Salida: Latin America, ICSID, and the Politics of International Investment Arbitration

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Abstract/Résumé

[La version française suivante]

Since 2007, Bolivia, Ecuador, and Venezuela have exited from the International Centre for the Settlement of Investment Disputes (ICSID), a subsidiary of the World Bank that serves as an arbitration forum for international investment agreements. The departed member states have accused ICSID of bias towards corporations and criticized the institution's high costs, lack of an appeal mechanism, and what they perceive as non-transparency, blindness to economic disparities between members, and intrusions on national sovereignty. Referring to ICSID's alleged favouritism, Bolivian President Evo Morales has charged: "[t]he governments of Latin America… never win the cases. The multinationals always win" (Reuters 2007).

This thesis examines these exits from ICSID and tests critics' claims regarding the institution's operations. I demonstrate that states have left ICSID for ideological, and not purely economic, reasons. Whereas Bolivia and Ecuador exited despite having fared relatively well in their respective caseloads, other Latin American states have remained members despite being litigated against and losing more frequently. Where the exiting states differ, however, is in their governments' political ideology, which is demonstrably more anti-neoliberal than that of remaining member states.

To test my theory, I perform case studies of Argentina, Bolivia, Ecuador, and Venezuela. Using an index of anti-neoliberal indicators, I demonstrate that government ideology provides a more robust explanation for state exit from ICSID than expenses and litigation records alone.

En 2007, la Bolivie, l'Équateur, et le Venezuela ont quitté le *Centre international pour le règlement des différends relatifs aux investissements* (CIRDI), une filiale de la Banque mondiale

qui sert de colloque pour accords d'investissements internationaux. Ensuite, ces anciens membres ont cité plusieurs raisons pour leur départ. Notamment, ils ont accusé le CIRDI de s'agir avec loyauté envers certaines compagnies multinationales. De plus, ils ont indiqué les coûts élevés reliés à l'utilisation du CIRDI, l'absence de mécanisme d'appel suivant le rendement des décisions issus du CIRDI, de la non-transparence relatif aux procédures de l'établissement, l'indifférence quant aux disparités économiques entre membres, et d'intrusions répétés contre la souveraineté nationale. Se référant à la présomption de favoritisme du CIRDI, le Président de la Bolivie, Evo Morales, a répondu : « les gouvernements latino-américains… ne gagnent jamais en cause. Les multinationales gagnent à chaque fois » (Reuters 2007).

Cette thèse traite le sujet de ces renonciations d'adhésion du CIRDI en profondeur et examine les allégations faites au sujet des opérations de l'institution. Ainsi, je démontre que certains pays ont sorti du CIRDI plutôt pour raisons idéologiques que pour raisons purement économiques. Alors que la Bolivie et l'Équateur ont quitté l'institution malgré de bons résultats en cause, d'autres pays latino-américains demeuraient membres malgré le fait qu'ils continuent de perdre souvent en cause. Je propose que les États qui ont décidé de renoncer leur adhésion au CIRDI de distinguent dans leurs idéologies politiques, qui se démontrent plus anti-néolibérale que les États membres actuels.

Pour justifier cette théorie, j'ai effectué d'analyses sur les cas d'Argentine, la Bolivie, de l'Équateur et de Venezuela. J'ai employé une méthodologie qui engage une série d'indicateurs qui rapporte sur la présence d'idéologie anti-néolibéralisme. Ainsi, je démontre que l'idéologie d'un gouvernement explique avec plus de précision ces sorties notés du CIRDI relatif aux théories basés dans les dossiers de dépenses ou succès en litige.

I. Introduction: Why Are States Leaving ICSID?

A. International cooperation and domestic political ideology: state exits from ICSID and the influence of anti-neoliberal ideology in Latin America

Since 2007, Bolivia, Ecuador, and Venezuela have exited from the International Centre for the Settlement of Investment Disputes (ICSID); a subsidiary of the World Bank that serves as an arbitration forum for international investment agreements (IIAs). Latin American governments have a tumultuous history with this institution. Indeed, when the World Bank voted on the proposal to create ICSID in 1964, 19 of the 21 opposing votes came from Latin American states.[1] Eventually established in 1966, the Centre initially operated without the involvement of these states, and generally did not experience much activity for the first 30 years of its existence, only receiving approximately one case filing per year until 1996.[2]

The 1990s proved to be an auspicious period for ICSID, with many international developments aligning to raise the institution's prominence. In the wake of the debt crisis of the late 1980s, many Latin American states adopted the Washington Consensus and opened up to neoliberal influence.[3] The 1990s saw a massive increase of foreign investment in the region, largely facilitated by the signing of bilateral investment treaties (BITs), which proliferated substantially during this period.[4] To support these burgeoning agreements, many of ICSID's initial objectors signed and ratified its convention. Since then, BITs have become ICSID's

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[1] Sergio Puig, "Emergence & Dynamism in International Organizations: ICSID, Investor-State Arbitration & International Law" *Georgetown Journal of International Law* 44 (2012): 551.
[2] Simon Greenberg, Christopher Kee, and J. Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge: Cambridge University Press, 2010), 482.
[3] Pedro-Pablo Kuczynski and John Williamson. *After the Washington Consensus: Restarting Growth and Reform in Latin America* (Washington: Institute for International Economics, 2003): 25.
[4] UNCTAD, "Bilateral Investment Treaties: 1959-1999," (2000): iii. The number of IIAs increased 482% from 1989-1999.

