in the language of international relations scholars, is certainly available to members of the investment arbitration organization and may be exercised in myriad ways and degrees.¹⁷¹ As discussed here, the term refers to a state's failure to comply with its obligations respecting investor–state arbitration and not any substantive obligations assumed in an investment treaty. This choice is made primarily because investor–state arbitration is the focus of this Article, but also because breaches of this nature will be in many cases more visible and thus more vocal than breaches of other types. Whether a host state has breached an obligation to afford fair and equitable treatment, for example, may be debatable, especially before an arbitral award is rendered, whereas a state's compliance with its obligation to pay a final

169. OECD has hosted these discussions, on “how governments can reconcile the need to preserve and expand an open international investment environment with their duty to safeguard the essential security interests of their people,” since 2006. See *Freedom of Investment Roundtables: Summary of Discussions*, OECD, <http://www.oecd.org/daf/inv/investment-policy/oecdroundtablesonfreedomofinvestment.htm> (last visited July 7, 2014), archived at <http://perma.unl.edu/5QQS-6MYR?type=live>. President Chavez made this announcement on January 8, 2012. *Chávez No Aceptará los Fallos de un Órgano Internacional Contra Sus Expropiaciones* [Chavez Will Not Accept the Rulings of an International Body Against His Expropriations], BBC NEWS (Jan. 8 2012), http://www.bbc.co.uk/mundo/ultimas_noticias/2012/01/120108_ulnnot_venezuela_chavez_petroleo_exxon_fp.shtml, archived at <http://perma.unl.edu/RZ8-YSTV>.

170. HIRSCHMAN, *supra* note 19, at 30.

171. See Helfer, *supra* note 107, at 1614.

arbitration award will more typically be regarded incontrovertibly. This is especially true in the case of ICSID awards. Because an emblematic feature of ICSID arbitration is its self-contained nature, a state's refusal to voluntarily pay an ICSID award is particularly conspicuous and apt to register as a targeted protest of the investor-state arbitration system, as illustrated below with the example of Argentina.¹⁷² As Christoph Schreuer has cogently stated, "[t]he obligation to abide by and comply with the terms of [an ICSID] award is a logical consequence of its binding nature."¹⁷³

Indeed, while the majority of states that have lost investor-state disputes have paid the awards, a number have not done so, and the acts of nonpayment have been widely publicized.¹⁷⁴ Russia, Argentina, Kazakhstan, Kyrgyzstan, Zimbabwe, Congo, Liberia, and Senegal have all declined to voluntarily pay one or more investment arbitration awards.¹⁷⁵ As a practical matter, such refusals can be very difficult for the award-holding investor to overcome, because a state's consent to investment arbitration has generally been interpreted as a limited waiver of the state's jurisdictional sovereign immunity that does not impugn its separate sovereign immunity from execution; the ICSID Convention states this expressly.¹⁷⁶ Accordingly, an investor confronted with a non-paying state is generally left to seek enforcement against the state's commercial assets in a municipal court, with uncertain prospects for success.¹⁷⁷ Ultimately, a state's refusal to voluntarily pay an investment arbitration award creates a risk that the dispute will be "re-politicized" if the investor's

172. Article 53 of the ICSID Convention provides that an award "shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided in this Convention." ICSID Convention, *supra* note 9, art. 53. Article 54, in turn, requires each Contracting State to recognize an ICSID award "as binding and enforce the pecuniary obligations . . . as if it were a final judgment of [a court] in that State." *Id.* art. 54. *See also* DOLZER & SCHREUER, *supra* note 1, at 223 ("Proceedings under the ICSID Convention are self-contained. . . . [They also] are independent of the intervention of any outside bodies.")

173. CHRISTOPH H. SCHREUER ET AL., *THE ICSID CONVENTION: A COMMENTARY* 1106 (2d ed. 2009).

174. Andrea Bjorklund, *Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes*, 21 AM. REV. INT'L. ARB. 211, 213 & nn.13-17 (2010). *See also* Rosenberg, *supra* note 94, at 508 & nn.26-31 (listing particular nations who have refused to comply with ICSID awards).

175. Bjorklund, *supra* note 174, at 213 n.18. It should be noted that the majority of states have voluntarily paid the awards including, notably, Bolivia and Ecuador, even after they denounced the ICSID Convention. *See id.* at 214 n.20.

176. *See id.* at 211. *See also* ICSID Convention, *supra* note 9, art. 55 (stating that nothing in the ICSID will prejudice the law in force in any Contracting State relating to immunity from execution); Georges R. Delaume, *ICSID Arbitration and the Courts*, 77 AM. J. INT'L L. 784, 797 (1983) (discussing the various methods and problems available for executing against a state's assets).

177. *See* Bjorklund, *supra* note 174, at 220-23.

home state chooses to take up the matter.¹⁷⁸ This is typically regarded as a failure for the legal regime given that one of its chief aims is the depoliticization of investor–state disputes.¹⁷⁹ It illustrates rather well, however, the availability and operation of voice through protest in this context.

Of all the refusals to voluntarily pay ICSID awards, Argentina’s refusals have garnered the most attention, and for very good reason. Argentina is the most frequent respondent in investor–state arbitration, having defended itself in at least fifty-two arbitrations as of May 2013.¹⁸⁰ The storied tale of Argentina and ICSID spans the state’s implementation of a suite of measures to address an economic crisis in 2002, a subsequent flood of investment treaty claims based on those measures, inconsistent arbitral awards on the outcome-determinative issue of Argentina’s “necessity” defense, and, finally, single awards in the hundreds of millions of dollars and potential mass liability in the billions of dollars.¹⁸¹ Against this backdrop, Argentina has taken the legal position that it is not required to pay adverse ICSID awards until the prevailing foreign investor pursues formal proceedings in an Argentine court.¹⁸² Argentina’s position smacks of protest and has been widely received as such by the international community. Defenders of ICSID criticize Argentina’s actions as self-calculated and self-interested; others assert that the tale showcases ICSID’s incompetence in handling investor–state disputes stemming from sovereign debt crises.¹⁸³ It is not yet clear how the story will end; however, the issue is evidently becoming increasingly political over time. On March 26, 2012, acting on petitions filed by two U.S. companies, President Obama suspended Argentina’s preferential trade benefits under the U.S. Generalized System of Preferences (GSP), which grants non-reciprocal, duty-free tariff treatment to certain products imported from Argentina, on the unprecedented basis that the state “has not acted in good faith in enforcing arbitral awards in favor of United States citi-

178. *See id.* at 239–42.

179. *See id.* at 214, 239–42.

180. *IIA Issues Note: Recent Developments*, *supra* note 5, at 4. Venezuela, with 34 known cases as of May 2013, is the second most frequent respondent. *Id.* *See also List of Concluded Cases*, *supra* note 3 (listing all concluded cases); *List of Pending Cases*, *supra* note 3 (listing all pending cases).

181. *See* Eric David Kasenetz, *Desperate Times Call for Desperate Measures: The Aftermath of Argentina’s State of Necessity and the Current Fight in the ICSID*, 41 *GEO. WASH. INT’L L. REV.* 709, 711–31 (2010). *See also* Trakman, *supra* note 134, at 642–43 (noting the inconsistent applications of law in cases involving the necessity defense).

182. *See* Rosenberg, *supra* note 94, at 510–15.

183. Trakman, *supra* note 134, at 611. *See also* L. Yves Fortier, *International Arbitration and the Argentine Cases: An Evaluation of 10 Years of Arbitration—Institutional Aspects*, 6 *WORLD ARB. & MEDIATION REV.* 545, 545 (2012) (questioning the ability of the ICSID to successfully manage investment disputes).

zens or a [United States entity].”¹⁸⁴ More recently, in October 2013, Argentina announced it will settle five ICSID awards for \$500 million, a reduction of 25% from the original amount claimed, in government bonds (not cash).¹⁸⁵ While this decision appears to mark a shift in Argentina’s stance on ICSID awards, Argentina may have taken the action at least in part to bolster its credibility in other, larger battles over repayment of its restructured government debt and privately held bonds.¹⁸⁶ In essence, the political fight continues.

2. Interpretation

An altogether different channel for voice is subsequent agreement and practice. The VCLT provides that treaty interpretation shall take into account “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” and “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”¹⁸⁷ As is well-known to those in the investment treaty field, NAFTA goes a step beyond the VCLT to provide that subsequent interpretations issued by its Free Trade Commission (FTC), which is comprised of cabinet-level representatives of the three treaty parties, are binding on NAFTA tribunals.¹⁸⁸ On July 31, 2001, during the pendency of the damages phase of the *Pope & Talbot* arbitration against Canada and the merits phase of the *ADF Group* arbitration against the United States, the FTC issued a binding note of interpretation “clarifying” that the concepts of “fair and equitable treatment” and “full protection and security” contained in NAFTA Section 1105(1) do not require treatment “in addition to or beyond that which is required by the customary international law minimum standard of

184. Proclamation No. 8788, 77 Fed. Reg. 18,899 (Mar. 29, 2012). See also VIVIAN C. JONES, CONG. RESEARCH SERV., RL33663, GENERALIZED SYSTEM OF PREFERENCES: BACKGROUND AND RENEWAL DEBATE 3 (2013) (discussing the implications of Argentina’s suspension of GSP benefits); Rosenberg, *supra* note 94, at 510–16 (discussing Argentina’s failure to comply with ICSID awards).

185. Ken Parks, *Argentina Reaches \$677M Investment Dispute Settlement—Government*, WALL ST. J., Oct. 18, 2013, <http://online.wsj.com/article/BT-CO-20131018-705467.html>, archived at <http://perma.unl.edu/WJB9-PEAE>.

186. Two months prior to Argentina’s announcement, the U.S. Court of Appeals for the Second Circuit upheld an injunction barring the state from repaying holders of its restructured debt if it fails to pay private holders of certain defaulted bonds. *NML Capital, Ltd. v. Republic of Arg.*, 727 F.3d 230 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 2819 (2014). Most recently, in May 2014, Argentina announced it had reached a deal with the Paris Club to settle its \$9.7 billion debt on bonds held by Paris Club governments. James K. Glassman, *Don’t Welch on Me, Argentina*, WALL ST. J., June 3, 2014, <http://online.wsj.com/articles/james-k-glassman-dont-welch-on-me-argentina-1401826159>, archived at <http://perma.unl.edu/8B6Q-XSRC?type=live>.

187. VCLT, *supra* note 121, art. 31(3)(a)–(b).

188. NAFTA, *supra* note 135, arts. 1131(2), 2001(1), 2001(2)(c).

aliens.”¹⁸⁹ The *Pope & Talbot* tribunal chafed at the interpretation given its timing but ultimately applied it, as did the *ADF Group* tribunal and subsequent tribunals.¹⁹⁰ The extent to which the specific interpretation issued actually impacted the outcome of the disputes is debatable, given that the meaning of the customary international law minimum standard itself is less than clear. Nonetheless, the mechanism may be regarded as one significant channel for voice in this context. Criticisms of the mechanism notwithstanding, an investment arbitration tribunal would be hard-pressed to ignore the FTC’s interpretation.

To some, the FTC’s interpretation came at a less-than-ideal time given the pendency of the arbitrations. That view is understandable, but it may also reflect some degree of disciplinary tunnel vision, as the necessary political impetus for the interpretation may not have otherwise existed, especially in light of the relatively low number of investment arbitration awards that had been rendered at the time. The impetus may exist more broadly now, given the increasingly widespread recognition that the investment arbitration machine is in need of recalibration, coupled with the difficulty of exit. Subsequent agreement and practice would therefore seem to be a potentially valuable channel through which states can exercise increased voice. Consistent with the theme of this Article, political motivations should not be discounted automatically; however, it stands to reason that not all instances of subsequent agreement and practice will warrant equal weight. Anthea Roberts has recently made excellent arguments as to how and when states can most effectively conclude subsequent agreements and engage in subsequent practice.¹⁹¹

The FTC illustrates the remarkable power states have to include similar mechanisms in their treaties and thereby retain a significant degree of interpretive control over their agents. To American lawyers, the power is especially striking for two inter-related reasons: (1) the law-making and law-interpreting functions reside in separate branches of government in our system, and (2) domestic courts consider at most a statute’s plain language and legislative history in in-

189. N. Am. Free Trade Comm’n, *Notes of Interpretation of Certain Chapter 11 Provisions*, U.S. DEPT OF STATE (July 31, 2001), <http://www.state.gov/documents/organization/38790.pdf>, archived at <http://perma.unl.edu/D25A-M3YM>.

190. See *ADF Grp. Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award, ¶ 177 (Jan. 9, 2003), 18 ICSID Rev. 195 (2003); *Pope & Talbot Inc. v. Gov’t of Can., Award in Respect of Damages*, 41 I.L.M. 1347, ¶¶ 11–16 (NAFTA Ch. 11 Arb. Trib. 2002). See also United Nations Conference on Trade & Dev., *IIA Issues Note: Interpretation of IIAs: What States Can Do*, at 13, U.N. Doc. UNCTAD/WEB/DIAE/IA/2011/10 (Dec. 2011), archived at <http://perma.unl.edu/LUD7-26DD> (discussing the FTC’s application of 1105(1) to the *Pope & Talbot* and *ADF Group* cases); Yackee, *supra* note 15, at 441 (noting that tribunals have often respected FTC interpretive authority).

191. See generally Roberts, *supra* note 25.

terpreting a law made by Congress; subsequent interpretations by Congress are not considered. With respect to the former, and as Jason Yackee has noted, the FTC is not analogous to a domestic court or, for that matter, to any single branch of domestic government.¹⁹² With respect to the latter, it is striking that the VCLT requires, and does not merely permit, consideration of subsequent agreements and practice in treaty interpretation. Quite distinct from the domestic law principle contained in *Marbury v. Madison*, this VCLT requirement stems from the public international law principle that “the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it.”¹⁹³ Accordingly, treaty parties possess a very powerful tool even in the absence of a mechanism comparable to NAFTA’s FTC. The strongest evidence of subsequent agreements and practice will represent the views of all parties to a treaty and thus will not always be possible, but the fragmented nature of the legal regime presents an opportunity in this respect for the simple reason that it is typically easier for a smaller number of parties to reach agreement than it is for a larger number to do so.