primary source of disputes, comprising 61.8% of the Centre's caseload.[5] As Susan Franck has argued, growth in IIAs has "dramatically expand[ed] the potential scope of ICSID jurisdiction."[6]

By the 2000s, Latin American states became increasingly litigated against before ICSID. Claims skyrocketed in response to several key economic events in the region, most notably the Argentine default in 2001, and several industry nationalizations in Argentina, Bolivia, Ecuador, Guatemala, and Venezuela.[7] Currently, 26% of active ICSID cases involve South American state respondents.[8] This state of affairs has drawn criticism from several Latin American states, which have accused ICSID of bias towards corporations and criticized the institutions' high costs, lack of an appeal mechanism, connection to the World Bank,[9] and what they perceive as non-transparency, blindness to economic disparities between members, and intrusions on national sovereignty.[10] Referring to ICSID's alleged favouring of business interests, Bolivian President Evo Morales has charged: "[t]he governments of Latin America… never win the cases. The multinationals always win."[11]

The severity of these grievances has been confirmed by the aforementioned denunciations of the ICSID Convention by three Latin American states. This is a legal, but curious action. The Vienna Convention on the Law of Treaties permits exit from treaties when

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[5] ICSID, "The ICSID Caseload – Statistics," (2015): 10. Available online: https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-1%20%28English%29%20%282%29_Redacted.pdf.

[6] Susan D. Franck, "The ICSID Effect? Considering Potential Variations in Arbitration Awards," *Virginia Journal of International Law* 51, no. 4 (2011): 838.

[7] Katia Fach Gomez, "Latin America and ICSID: David versus Goliath?" *Law and Business Review of the America* 17 (2011): 195.

[8] ICSID, "The ICSID Caseload – Statistics," no. 1 (2015), 11. "Latin America" is not directly measured.

[9] Silvia Karina Fiezzoni, "The Challenge of UNASUR Member Countries to Replace ICSID Arbitration." *Beijing Law Review* 2, no. 3 (2011): 134.

[10] Diana Marie Wick, "The Counter-Productivity of ICSID Denunciation and Proposals for Change," *Journal of International Business & Law* 11, (2012): 245; Jeswald W. Salacuse, "The Emerging Global Regime for Investment," *Harvard International Law Journal* 51, no. 2 (2010): 469.

[11] Evo Morales, quoted in Reuters, "Latin leftists mull quitting World Bank arbitrator," *Reuters*, April 30, 2007, http://www.reuters.com/article/2007/04/30/us-bolivia-venezuela-nationalizations-idUSN2936448520070430.

explicitly provided for or implicitly permitted by a treaty.[12] Article 71 of the ICSID Convention permits denunciation, but Article 72 protects the rights of contractors whose agreements predate exit.[13] Thus, while defectors can act to prevent ICSID arbitration over future IIAs, they cannot avoid ICSID's judgment if a dispute arises from a pre-existing agreement. Given this reality, why exit? Is the potential of ICSID-arbitrated disputes over yet unsigned agreements so grave that any possibility of this occurring must be quashed pre-emptively? Why not simply exclude ICSID jurisdiction from future agreements, or move away from BITs, as South Africa and Indonesia have done, and Australia has announced intentions to do?[14] Moreover, given the activity of other dispute settlement mechanisms, such as UNCITRAL and the International Court of Arbitration, why do states feel compelled to direct their anger towards ICSID in particular?

In general, the pattern of opposition, support, confrontation, and exit in the cases of Bolivia, Ecuador, and Venezuela is puzzling. What explains these states' defection from the 'international investment regime'?[15] Specifically, this research addresses the question, 'why do states leave ICSID?' I test hypotheses that are informed by existing scholarship on ICSID and international cooperation more generally. Given the literature's relative focus on more materialist explanations for exit and the mixed empirical record supporting them, the thesis primarily seeks to identify whether ideological variables can be confirmed as contributing factors to state exit from ICSID.

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[12] John H. Currie, Craig Forcese, and Valerie Oosterveld, *International Law: Doctrine, Practice, and Theory*, (Toronto: Irwin Law), 92.

[13] ICSID. "The ICSID Convention, Regulations and Rules." (2006) [1965]. Available online: https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/main-eng.htm.

[14] Jurgen Kurtz, "Australia's Rejection of Investor-State Arbitration: Causation, Omission and Implication," *ICSID Review*, (2012): 1-22.

[15] Jeswald W. Salacuse, "The Emerging Global Regime for Investment," *Harvard International Law Journal* 52, (2010), 427-473.

B. ICSID research: arbitration, reputation, and opposition

ICSID proceedings are notoriously expensive, especially for those who appear (and lose) most frequently in disputes. These high costs are regularly cited in criticisms of ICSID, most notably by the states who have decided to exit. *Prima facie*, ICSID's caseload and states' records offer a straightforward explanation for exit; states lose money by participating in ICSID proceedings, paying out settlements and awards, and covering the legal expenses of challengers with meritorious claims. Eventually, the costs associated with ICSID membership outweigh its benefits, and states withdraw to minimize financial damage.