3. Prescription

Finally, a third and potentially very powerful channel for voice is treaty amendment or wholesale replacement. This requires not only the assent of all parties, but also domestic ratification, and accordingly entails the most significant transaction costs. Because amendments and new treaties will go beyond interpretations of existing provisions, it is also to be expected that reaching agreement may in some instances be more difficult than reaching agreement on a subsequent interpretive agreement. Again, however, significant opportunities exist by virtue of the fragmented nature of the legal regime. By way of comparison, it is virtually impossible to amend the ICSID Convention because there are 150 parties to it and consensus is required. Fortunately, in one sense, and as discussed above, the ICSID Convention is a skeletal instrument which leaves a substantial amount of room for states to fill in the gaps in their BITs and IIAs. Of all the existing channels for voice, treaty amendment or replacement is the most powerful because it does not operate as a means of controlling an

192. See Yackee, *supra* note 15, at 441; Joshua Elcombe, Note, *Regulatory Powers vs. Investment Protection Under NAFTA’s Chapter 1110: Metalclad, Methanex, and Glamis Gold*, 68 U. TORONTO FAC. L. REV. 71, 98 (2010).

193. Question of Jaworzina, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 8, at 37 (Dec. 6). See also *Kasikili/Zedudu Island (Bots. v. Namib.)*, Judgment, 1999 I.C.J. 1045, ¶ 63 (Dec. 13) (analyzing state practice subsequent to an agreement for an authoritative interpretation of its terms). But see *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

agent's exercise of existing authority. Instead it affirmatively modifies the scope of that authority.

The ways in which new provisions or treaties may differ from existing ones are also essentially limitless. Briefly, options related to the aforementioned possible recuperative goals of mission definition, adaptation, and cost–benefit balancing will be considered here. With respect to mission definition, the lack of a formal international investment organization comparable to the WTO gives BIT and IIA parties a remarkable opportunity to define the object and purpose of the club for their purposes, and to tailor their BITs to their particular circumstances and appetites for risk. For example, if the promotion of sustainable development is a goal, then it is worthwhile for the treaty parties to state this expressly in their treaty's statement of object and purpose. Related to this, the parties may wish to include denial of benefits clauses applicable to foreign investors that have no substantial business activity in the host state.¹⁹⁴ As is now evident, the risk of not specifying a treaty's broader object and purpose is that arbitration tribunals will interpret it as investment protection in a vacuum, divorced from any broader economic goals. A number of recent BITs are better in this regard than their earlier counterparts. The preamble to the recently signed Canada–Benin BIT, for example, references “the stimulation of mutually beneficial economic activity, the development of economic cooperation between both countries and the promotion of sustainable development.”¹⁹⁵ That language helpfully goes beyond preambles in earlier Canadian BITs, which reference only “the stimulation of business initiative and . . . the development of economic cooperation.”¹⁹⁶ Taking the concept a step further to address the relationship between investment protection and the parties' other sovereign prerogatives, and along the lines of the most recent U.S. Model BIT, treaty parties could express the object and purpose in terms of investment promotion and protection “consistent with” their other objectives—and sovereign prerogatives and responsibilities—including sustainable development, adherence to international labor standards, and the protection of health, safety, and the environment.¹⁹⁷

194. *See* Agreement Between Canada and the Slovak Republic for the Promotion and Protection of Investments, Can.-Slovak Republic, art. XV, July 20, 2010, 2010 Can. T.S. No. E105168 [hereinafter Canada–Slovak Republic Agreement].

195. Agreement Between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments, Can.-Benin, pmb., Jan. 8, 2013, 2014 Can. T.S. No. E105414 *archived at* <http://perma.unl.edu/N7YY-TWZS> [hereinafter Canada–Benin BIT].

196. *See, e.g.*, Agreement Between the Government of Canada and the Government of the Republic of Hungary for the Promotion and Reciprocal Protection of Investments, Can.-Hung., pmb., Oct. 3, 1991, 1993 Can. T.S. No. E101513.

197. *2012 U.S. Model Bilateral Investment Treaty*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, pmb. (2012) [hereinafter *2012 U.S. Model BIT*], <http://www.ustr.gov/>

Second, with respect to adaptation and as mentioned previously, the global climate for investment—and investment treaties—is much different than it was in the club’s early days, when capital-exporting states sought to conclude BITs primarily due to fears of expropriation and many newly independent but economically undeveloped countries had a recent history of fiercely guarding their right to expropriate foreign investment.¹⁹⁸ As investment flows have increased and diversified and the line between capital-importing and capital-exporting states has blurred, it is increasingly the case that both parties to a BIT may have favorable climates for investment, or at least climates that are significantly improved from the club’s early days. At the same time, and in light of the rapid and recent explosion in investor–state arbitration, both parties—as opposed to one or neither—are likely to understand that liability is a significant risk and accordingly be willing to include provisions designed to limit their liability.

One consequence and opportunity presented by these changes is that both parties may now have a greater interest in clarifying the substantive treaty standards to make expectations more clear. At the front end, clearer standards may reduce the number of investor–state disputes filed, and at the back end, they may helpfully limit the discretion of the arbitration tribunals and, in turn, enhance the predictability and consistency of arbitral awards. The current trend is towards greater precision, which is encouraging given that precision is typically associated with more effective legal rules and is particularly warranted where, as here, the stakes are high and the parties are risk-adverse.¹⁹⁹ One means of making the standards more precise is by reference to domestic law, where it is sufficiently developed, or to other appropriate sources of international law. In the wake of its experiences under NAFTA, for example, the United States amended its Model BIT in 2004 to provide for indirect expropriation claims to be decided in accordance with a three-factor test derived from U.S. constitutional law, in particular the U.S. Supreme Court’s decision in *Penn Central Transportation Co. v. City of New York*.²⁰⁰ More recently, the United States included more robust notice and comment requirements for “laws, regulations, procedures and administrative

sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf, archived at <http://perma.unl.edu/98L6-BLR2>.