Furthermore, researchers have found evidence that the costs associated with ICSID go beyond lawyers' fees, settlement payouts, and awards. While BITs have been described as credibility-enhancing mechanisms, Allee and Peinhardt show that the credibility a state earns from signing these agreements is contingent on their subsequent behaviour towards them. In theory, BITs enable states to 'tie their hands' by allowing investors to hold them accountable to their agreements through independent dispute settlement procedures, rather than domestic courts.[16] ICSID cases, however, indicate challenges to a states' behaviour towards investment agreements. These records provide a mechanism by which investors can make inferences regarding "a foreign government's preferences regarding expropriation… by studying its behaviour in context."[17] Whereas Michael Tomz would suggest that the "reputational consequences" of government actions towards investments would depend on the government's motivation, Allee and Peinhardt demonstrate that simply being named as a respondent to a case

[16] Todd Allee and Cliff Peinhardt, "Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment," *International Organization* 65, no. 3 (2011): 407.
[17] Michael Tomz, *Reputation and International Cooperation: Sovereign Debt across Three Centuries*, 237.

harms a state's level of foreign direct investment (FDI).[18] Furthermore, settling and losing cases are associated with even larger losses.[19] Thus, in this context, investors are more indiscriminate in updating their expectations than Tomz suspects when contemplating the extension of his theory.

While the "reputational consequences" of exit have not been directly tested, given this relationship between ICSID-related activity and investment, it is likely that leaving the institution also has an effect on FDI. This could be negative, if investors view ICSID exit suspiciously; or it could be positive, if investors' confidence is unshaken and withdrawal allows states to avoid reputation-damaging proceedings. Assuming states are aware of the connection of ICSID membership and the investment they receive, concerns related to FDI could also be a factor behind the decision to exit.

Andrew Guzman has eminently theorized the connection between reputation and compliance with international law. He argues that states "manage" a reputation for compliance, which consists of "judgements about an actor's past behaviour and predictions about future compliance based on that behaviour."[20] In his account, states strategically comply with international law with a view to maximizing reputational and non-reputational gains from compliance. Guzman identifies three main benefits of a reputation for compliance: the ability to make more credible commitments, greater ease of cooperation, and increased bargaining leverage.[21] His theory holds that reputational consequences can be enough to 'tip the scales' in

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[18] Allee and Peinhardt, 423.
[19] Ibid., 425.
[20] Andrew T. Guzman, *How International Law Works: A Rational Choice Theory*, (Oxford: Oxford University Press, 2008): 33.
[21] Ibid., 34-35.

favour of compliance.[22]

Considering Allee and Peinhardt's observations, if Guzman's thesis is correct and reputational concerns drive state behaviour in international law, then states may withdraw from ICSID in order to avoid the damage their reputations incur as a result from arbitration proceedings. This account is partially supported by the fact that the states have left in accordance with ICSID's exit clause, demonstrating a commitment to compliance with international law, and arguably a concern for their reputation in this regard.

The relationship between exit clauses and compliance has been most notably studied by Laurence Helfer, whose work considers the rationality of exit from the perspective of treaty design and from an individual state's perspective. He critically highlights the tension between compliance and cooperation that exit clauses invoke in treaties. While well aware of its legality, Helfer recognizes that "exit provides a mechanism for states to disengage from or radically reconfigure existing forms of international cooperation."[23] In another piece, he identifies four broad motivations for exit: to challenge disfavoured laws or rebuke international institutions, to gain negotiating leverage *vis-à-vis* other states and expand influence in international organizations, forced exit, and policy linkage.[24] The second form of 'critical' exit is the most interesting for ICSID cases, offering a conception of withdrawal as a symbolic action against the prevailing international legal and economic order.

In his theorization of a global "investment regime," Salacuse considers less strategic, and

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[22] Ibid., 41.
[23] Laurence R. Helfer, "Exiting Treaties," *Virginia Law Review* 91, no. 7 (2005): 1583.
[24] Laurence R. Helfer, "Flexibility in International Agreements," in Jeffrey L. Dunoff and Mark A. Pollack, *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge, Cambridge University Press, 184.

more utilitarian, reasons for exit. He identifies four sources of discontent in regimes: disappointing regime results, perceived defective decision-making processes and constraints on sovereignty, divergent expectations, and the impact of crises.[25] Considering ICSID in particular, Salacuse focuses on the second concern, attributing Bolivia and Ecuador's exits to their allegations of ICSID's unfair adjudication and imprudent encroachments on sovereignty.[26] In Salacuse's account, these governments became upset with the institutions' practices and the disempowering effects they generated, eventually growing dissatisfied and leaving.

Hafner Burton, Steinert-Threlkeld, and Victor have narrowed their focus on one source of criticism towards ICSID: non-transparency. They note that states' concerns about the institution's restrictions on case-related information have "played a role in decisions by the governments… to withdraw from ICSID."[27] Examining data from all available ICSID cases, they find distinct patterns of secrecy related to the type of investment, and the arbitration histories of disputants.[28] Concluding generally, the authors assert that in ICSID arbitration, "transparency is an outcome that reflects the private interests of the litigants."[29] These findings feed into the perception that ICSID-proceedings generally serve investors' preferences, undermining the institution's credibility. The organization's secrecy engenders distrust among certain governments, bolstering their suspicion that investors always get their way. Perceiving themselves to be at a disadvantage, they decide to avoid opaque proceedings that drain their coffers.

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[25] Salacuse, "The Emerging Regime for International Investment," 468-71. Venezuela had not left at the time of writing.
[26] Ibid., 469.
[27] Emilie M. Hafner-Burton, Zachary C. Steinert-Threlkeld, and David G. Victor, "Transparency in Investor-State Arbitration," *Working Paper* (2013): 5.
[28] Ibid., 30-32.
[29] Hafner Burton et al., "Transparency in Investor-State Arbitration," 52.

From a constructivist standpoint, this last notion, how states 'perceive' their relationship with ICSID, is determining. Ultimately, the costs and benefits of ICSID membership are weighed by states on the basis of the beliefs they hold as a result of their identity. Ellner has closely examined the three states that have exited ICSID, specifically their ideological makeup. He identifies Bolivia, Ecuador, and Venezuela as states at the forefront of an ideology that he terms "radical democracy," which he attributes to the "New Left" in Latin American politics.[30] In contrast to individual rights-based, authority diffusing liberal democracy, radical democracy emphasizes social incorporation and direct participation.[31] Radical democratic governments also maintain a characteristic approach to foreign policy that emphasizes anti-imperialism and anti-neoliberalism.[32]

The latter is particularly important in the present case, as it entails rejection of liberalized trade, investment, development, and resistance to the influence of Bretton Woods' organizations (such as the World Bank). In general, those who resist the World Bank in principle are unlikely to view the high costs of membership in one of its institutions favourably. Thus, examining states' political ideology provides insight into why certain states are inclined to, or disinclined from, exit; namely, states prone to exit are those whose beliefs conflict with the goals and philosophy of ICSID and lead them to distrust the institution as well as what it represents. Issues of bias and non-transparency become salient to states whose ideology suggests that these problems are inherent features of a conflicting worldview. This culminates in an exit as conceptualized by Helfer: disengagement that challenges ICSID practices and rebukes the institution.

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[30] Steve Ellner, "The Distinguishing Features of Latin America's New Left in Power: The Chávez, Morales, and Correa Governments," *Latin American Perspectives* 39, no. 182 (2012): 98-102.
[31] Ibid., 98-99.
[32] Ibid., 104.

II. Methodology

A. Hypotheses & Variables

Table 1: Hypotheses & Variables

Dependent Variable	Hypotheses	Independent Variables	Data Source
Exit from ICSID	H1: States that appear and lose frequently in ICSID cases are more likely to exit	IV1: Arbitration history	ICSID records[33]
	H2: States that incur high costs due to ICSID membership are more likely to exit	IV2: Monetary costs (legal costs, awards)	ICSID records
	H3: States with anti-neoliberal populaces are more likely to exit	IV3: Anti-neoliberal populace (anti-market sentiment)	*Latinobarometro*[34]
	H4: States with anti-neoliberal governments are more likely to exit	IV4: Anti-neoliberal government (economic freedom)	Index of Economic Freedom (Heritage Foundation)[35];

This thesis will test four hypotheses informed by existing literature on state relations with ICSID. For the most part, state exit has not been directly addressed or robustly explained in this work; rather, broad suggestions have been made or general criticisms have been identified but left untested. This thesis has compiled these notions into four testable explanations for exit from ICSID. My first two hypotheses aim to test the criticisms that have been levelled against ICSID. I examine the costs incurred by ICSID's biggest critics, and how these states have performed in their cases before the institution. The latter hypotheses test the role of ideology in exit from ICSID, by examining two levels of influence: the populace and the government.

[33] ICSID, *Cases*. https://icsid.worldbank.org/apps/ICSIDWEB/Pages/default.aspx.
[34] *Latinobarometro*, *Banco de datos*, http://www.latinobarometro.org/latContents.jsp.
[35] The Heritage Foundation, "Explore the Data," *Index of Economic Freedom*. http://www.heritage.org/index/explore.

Dependent Variable

This study's dependent variable is state exit from ICSID, which is initiated by denunciation of the ICSID Convention.

Hypothesis 1 (H1): States that appear and lose frequently in ICSID cases are more likely to exit

This hypothesis will be tested by examining ICSID case records. If it is correct, exit should align with appearances and performance before ICSID. States that appear and lose frequently should be most likely to exit; states that appear and lose rarely should be least likely to exit.

Independent Variable 1 (IV1): Arbitration history

This variable is represented by two direct measures of ICSID activity. First, I compare each state's level of ICSID activity, measured by the number of cases to which they have been named as a respondent. For the departed states, this measure will be taken from their last full year of membership; for Argentina, the most recent year available will be used. I then consider the states' records in terms of the outcomes they have achieved in their concluded cases.