198. Vandavelde, *supra* note 6, at 166.

199. See Hafner-Burton, Victor & Lupu, *supra* note 55, at 74–75.

200. Kurtz, *supra* note 60, at 81. To observe this incorporation of United States constitutional law into the Model BIT, see 2004 U.S. Model Bilateral Investment Treaty, U.S. DEP’T OF STATE, Annex B, no.4, <http://www.state.gov/documents/organization/117601.pdf> (last visited June 26, 2014), archived at <http://perma.unl.edu/FQ7P-BGYW>, and *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

rulings of general applicability” in its 2012 U.S. Model BIT.²⁰¹ Those requirements, which include a sixty-day comment period “in most cases,” an explanation of “the purpose and rationale” for proposed regulations, and upon promulgation of a final regulation, a response to “significant, substantive comments” and an explanation of any “substantive revision” from the proposed regulation, are evidently based on U.S. administrative law.²⁰² Provisions that may particularly benefit from greater specificity include those providing for fair and equitable treatment, most-favored-nation treatment, and compensation for expropriation.²⁰³

Finally, and related to the foregoing, treaty amendment or replacement presents opportunities to include provisions aimed at managing both financial and sovereignty risks. With respect to the former, the awards rendered to date suggest that treaty parties may wish to seriously consider addressing the subject of remedies. Most investment treaties do not limit the remedies that may be fashioned or provide any guidance on the subject, which has led investment arbitration tribunals to rely by default on the customary international law principle, as stated by the Permanent Court of International Justice in the *Factory at Chorzów Case*, that if a state has committed a wrong, it is liable to make reparations.²⁰⁴ The amount of reparations owed under customary international law is that sufficient to eliminate the consequences of the illegal act and place the wronged party in the position it would have been in if the illegal act had never occurred.²⁰⁵ Investment arbitration tribunals typically award pecuniary remedies, likely in large part because only the pecuniary aspects of an ICSID awards are enforceable as if they were a final judgment of the state in which enforcement is sought.²⁰⁶ The International Court of Justice, however, has relied on the *Factory at Chorzów* standard in fashioning non-pecuniary relief such as injunctions and specific performance, and it

201. 2012 U.S. Model BIT, *supra* note 197, arts. 10–11.

202. See Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 236–38 (D.C. Cir. 2008). Compare 2012 U.S. Model BIT, *supra* note 197, art. 11(2)–(3), with 5 U.S.C. §§ 553, 556, 557 to observe the incorporation of administrative law standards into the 2012 Model BIT.

203. See, e.g., Canada–Slovak Republic Agreement, *supra* note 194, art. III (clarifying limited scope of fair and equitable treatment and full protection and security provisions); *id.* Annex A (clarifying meaning of indirect expropriation); Agreement for the Promotion and Protection of Investments Between the Republic of Colombia and the Republic of India, Colom.-India, art. IV, Nov. 11, 2009, U.N.T.S. 51078, *archived at* <http://perma.unl.edu/Z4G8-HGAQ> (clarifying that most favored nation treatment does not extend to dispute settlement, among other things).

204. See *Factory at Chorzów* (Ger. v. Pol.), Judgment No. 13, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13).

205. See, e.g., MTD Equity Sdn. Bhd. v. Republic of Chile, ICSID Case No. ARB/01/7, Award (May 25, 2004), 12 ICSID Rep. 3 (2007); Salacuse, *supra* note 48, at 446.

206. ICSID Convention, *supra* note 9, art. 54(1).

has been well-argued that nothing in the ICSID Convention prohibits ICSID tribunals from doing so.²⁰⁷ Overall, the customary international law rule confers a substantial amount of discretion on arbitration tribunals in fashioning remedies of whatever type and in whatever amount they deem appropriate.

Of course, the fact that BITs present an opportunity for treaty parties to address remedies does not mean that doing so would be legally or politically uncomplicated. With respect to pecuniary remedies, it is notable that they are not available in many domestic systems for claims similar to a number of investment treaty claims, such as allegations of arbitrary administrative conduct, and are widely thought to create the wrong incentive to bring such claims.²⁰⁸ Among other things, therefore, treaty parties may wish to consider whether the available remedies for expropriation, for instance, should differ from the available remedies for other claims. Regarding the domestic law analogy, however, it is also important that arbitration tribunals do not occupy a position equal to domestic courts that perform administrative or constitutional judicial review, and arguably should not be encouraged to fashion remedies that are the normal province of those courts.²⁰⁹ The United States' practice of limiting available remedies to money damages and restitution, and prohibiting punitive damages, appears to reflect this view.²¹⁰ The remedy question is thus difficult, but silence on the subject operates to shift it entirely to the arbitration tribunals. The suggestion made here is that treaty parties should at least consider a different choice as they move forward, given what is now known about the potential magnitude and impact of investment arbitration awards. In addition to, or in lieu of, language on the availability of specific remedies, treaty parties may wish to consider including language on the objectives of investor–state dispute settlement and the role of investment arbitration tribunals. Again, a possible source of guidance is the DSU, which provides, among other things, that the objectives of dispute settlement include obtaining a “positive solution to a dispute” and that a “solution mutually acceptable to the parties and consistent with [the law]” is “clearly to be preferred.”²¹¹ Language to this effect would shift the remedy focus away from enforceability and compensation towards mutual acceptability.

207. See Christoph Schreuer, *Non-Pecuniary Remedies in ICSID Arbitration*, 20 *ARB. INT'L* 325, 331 (2004).

208. See Anne van Aaken, *Primary and Secondary Remedies in International Investment Law and National State Liability*, in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW*, *supra* note 15, at 721, 730.

209. See Katselas, *supra* note 15, at 146–47.

210. See, e.g., NAFTA, *supra* note 135, art. 1135; 2012 U.S. Model BIT, *supra* note 197, art. 34.

211. DSU, *supra* note 79, art. 3(7).

With respect to managing sovereignty risks, the language on the treaty's object and purpose may go a long way. In particular, treaty parties should consider specifying that the object and purpose is investment promotion and protection "consistent with" their other objectives and responsibilities. In addition, treaty parties have opportunities to specify that health, safety, and environmental measures should not be relaxed to encourage investment, and to include carve-outs for new health, safety, and environmental measures along the lines of Article XX of the General Agreement on Tariffs and Trade.²¹² Both are increasingly being included in BITs, and Canada's recently signed BIT with Benin, for example, includes both provisions.²¹³ Carve-outs are not a perfect solution, as WTO practice illustrates, but they may helpfully inform and limit the meaning of a BIT's imprecise substantive standards.²¹⁴ On this point, it is useful to point out that, while the international investment regime is "fragmented" in the sense that it consists of thousands of treaties, it might also be argued that its specialized subject matter is problematic because it contributes to the "fragmentation" of international law. For those concerned about the latter type of fragmentation, one fear is that specialized treaty regimes may obscure the relevance and applicability of other areas of law as well as general principles of international law.²¹⁵ To at least some extent, provisions that make clear that the protections afforded in BITs do not displace or supersede the parties' other legal obligations or sovereign prerogatives may serve a useful "defragmentation" purpose.

4. *The Operation of Voice*

The foregoing is far from an exhaustive list of the available channels for voice in the investment arbitration club.²¹⁶ It is meant to illustrate that the options are numerous, diverse, and in some cases

212. General Agreement on Tariffs and Trade art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, incorporated by reference into General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187.

213. Canada-Benin BIT, *supra* note 195, art. 15.

214. See, e.g., Sanford Gaines, *The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT'L ECON. L. 739 (2001) (analyzing the effect of such carve-outs in WTO practice).

215. See Rep. of the Study Grp. of the Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 58th Sess., May 1-June 9, July 3-Aug. 11, 2006, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskenniemi); John F. Coyle, *The Treaty of Friendship, Commerce and Navigation in the Modern Era*, 51 COLUM. J. TRANSNAT'L L. 302, 346-47 (2013).

216. For a discussion of additional channels, including state-state arbitration and *renvoi* provisions, viewed from a different perspective, see generally Wolfgang Alschner, *The Return of the Home State and the Rise of 'Embedded' Investor-State*

extremely powerful. States may, among other things, protest the organization, clarify the rules (for their purposes) through subsequent agreements and practice, or change the rules (for their purposes) through new or amended treaties. The latter two options are unique and significant because they do not readily exist in multilateral organizations where changing the rules is extremely difficult and the most powerful voice option is typically the veto. This can prevent change or spur conversations about needed change, but not effectuate it directly.²¹⁷ As an example, decision-making under the WTO Agreement requires consensus.²¹⁸ Amendment of the ICSID Convention similarly requires consensus, but, as noted above, the ICSID Convention is a skeletal instrument that grants significant discretion to the contracting states to fill in the many gaps in, e.g., their BITs.

The latter two options are also significant because they represent a marriage of sorts between politics and law, in that states would not be “kicking up a fuss” à la Ralph Nader, or protesting the law, but rather refining or changing the law by directly interpreting or modifying the legal rules. Quite simply, states have a power as principals that Ralph Nader does not have, and while the occasional vigorous protest may be invigorating and highlight the need for change, too much protest, i.e., too many instances of states ignoring arbitral awards, would quickly render the club ineffective because it would become incapable of settling investor–state disputes.²¹⁹ Thus, while channels for voice clearly exist at both the law-making and law-applying stages, states should be encouraged to utilize the former, which are more powerful and specific, and in turn, more likely to bring about the specific changes sought as well as a more balanced organization.

One possible concern with respect to the prospect of more detailed treaties is that the variation among them, and in turn, among arbitral awards, may increase.²²⁰ The implication would be that the increase in treaty diversity would hinder the development of an overarching legal framework for international investment and a system of precedent in investment arbitration, which some view as necessary for the regime’s legitimacy.²²¹ It would seem an easy choice, however, be-

Arbitration, in THE STATE AND INVESTOR–STATE ARBITRATION (Shaheez Lalani & Rodrigo Polanco eds., forthcoming 2014).

217. See Pauwelyn, *supra* note 25, at 5; Weiler, *supra* note 21, at 2473.

218. See WTO Agreement, *supra* note 76, art. IX(1); Pauwelyn, *supra* note 25, at 26.

219. See HIRSCHMAN, *supra* note 19, at 25; Pauwelyn, *supra* note 25, at 33–34.

220. Inconsistency among arbitral awards is commonly cited as a problem. See Susan D. Franck, *The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future*, 12 U.C. DAVIS J. INT’L L. & POL’Y 47, 49–50 (2005).

221. See, e.g., Burke-White & von Staden, *supra* note 15, at 299; Christoph Schreuer & Matthew Weiniger, *Conversations Across Cases—Is There a Doctrine of Precedent in Investment Arbitration?*, 5 TRANSNAT’L DISP. MGMT., May 2008, at 3, 8–18 (2008).

tween “consistent” awards that do not accurately reflect the treaty parties’ intent and a body of law that better reflects that intent but does not lend itself to becoming a tidy jurisprudence.²²² Further, it is relevant that the many members of the investment arbitration club have never agreed on one multilateral treaty and additionally that the costs and benefits of club membership are not equal. To date, there is no central entity to address these distributional issues. Accordingly, if the treaty parties do not address issues such as their specific circumstances, relationships, and appetites for risk, for example, in their BITs, then there is a significant risk that the arbitral tribunals will not consider these issues when interpreting the BITs. Thus, while the fragmented legal regime gives rise to opportunities for voice that do not exist elsewhere, those opportunities arguably come with greater responsibility on the part of the treaty parties to exercise that voice.

Finally, it is worth considering whether the thousands of treaties might be regarded as an opportunity rather than an obstacle. A multitude of treaties creates an opportunity for states to tailor the rules of the game to their particular circumstances and appetites for risk, and even to experiment with provisions that would not be possible in a multilateral framework. As mentioned above, the club is currently in the midst of a teenager’s crisis. It is finding its voice and identity through experimentation but is not yet ready to be treated as an adult. Few, if any, would dispute that the system is in need of reform. As Franklin D. Roosevelt said of the United States in the 1930s, perhaps the system could benefit from “bold . . . experimentation. It is common sense to take a method and try it: If it fails, admit it frankly and try another. But above all, try something.”²²³

C. The Interplay of Exit and Voice, and the Question of Loyalty

1. *The Interplay and Relative Effectiveness of Exit and Voice*

Where, as here, both exit and voice are available to members of an organization, Hirschman opined that the two principal determinants of whether voice will be chosen over exit include: (1) the extent to which members are willing to trade off the certainty of exit against the uncertainties of the organization’s future improvement, and (2) the estimate members have of their ability to influence the organization.²²⁴

The primary difficulties for the investment arbitration club are that it is not clear that BITs lead to an increase in inward foreign

222. See Irene M. Ten Cate, *The Costs of Consistency: Precedent in Investment Treaty Arbitration*, 51 COLUM. J. TRANSNAT’L L. 418, 420–21 (2013).

223. Franklin Delano Roosevelt, Address at Oglethorpe University (May 22, 1932), archived at <http://perma.unl.edu/SB2A-ZXEE>.

224. HIRSCHMAN, *supra* note 19, at 77.

investment, and their financial and sovereignty costs are potentially very high. Accordingly, future improvement is very much an open question, not only in terms of its possibility, but also more fundamentally in terms of its nature and character. This would seem to be a distressing state of affairs for the prospect that states will decide to take up voice, except that exit, as illustrated above, is not readily available for states that have concluded BITs. Moreover, and more positively, BITs still appear to be a factor in a favorable investment climate, and the recognition that the costs and benefits of club membership need to be balanced appears to be on the rise.²²⁵ Finally, due to the regime's fragmented nature and lack of a centralized multilateral body akin to the WTO, the opportunities for voice and the ability of states to influence the organization for their purposes are very high. Ultimately, while states originally signed up for a low exit and low voice club that is unsustainable, that club appears to lend itself rather well to a low exit and high voice makeover. Of course, the combination of low exit and high voice is strongly preferred by international lawyers to the converse.²²⁶

The significance of exit should not be minimized, however, given that a number of states have taken some real steps toward a formal exit from the club that are legally difficult, public, and that would be politically untenable in other international organizations. Given that states sometimes use exit, or threats thereof, as a strategy to increase their voice in international organizations, it is possible that some states are using exit as a strategic tool in this context as well.²²⁷ It appears that others, however, have determined that the costs of membership exceed the benefits by too much and that voice is not likely to bring about a workable balance in a reasonable timeframe. Notably, exit and threats of exit have occurred by states with varying levels of power and influence in the club. These actions support the conclusion that the pressure on the exit side of the scale is presently too high. Fortunately, voice can lead to more sophisticated processes for self-correction than exit and should accordingly be encouraged over exit in order to rectify the imbalance.²²⁸

2. *The Question and Role of Member Loyalty*

In addition to the relative difficulty of exit, it is possible that some states are retaining their memberships due in part to some degree of attachment, or loyalty, to the club. Where, as here, both exit and voice

225. See Vandeveld, *supra* note 6, at 178–82.

226. See Alvarez, *supra* note 35, at 343 (“The push to enhance ‘voice’ is so insistent precisely because international lawyers have been relatively successful in discouraging ‘exit.’”).