Hypothesis 2 (H2): States that incur high costs due to ICSID membership are more likely to exit

This hypothesis is informed by the intuitive, materialist explanation for state exit: ICSID membership imposes high costs on states, and those who face the highest costs are the most likely to exit. The high cost of ICSID activity has been raised in several accounts of state exits from the institution and is generally offered as a self-evident reason for discontent.[36] I will test this hypothesis by examining ICSID case records, and calculating the costs incurred by select members. When available, these calculations will rely on figures announced in case records, as well as other publicly available figures; otherwise, estimations will be made based on average

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[36] For example, see Katia Fach Gomez. Latin America and ICSID: David versus Goliath? *Law and Business Review of the America* 17 (2011) and Leon E Trakman, "The ICSID Under Siege," *Cornell International Law Journal* no. 45, (2013).

ICSID-related costs, as determined by the international law firm Allen & Overy.[37] To account for variation among states' economic power, total costs per state will be scaled to GDP. If this hypothesis is correct, the states who are most inclined to exit will be those who have faced the highest costs; in turn, states with relatively low ICSID-related expenses will not be inclined to exit.

Independent Variable 2 (IV2): Costs

I account for this variable with two measures: the cost of responding to a case filing at ICSID, taken from Allen & Overy's publication, and, when applicable, the value of the awards rendered as a result of ICSID cases. The latter figure will be the net total of money lost and funds recovered through successful defense (net costs = expenses + awards – recoveries).

Hypothesis 3 (H3): States with strongly anti-neoliberal populaces are more likely to exit

This hypothesis posits a different mechanism than Hypothesis 4 while identifying a similar relationship between anti-neoliberalism and exit. Rather than acting on the basis of their own ideological views, in this assumption, governments seek to appease their voter base by acting in accordance to the prevailing ideological convictions of the populace. Accordingly, governments leave ICSID because it is what the people, and not necessarily the government, want. Therefore, countries whose populaces are the most strongly anti-neoliberal should be the most likely to exit.

Independent Variable 3 (IV3): Anti-neoliberal populace

This variable is operationalized using country-level polling data from the *Latinobarometro*. Of interest are views on the role of a market economy in development. In surveys from 2003-2005 and 2007-2013, respondents were asked if they "strongly agree, agree,

[37] Allen & Overy, "Investment Treaty Arbitration: How much does it cost? How long does it take?" *Publications*, February 18, 2014. http://www.allenovery.com/publications/en-gb/Pages/Investment-Treaty-Arbitration-How-much-does-it-cost-How-long-does-it-take-.aspx.

disagree, or strongly disagree" with the statement that "[o]nly with a market economy can (country) become a developed country."[38] Given the neoliberal belief in market-led development, the more that a country's respondents disagree with this statement, the more anti-neoliberal the population.

In my analysis of the case studies, I examine the percentage of negative ("disagree" and "strongly disagree") responses to the above question. For the positive cases, I look for trends in the five years preceding exit. If hypothesis 3 is correct, either consistently high or increasingly high levels of anti-market sentiment should be observable before the year of exit.

Hypothesis 4 (H4): States with anti-neoliberal governments are more likely to exit

This hypothesis is informed by Helfer's theory of critical exit and Ellner's insights on Latin American anti-neoliberalism. Anti-neoliberal governments, that is, governments that oppose market liberalization and restrictions on governmental regulatory power, should be more likely to object to ICSID's practices and perceive them as threatening. States run by such governments should therefore be more likely to exit, as this action provides them with a form of protest that simultaneously makes a symbolic statement against the institution while challenging its authority.

Independent Variable 4 (IV4): Anti-neoliberal government

Axiomatically, anti-neoliberal governments are those that operate in opposition to the doctrine of neoliberalism. With this is mind, I conceptualize anti-neoliberal governments by reversing the political tenets of neoliberalism, which I take from Oxhorn's description as: "policies emphasizing privatization of state-owned enterprises, a general downsizing and

[38] *Latinobarometro*. Data from this question are available for years 2003-2005, 2007-2013. See Appendix I.

decentralization of the state, policies of free trade and deregulation, as well as fiscal austerity."[39] Based on this definition, anti-neoliberal governments should be committed to policies that nationalize or resist privatization of industries, expand the influence of the state, centralize political power, restrict trade and increase regulation, and finally, spend relatively freely.

This is captured with country scores on the Index of Economic Freedom, compiled by the Heritage Foundation.[40] The index captures a range of variables that indicate strong rule of law, limited government, regulatory efficiency, and market openness.[41] Given the tenets of neoliberalism described above, whereas neoliberal governments would score highly on this measure, anti-neoliberal governments should score poorly. Thus, the unit of observation for this variable is the government, not the country *per se*.

Robustness Check: FDI and Portfolio Investment

The research design focuses primarily on state level factors, which discounts the influence of broader forces that shape and constrain government policy. To account for the potential impact of macroeconomic forces in the events of interest, I track changes in FDI and portfolio investment.[42] In the cases of interest, substitution may be occurring by which states attempt to replace FDI, which concedes greater influence to foreign investors in the country, with portfolio investment. Exiting ICSID would make FDI a less desirable option for investors, who may then invest in stocks or bonds instead – arguably to the state's preference. Thus, states could avoid entanglements in investment litigation, but still receive capital from abroad. Considering

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[39] Philip Oxhorn, "Beyond Neoliberalism? Latin America's New Crossroads," in *Beyond Neoliberalism in Latin America? Societies and Politics at the Crossroads*, edited by John Burdick, Philip Oxhorn, and Kenneth M. Roberts (New York: Palgrave Macmillan, 2009), 217.