227. See Helfer, *supra* note 107, at 1583–84.

228. See Weiler, *supra* note 21, at 2411.

are available, loyalty functions to hold exit at bay for a finite period of time and is important in many cases because it neutralizes, within limits, the tendency of the most quality-conscious members of an organization to be the first to exit.²²⁹ Loyalty is unlike faith in that it “retains an enormous dose of reasoned calculation.”²³⁰

The states most likely to feel some semblance of loyalty to the investment arbitration club would appear to be those that stand the most to gain and the least to lose from membership. That group appears to be the large capital exporters that feel the greatest need to protect their nationals’ foreign investments through investment treaties and have the least risk of liability under them.

Loyalty is particularly difficult to gauge in the investment arbitration club due to its fragmented nature and the difficulty of exit. It would appear, though, that states which are actively seeking to retain their existing investment arbitration treaty partners, whether through original or replacement treaties, and recruit new ones are more plausibly loyal members of the club than other states. It would also appear that only those states that are doing so after experience as a respondent in investment treaty arbitration can be said to have had their loyalty tested at all. Given the lag between the heyday of BIT conclusions and the gearing-up of the investment arbitration industry, the total number of investment treaties a state has concluded may not necessarily reflect its loyalty to the club today. The state may have concluded most or all of its treaties prior to the surge of investment treaty claims or may regard its particular risk to be low, or both.

In any event, the state may have determined that it has more to gain and less to lose from seeking to reduce its risk from within the club than from the outside. The Czech Republic is a notable example. The state concluded many investment treaties in the 1990s, and though it has not denounced the regime completely, it has embraced the European Commission’s position that intra-EU bilateral investment treaties are inconsistent with EU law. As a result, it has embarked on a path to terminate those treaties.²³¹ The Czech Republic will of course be bound by any investment treaties the EU concludes, but it will eventually, if fully successful in this course of action, eliminate the very real risk of claims by investors from other EU countries.²³² Notably, the state is terminating its intra-EU investment

229. See HIRSCHMAN, *supra* note 19, at 79.

230. *Id.*

231. MINISTRY OF FIN. OF THE CZECH REPUBLIC, THE CZECH REPUBLIC’S EXPERIENCE WITH BILATERAL INVESTMENT TREATIES (BITS) 6–7 (2013), <http://investmentpolicyhub.unctad.org/Upload/Documents/DOWNLOAD15-Czech%20Rep.-Experience%20with%20BITS.pdf>, archived at <http://perma.unl.edu/MFP5-VQ5A> [hereinafter CZECH REPUBLIC BIT ANALYSIS].

232. The Czech Republic has defended itself repeatedly against such claims. See CECILIA OLIVET, A TEST FOR EUROPEAN SOLIDARITY 3, 5–6 (2013), <http://www>.

treaties through mutual agreements which provide for abrogation of the treaties' continuing effects clauses, something it could not accomplish through unilateral termination.²³³

Recently, Lauge Poulsen and Emma Aisbett found that developing countries' rates of concluding BITs dropped precipitously after a first investment treaty claim.²³⁴ Because the benefits of club membership are more readily apparent for developed countries, they may be less sensitive to a single treaty claim. It is also possible that at least some developing states are less sensitive to the costs of membership, but more sensitive to the quality of the benefits they are receiving, than their developing counterparts. Notwithstanding these possibilities, many developed countries may also be in a "hold" pattern. The United States has not signed a new bilateral investment treaty since 2008, and its model treaties have, over time, increasingly strengthened the protections afforded to host states while circumscribing the protections afforded to foreign investors.²³⁵ Jose Alvarez remarked in 2011, for instance, that it was difficult to determine what the object and purpose of the 2004 U.S. Model BIT was, given that it was double the length of its predecessor, shrunk virtually every standard of investment protection, and expanded the discretion afforded to host states.²³⁶ The 2012 Model BIT goes even further in this direction.

Ultimately, a state's active efforts to amend its existing treaties or otherwise limit its litigation risk do not, without more, necessarily signify loyalty. The state may have merely weighed its options, including exit, and chosen the one in its best interest. Again, active retention and recruitment efforts appear to be significant in assessing a member's potential loyalty to the club, particularly following experience as a respondent.

Application of the above two criteria yields a fairly small number of potentially loyal investment arbitration club members. As mentioned previously, the rate of new treaty conclusions has declined significantly overall in recent years, likely due in part to some level of saturation and a trend away from bilateral investment treaties in favor of

tni.org/sites/www.tni.org/files/download/briefing_on_intra-eu_bits_0.pdf,
archived at <http://perma.unl.edu/3LQR-SWXN>.

233. See CZECH REPUBLIC BIT ANALYSIS, *supra* note 231, at 7.

234. See Lauge N. Skovgaard Poulsen & Emma Aisbett, *When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning*, 65 *WORLD POL.* 273 (2013).

235. The United States most recently signed a bilateral investment treaty with Rwanda in 2008, which was ratified in 2012. *United States of America, Bilateral Investment Treaties (BITs)*, UNITED NATIONS CONF. ON TRADE & DEV, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/223#iiaInnerMenu> (last visited Sept. 26, 2014), archived at <http://perma.unl.edu/H4XG-AJQL> [hereinafter *U.S. BITs List*].

236. See José E. Alvarez, *The Return of the State*, 20 *MINN. J. INT'L L.* 223, 235–36 (2011).

regional trade and investment agreements, such as the Trans-Pacific Partnership Agreement and the Transatlantic Trade and Investment Partnership (TTIP), both of which are under negotiation.²³⁷ Aside from those considerable caveats, Canada, China, and India are among the states that have concluded the most investment treaties within the past five years (each, according to UNCTAD, has signed at least nine and ratified at least four). Of these states, Canada is the only one that has been doing so following experience as a respondent.²³⁸ Another potentially loyal entity, however, is the EU. Canada and the EU have each learned through experience that they are not immune to investment treaty claims—with the caveat that only some of the EU's Member States have been respondents—and appear to remain committed to investor–state arbitration, at least in some cases. Because these entities may be among the critical quality-conscious club members, the remainder of this section considers their recent practice.

In short, both Canada and the EU are exercising their voice to move away from first generation BITs to more balanced treaties. As discussed previously, Canada has been a respondent in NAFTA arbitrations, has revised and narrowed its original investment treaty provisions, and has continued to pursue and conclude new investment treaties.²³⁹ By comparison, the United States has been less active in

237. See United Nations Conference on Trade & Dev., *IIA Issues Note: Towards a New Generation of International Investment Policies: UNCTAD's Fresh Approach to Multilateral Investment Policy-Making*, at 5, U.N. Doc. UNCTAD/WEB/DIAE/PCB/2013/6 (July 2013), archived at <http://perma.unl.edu/N5DS-9ZBB>. See also *White House Fact Sheet: Transatlantic Trade and Investment Partnership (TTIP)*, OFF. U.S. TRADE REPRESENTATIVE, EXECUTIVE OFF. PRESIDENT (June 2013), <http://www.ustr.gov/about-us/press-office/fact-sheets/2013/june/wh-ttip>, archived at <http://perma.unl.edu/5XH4-BL95> (announcing the launch of the T-TIP).

238. *Canada, Bilateral Investment Treaties (BITs)*, UNITED NATIONS CONF. ON TRADE & DEV, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/35#iiaInnerMenu> (last visited Sept. 26, 2014), archived at <http://perma.unl.edu/5YMH-VXZU>. China has been named as a respondent in one ICSID arbitration, but it settled within two months. See *Ekran Berhad v. People's Republic of China*, ICSID Case No. ARB/11/15 (May 16, 2013), <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded>, archived at <http://perma.unl.edu/P8XN-ZXBJ>; (Shaun) Zuang-Hui Wu, *International Arbitration for Chinese-Foreign Disputes: Emerging Choices in 2012*, INT'L L. NEWS, Spring 2012, at 1, 8, archived at <http://perma.unl.edu/HT66-ELEQ>. India suffered its first-known adverse investment arbitration ruling in November, 2011, and has not signed a new investment treaty since. It accordingly remains to be seen whether, and if so how, its treaty practice will change. See Prabhash Ranjan, *The White Industries Arbitration: Implications for India's Investment Treaty Program*, INVESTMENT TREATY NEWS, Apr. 2012, at 13, archived at <http://perma.unl.edu/7534-VTUE>; *India, Bilateral Investment Treaties (BITs)*, UNITED NATIONS CONF. ON TRADE & DEV, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/96#iiaInnerMenu> (last visited Sept. 26, 2014), archived at <http://perma.unl.edu/BQ4D-4EB9>.

239. See *supra* text accompanying notes 189–98. See also *Canada, Bilateral Investment Treaties (BITs)*, *supra* note 238 (listing the countries with which Canada has con-

concluding new treaties following its experiences under NAFTA.²⁴⁰ Canada has also been a vocal critic of South Africa's plans to terminate some of its BITs, and has recently ratified the ICSID Convention—nearly seven years after signing it.²⁴¹

The EU may be in the best position to appreciate both the potential costs and benefits of investment arbitration, given that it is the world's largest trading bloc and a significant exporter and importer of capital.²⁴² Since acquiring exclusive competence to negotiate and conclude investment agreements for EU Member States under the Lisbon Treaty, it has supported investor–state arbitration in principle but has also stressed the need for reform.²⁴³ The European Commission seeks to gradually replace all of the EU Member States' approximately 1,400 investment treaties with EU agreements and has recently issued a policy statement reaffirming its belief in the value of investor–state dispute settlement but stressing the need to strengthen the system's integrity and to strike a better balance between the right of host states to regulate and the protection of foreign investors.²⁴⁴ More specifically, the European Commission has expressed its support for treaty provisions that: (1) reaffirm the right of host states to regulate; (2) clarify the scope and meaning of indirect expropriation and fair and equitable treatment; (3) prohibit frivolous claims; and (4) require increased transparency in arbitral proceedings.²⁴⁵ According to Karel De Gucht, the EU is interested in obtaining investor–state dispute settlement in agreements with China, Myanmar, and many other countries; De Gucht has expressed support for the provisions when they are new or rewritten, transparent, provide for appellate review, permit the refusal of arbitrators, and require the foreign investor to

cluded new BITs between 2010 and 2013 as Benin, China, Kuwait, Latvia, Slovakia, and the United Republic of Tanzania).

240. *U.S. BITs List*, *supra* note 235 (showing the conclusion of only two new investment treaties since 2000, and none since 2009).

241. *See supra* text accompanying note 157 (regarding Canada's outcry against South Africa's plans). *See also supra* text accompanying note 87 (regarding Canada's ratification of the ICSID Convention).

242. *See* Directorate-Gen. for Trade of the Eur. Comm'n, *Investment*, EUR. COMMISSION (June 11, 2014), <http://ec.europa.eu/trade/policy/accessing-markets/investment/>, archived at <http://perma.unl.edu/W2U2-N97Z>.

243. *See* Treaty of Lisbon, *supra* note 10, art. 207(1); EUR. COMM'N, FACT SHEET: INVESTMENT PROTECTION AND INVESTOR-TO-STATE DISPUTE SETTLEMENT IN EU AGREEMENTS(2013), http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf, archived at <http://perma.unl.edu/FRK4-JS9M> [hereinafter EUROPEAN COMMISSION FACT SHEET]. *See also* Youri Devuyt, *European Union Law and Practice in the Negotiation and Conclusion of International Trade Agreements*, 12 J. INT'L BUS. & L. 259, 265–67 (2013) (describing how the Lisbon Treaty vests the competency to negotiate and conclude investment agreements of all EU Member States exclusively in the EU).

244. EUROPEAN COMMISSION FACT SHEET, *supra* note 243, at 1.

245. *See id.* at 2.

have a sufficient connection to the host state.²⁴⁶ The EU has, however, expressed concern about the inclusion of investor–state dispute settlement in the TTIP and has opened up a period of public consultation on the issue.²⁴⁷

Large capital exporters are still effectively calling the shots in the investment arbitration club because their treaty partners often accept their model treaties without significant modifications. Many find this state of affairs troubling. As the members most committed to the club, however, these states and entities may be the only ones that will take up the laboring oar in spurring needed recuperation and reform. On this point, it is in some sense a positive that the line between capital-importing and capital-exporting states has blurred since the club was formed, and that the states leading the reform efforts have not, as they originally might have thought, proven immune to investment arbitration risk.

As these states move forward into the club’s next chapter, they will need to convince less loyal members to retain their memberships and will likely also seek to recruit new members. This is perhaps most evident in the case of the EU, given its ambitious plan to replace all of its Member States’ existing investment treaties. Again, it is a positive from a certain standpoint that the fervor which occurred in the wake of the Washington Consensus has dissipated, and that capital-importing states are no longer scrambling to conclude BITs as they did in the club’s early days. The club’s champions are in a different and more competitive position than they were then, and they will have to step up their membership pitch as a result. The conversation between South African and Canadian officials discussed previously is one example of a conversation that does not appear to have occurred before many early BITs were concluded. Such conversations could contribute to more balanced and carefully drafted future treaties. With respect to world trade, Pauwelyn argued that the WTO must “play out its strongest card: that genuine free trade benefits the masses, not the few.”²⁴⁸ In the absence of a multilateral investment arbitration entity, the “leaders” of the investment arbitration club will need to champion the cause that investment protection and promotion will likewise benefit the masses, not the few, and further that investment

246. Monika Ermert, *TTIP: EU Commissioner Points Finger at US Secrecy, Investor–State Provisions*, INTELL. PROP. WATCH (Apr. 2, 2014, 2:40 PM), <http://www.ip-watch.org/2014/04/02/ttip-eu-commissioner-points-finger-at-us-secrecy-investor-state-provisions/>, archived at <http://perma.unl.edu/S246-ZUBP>.