[40] The Heritage Foundation, *Index of Economic Freedom*. http://www.heritage.org/index/about

[41] Ibid.

[42] Both measures are taken from the World Bank: "Foreign direct investment, (BoP, current US$)," http://data.worldbank.org/indicator/BN.KLT.DINV.CD; "Portfolio Investment, net (BoP, current US$)," http://data.worldbank.org/indicator/BN.KLT.PTXL.CD. "Portfolio equity, net inflows" would have been the ideal measure to use in this instance, but the World Bank database is missing data for Bolivia on this indicator.

this possibility, I examine patterns of FDI and portfolio investment and comment on how they may be influencing the study's results.

B. Testing Method: Case Studies

The nature of the topic under consideration poses certain methodological challenges, particularly case selection, which deserve explanation. Given the extremely narrow sample of exits from ICSID (3 examples in 50 years of institutional history), random case selection is ill-suited to the present study. Instead, I rely on purposive selection[43] to assess the internal validity of potential causal claims restricted to the cases under examination. The goal of this approach is not the creation of a broadly generalizable theory (the highly circumscribed reality of my chosen topic precludes the feasibility of this ambition); rather, given my contention that exit from ICSID has been an under-studied and oversimplified phenomenon, the aim of this project is to provide descriptive explanations through exploratory tests of four cases. While the general history of countries' relations with ICSID will be considered informally, proper conclusions will be drawn from the case studies alone.[44]

With these goals and limitations in mind, I have selected four extreme and deviant cases: Argentina, Bolivia, Ecuador, and Venezuela. These cases provide for variation on my first two independent variables; while Argentina and Venezuela are the first and second-most sued states in the history of ICSID, Ecuador has had a middling 13 cases, and Bolivia has only had four, producing a range of costs. Furthermore, all four cases contain exceptional values of my anti-neoliberal independent variables, allowing for a fine-grained analysis of the differences among these similar cases. In terms of my dependent variable, as the only three positive cases of exit

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[43] Seawright and Gerring, "Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options," *Political Research Quarterly* 61:2 (2008), 295.
[44] Ibid., 294.

among ICSID members, Bolivia, Ecuador, and Venezuela are definitively extreme cases.[45] As the only negative case I consider, and given its values on my independent variables, Argentina serves as a deviant case in my analysis. My contention is that this approach provides new insights into the cases under examination, which are not necessarily representative of the potential universe of cases.[46]

[45] Ibid., 301.
[46] Ibid., 297.

III. Overview of ICSID-State Relations and Anti-Neoliberalism

Before proceeding to systematic tests of my hypotheses, a broad overview is in order to provide context to the case countries' relations with ICSID. While the four case studies provide the necessary in-depth consideration required to develop my particular theory of anti-neoliberal influenced exit, this narrow focus should not occur in complete isolation from more general activity in the "international investment regime." In what follows, I review patterns in ICSID membership and litigation, to describe the more typical background against which my cases distinguish themselves, thereby "provid[ing] a more representative picture of the population."[47] I consider how these broader trends relate to my hypotheses, but these are not tested in this section. After highlighting the exceptional nature of the phenomenon and cases I examine, I turn to the thesis' main research findings.

With an eye to the thesis' first hypothesis concerning performance in ICSID arbitration and exit, Table 2 provides a detailed breakdown of case records for a select group of states. Given this project's interest in both extreme and Latin America cases, to provide a basis of comparison I have listed states that have been named as a respondent to 10 or more cases and Latin America states with a history of at least one case at ICSID. The column "Cases" shows the total number of filings that a state has faced throughout its membership. These are further broken down into "Pending," which indicates that some form of proceeding is still ongoing, and "Concluded," wherein an award has been rendered (that is, the tribunal has made a decision) or the case has been settled or discontinued. Whereas settlements reflect a mutual agreement between the parties, discontinuances occur when a litigant drops his or her case or fails to comply with ICSID's timeline for actions or payments. These three case outcomes are also

[47] Seawright and Gerring, 301.

shown in Table 2. A precursory glance suggests that there is at best an ambiguous relationship between one's caseload and the potential for exit.

Table 2: Select States' ICSID Case History (as of February 2016)[48]

State	Cases	Pending	Concluded	Award rendered	Settlement	Discontinued	Annulment Attempts
Argentina	53	18	35	20	9	11	15
Venezuela*	39	25	14	15	1	5	2
Egypt	28	11	17	12	3	7	8
Spain	25	23	2	2	0	0	0
Mexico	17	2	15	14	0	1	0
Ukraine	14	3	11	8	2	1	1
Ecuador*	13	2	11	5	3	3	2
Peru	13	3	10	8	2	1	4
Romania	12	4	8	7	0	1	1
Kazakhstan	11	3	8	7	1	0	3
Costa Rica	10	5	5	4	0	1	0
Bolivia*	4	1	3	1	1	2	1
El Salvador	4	1	3	3	0	1	1
Chile	3	1	2	3	0	0	3
Grenada	3	0	3	2	1	0	1
Guatemala	3	1	2	3	0	0	2
Paraguay	3	0	3	2	0	1	1
Guyana	1	0	1	0	0	1	0
Nicaragua	1	0	1	0	1	0	0

*indicates former member

In terms of volume, Argentina leads the way with 53 cases, representing almost 10% of ICSID's entire historical caseload.[49] 14 cases separate it from Venezuela in second, clearly demarcating Argentina as an outlier in terms of litigation at ICSID. Venezuela also deserves this classification, given the 11 cases separating it from third-place Egypt. Notably, notwithstanding my intentional inclusion of Latin American states, these countries dominate the upper region of the list, making up over half of those with 10 cases or more. The resulting mix contains some strongly contrasting matchups; for instance, Ecuador's 13 cases put it in a tie with Peru for

[48] ICSID, *Cases*. https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx.
[49] As of February 2016, 560 cases have been filed with ICSID. International Centre for the Settlement of Investment Disputes, *Cases*. https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx.

seventh-most, despite being only slightly more than half the size of its Andean neighbour.[50] More strikingly, tiny Costa Rica trails Ukraine, a country nearly ten times its size, but only one case.[51] Thus, this table indicates significant variation among the states most frequently named as respondents to claims before ICSID.

While Table 2 casts a spotlight on two of this study's cases, Argentina and Venezuela, its implications for the other cases is less clear. While Ecuador's high caseload and relatively small size arguably make it a somewhat exceptional case, Bolivia's four cases do not distinguish it in any similar fashion. This table actually makes Bolivia look like a bigger target than it really is – on a full list, there would be fifteen states separating Bolivia from Costa Rica. This considered, how one's caseload influences the decision to exit remains far from clear.

Part of this ambiguity, however, is a product of ICSID's record-keeping. While the categories – taken from ICSID's own terminology - provide general indication towards the level of involvement states have with ICSID, they actually obscure how members have performed in arbitration hearings. The most nebulous example of this is ICSID's use of the term "award." Used as the official name for the decision of a tribunal, an "award" can either favour the claimant (usually a corporation) or the respondent (usually a state). The only way to identify the 'winner' in ICSID proceedings is by reading the tribunal's decision, which as Hafner-Burton et al. have lamented, is frequently not possible. As a result, studying case records provides an incomplete picture of states' performance in arbitration.

A reasonably good approximation, however, can be made with respect to the costs incurred by states as a result of ICSID membership. Table 3 shows the estimated net costs[52]

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[50] In 2014, Ecuador's population was 15,902,916 while Peru's was 30,973,148. World Bank, "Population, total," *Data*. http://data.worldbank.org/indicator/SP.POP.TOTL.
[51] Whereas Ukraine's population was 45,362,900 in 2014, Costa Rica's was 4,757,606. Ibid.
[52] Net cost = expenses + awards – recoveries.

incurred by the members under consideration, first as an absolute amount, and then weighted by GDP. I calculated the first figure by combining the value of awards and administrative costs from publically released ICSID decisions with an estimation of costs for unreleased cases, using data from Allen & Overy.[53]

Table 3: ICSID Costs[54]

Country	Net Costs (USD)	Country	Costs/GDP[55]
Venezuela*	3605331102	Grenada	0.014790105
Ecuador*	1113332905	Ecuador*	0.011032123
Argentina	543506931	Venezuela*	0.009455707
Mexico	270242299	Bolivia*	0.001957807
Egypt	158913351	Paraguay	0.001753821
Spain	126903970	Guyana	0.001592703
Ukraine	93755120	Costa Rica	0.001177132
Peru	66792837	Argentina	0.001010875
Bolivia*	64600181	Guatemala	0.000785785
Kazakhstan	64013108	El Salvador	0.000782482
Romania	62367995	Ukraine	0.000711316
Costa Rica	58329908	Egypt	0.000554598
Paraguay	54159513	Nicaragua	0.000417783
Guatemala	46225457	Peru	0.000329684
Chile	42692617	Romania	0.000313338
El Salvador	19690143	Kazakhstan	0.00029381
Grenada	13485674	Mexico	0.000208731
Guyana	4932200	Chile	0.000165436
Nicaragua	4932200	Spain	0.00009187

*Indicates former member

Perhaps unsurprisingly, according to this calculation, Venezuela and Argentina have faced the highest and third highest costs at ICSID, respectively. Despite having 14 fewer cases than Argentina, Venezuela outpaces it thanks in large part to a massive $1.6 billion award in *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela*, a dispute involving a

[53] The estimation does not include the costs of settlements or annulment proceedings. Additionally, interest was only included when an explicit amount was awarded in ICSID's decision. Rates are often provided, but these reveal little without knowing the timeline of payment, which is usually left open to the respondent.
[54] All data from ICSID. See Appendix B.
[55] GDP Data taken from the World Bank, "GDP at market prices (current US$)," *Data*, 2014. http://data.worldbank.org/indicator/NY.GDP.MKTP.CD. Due to data availability, Venezuela's GDP is from 2012.