247. William New, *US Defends Investor–State Provisions; EU Promotes TTIP Consultation*, INTELL. PROP. WATCH (Mar. 27, 2014, 10:42 PM), <http://www.ip-watch.org/2014/03/27/us-eu-defends-investor-state-provisions-eu-promotes-ttip-consultation/>, archived at <http://perma.unl.edu/RRE2-BLYE>.

248. Pauwelyn, *supra* note 25, at 57.

arbitration is an important component of such protection and promotion. Their task is not an easy one.

The existence of a “public good dimension” to club membership would operate to increase and broaden member loyalty and, in turn, the prospects for voice, because it would effectively make a complete exit from the organization impossible.²⁴⁹ A “public good” is defined as one that is consumed by all members of a given community in a manner such that consumption by one does not detract from consumption by another.²⁵⁰ Examples include advanced standards of literacy and public health.²⁵¹ The designation is important in economics because public goods are market failures, in that the inability to make the consumption excludable weakens the incentive for private provision.²⁵² On the national level, governments often step in to provide these goods, but the provision of “global public goods” at the international level is generally regarded as more difficult due to a lack of effective international governance.²⁵³

Barnali Choudhury recently argued that the system of international investment law provides two public good benefits: (1) “an overarching framework that guides foreign investment and enhances its stability and predictability,” and (2) “a vehicle that helps foster a state’s economic development.”²⁵⁴ In Choudhury’s view, international investment law produces, among other things, a framework that efficiently facilitates the transfer of capital between states, and it is not possible to exclude non-participating states from this benefit.²⁵⁵ This illustrates that the public good inquiry is not straightforward and further that the most obvious public good in need of international governance in this context is probably international investment itself.

Putting the question to the club considered here, however, the inquiry becomes whether it is possible for states to escape the “output” of the investment arbitration club.²⁵⁶ Although it requires a long journey, it is certainly possible for states to eventually free themselves of the obligation to arbitrate investment treaty disputes and of the ultimate obligation to recognize the awards. The organization would continue to arbitrate other investment treaty disputes, but it is not clear that the exiting states would be unable to escape that particular output, or any other output of the organization.

249. HIRSCHMAN, *supra* note 19, at 102.

250. *See id.* at 101.

251. *See id.*

252. *See* David Gartner, *Global Public Goods and Global Health*, 22 DUKE J. COMP. & INT’L L. 303, 304 (2012).

253. *See id.* at 305.

254. *See* Choudhury, *supra* note 48, at 504.

255. *See id.*

256. HIRSCHMAN, *supra* note 19, at 101–02.

According to Choudhury, the fact that arbitration tribunals consistently cite earlier awards signals the “wider applicability” of the awards and, in turn, supports the conclusion that international investment law has attained the status of a system.²⁵⁷ Some have gone further to argue that aspects of international investment law have attained the status of customary international law; others disagree.²⁵⁸ It is certainly true that states cannot escape a world in which investor–state arbitration occurs. It is not clear that this is a fact generating any loyalty, however, particularly in light of the competitive motivations underlying the conclusion of many BITs. Regardless of whether one accepts Guzman’s prisoner’s dilemma theory, BITs are typically concluded—and investor–state arbitration afforded—in order to promote and protect investments. If a state opts out of the promotion and protection through this mechanism, it is not clear that it would retain an inevitable attachment to the organization that continues to promote and protect other states’ investments. An argument could certainly be made that, for competitive reasons, the state would instead seek to discredit the organization or at least diminish its importance. In addition, the state might even seek to promote or create an alternative. This distinguishes investment treaty arbitration from public goods such as literacy and public health, from which a member of the broader society really cannot escape.

Even more broadly, states cannot escape a globalized world, and the transfer of capital has many potential benefits that are now widely recognized. Accordingly, it is possible that some states may feel an attachment to the organization akin to loyalty for this reason, though as discussed above, the fragmented nature of the legal regime likely presents a challenge in this respect. The investment arbitration club lacks a clear locus, and furthermore has a short and not altogether positive history. Moreover, it is not the only means through which foreign investment may be protected and promoted; whether it is the best means is a different and open question. The organization is not, in other words, presently synonymous with increased foreign investment or, more significantly, with increased economic development. As such, it does not appear that a public good dimension effectively forecloses the exit option, at least not at the present time. Accordingly, the aforementioned “leaders” of the club will need to continue to champion its recuperation for the time being.

257. See Choudhury, *supra* note 48, at 493.

258. See Patrick Dumberry, *Are BITs Representing the “New” Customary International Law in International Investment Law?*, 28 PENN ST. INT’L L. REV. 675, 676 (2010) (arguing in the affirmative). *But see* ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 584 (2d ed. 2008) (arguing in the negative); Stephen M. Schwebel, *The Influence of Bilateral Investment Treaties on Customary International Law*, 98 AM. SOC’Y INT’L L. PROC. 27, 28–30 (2004) (same).

IV. CONCLUSION

Recently, Leon Trakman defended ICSID largely on the ground that it is merely “the supplicant of its signatories. The ICSID did not create itself, but rather member states created it.”²⁵⁹ He is correct, of course, and it follows that states can modify or terminate ICSID. They can also spur numerous reforms that do not require consensus or even a majority ICSID vote.

Exit and voice are both at work in the investment arbitration club, as they are in most, if not all, “organizations.” Of all the scenarios considered by Hirschman, the most analogous appears to be the product that reveals its faults only through time.²⁶⁰ There was a lag between the heyday of BIT conclusions and the widespread use of investment treaty arbitration by foreign investors. This in large part explains the delay in states’ demand for voice commensurate with the high price of exit. To return to this Article’s introduction, it is apparent that Paulsson was correct in his assessment that states did not appreciate the full implications of the obligations they assumed when they concluded early BITs.²⁶¹ Accordingly, they did not tread carefully in a gradual transition from high exit and low voice to low exit and high voice. Instead, they rapidly relinquished significant exit options without a commensurate increase in voice when they rushed to join their new and popular club. The club was not ready for the growth spurt it experienced and now finds itself in a delayed but acute teenager’s crisis.

The available options to correct the imbalance are a relaxing of the burden of exiting, an increase in opportunities for voice, or some combination of the two. The fragmented nature of the legal regime both complicates the limited exit options that remain and creates opportunities for meaningful voice that do not exist in formal multilateral organizations, where veto power is the most powerful voice option. Here, states are not limited to blocking change. They can directly effectuate it and can further prescribe its content. It is to be expected that the club’s members with the most to gain will take the lead in spurring change, and as they do, they are encouraged to have more robust conversations with their current and prospective treaty partners about the costs and benefits of club membership that may lead to more balanced and carefully drafted future treaties. Little by little, these conversations and other exercises of voice may help to bring about a better balance between exit and voice, law and politics, and efficiency and supportability. If the club is to survive, a better balance must be struck.

259. Trakman, *supra* note 134, at 664.

260. See HIRSCHMAN, *supra* note 19, at 26.

261. See Paulsson, *supra* note 1, at 257.