Dutch energy company that is currently undergoing annulment proceedings.[56]

More striking is Ecuador's placement at second overall. Like Venezuela, Ecuador's costs come disproportionately from one case – an astounding $1.7 billion award in *Occidental of Ecuador Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, also an energy-related dispute.[57] While Ecuador has successfully reduced this award by 40% through an annulment proceeding, the remaining costs are still more than sufficient to cement Ecuador at 2nd overall.

Controlling for size lifts a number of small countries to, or near, the top. Most notably, Grenada takes first place from Venezuela, but Bolivia, Paraguay, Guyana, and Costa Rica also push their way above Argentina. Larger states, such as Egypt and Mexico, drop considerably, but none further than Spain, whose costs barely register once the strength of its economy is taken into account. This lends some credence to criticism of ICSID's impact on smaller, less developed countries: while bigger markets may be targeted more frequently by lawsuits, these proceedings are more damaging to states with fewer economic resources.

A compelling example of this is Paraguay, a country of only 6.5 million people.[58] Paraguay has only been named to three ICSID filings, of which two have concluded with an award. In the first, a dispute involving food products from 1998, Paraguay actually fared quite well – the tribunal shot down the plaintiff's claims and declined to award damages.[59] The second, against a large, Swiss multinational corporation represented by the formidable New York

56 ICSID, "Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/07/27)," *Cases*, https://icsid.worldbank.org/apps/ICSIDWEB/cases/pages/casedetail.aspx?CaseNo=ARB/07/27.
57 ICSID, "Occidental of Ecuador Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (ICSID Case No. ARB/06/11)," *Cases*, https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/06/11.
58 World Bank, "Population, total," *Data*. http://data.worldbank.org/indicator/SP.POP.TOTL.
59 ICSID, "Eudoro A. Olguín v. Republic of Paraguay (ICSID Case No. ARB/98/5)," *Cases*, https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/98/5.

City-based White & Case law firm, however, did not go Paraguay's way. Paraguay was ordered to pay $39,025,950.31 for unpaid invoices from their dealings with Société Générale de Surveillance, plus an additional $336,961.64 to cover the claimant's arbitration expenses.[60] This one loss was a huge blow for Paraguay – to put it in perspective, the award's value was equivalent to over 5% of the amount of FDI the country received that year.[61] The reverberations were perhaps even more severe – the following year, Paraguay's level of FDI dropped over 90%.[62]

While Table 3 is informative with respect to criticisms against ICSID, it should be interpreted cautiously. The relationship it presents between costs and exit is exaggerated, as it displays Bolivia, Ecuador, and Venezuela's all-time net costs, which includes those incurred after exit. Similarly, the earlier presentation of case records does not differentiate between cases initiated and concluded before and after exit. While these earlier tables are intended to show an overall historical picture of state relations with ICSID, given this research's motivating interest in explaining exit, an adjusted perspective is provided below.

Excluding post-exit cases and costs complicates the story significantly. Each state's net costs are reduced by at least half, and scaled costs drop dramatically. Most notably, at their respective times of exit, Ecuador and Venezuela's costs were hardly a fraction of today's figures. Ecuador's costs in 2009 were more than 94% lower than they are today; for Venezuela in 2012, they were almost 96% lower. When these states left, they had not been faced with the hugely damaging cases discussed earlier. *Occidental v Ecuador* was not decided until over 3 years after

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[60] ICSID, "SGS Société Générale de Surveillance S.A. v. Republic of Paraguay (ICSID Case No. ARB/07/29)," *Cases*, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC3532_En&caseId=C258.
[61] World Bank, "Foreign direct investment, net inflows (BoP, current US$), *Data*, http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD.
[62] Ibid.

Ecuador pulled out[63] and Venezuela's big ticket case, *Venezuela Holdings B.V.*, was also concluded well after the state had made its exit from ICSID.[64]

Table 4: ICSID Records at Time of Exit vs. Current[65]

State	Cases	Pending	Concluded	Award Rendered	Settlement	Discontinued	Annulment attempts
Bolivia (05/01/2007)	2	1	1	0	1	0	0
Bolivia (02/01/2016)	4	1	3	1	1	2	1
Ecuador (07/01/2009)	12	5	7	3	3	1	1
Ecuador (02/01/2016)	13	2	11	5	3	3	2
Venezuela (01/23/2012)	27	21	6	3	1	2	0
Venezuela (02/01/2016)	39	25	14	15	1	5	2

Table 5: Costs at Time of Exit[66]

Country	Net Costs (% of 2016)	Country	Costs/GDP[67]
Venezuela (01/23/2012)	149,343,148 (4.1%)	**Ecuador** (07/01/2009)	0.0010183
Ecuador (07/01/2009)	62,890,730 (5.6%)	**Bolivia** (05/01/2007)	0.0008614
Bolivia (05/01/2007)	9,864,400 (20%)	**Venezuela** (01/23/2012)	0.0004719

More generally, Bolivia's caseload was 50% lower when it exited in 2007 and Venezuela's was 30% lower when it left in 2012. At their time of departure, Bolivia had yet to see an award rendered and Venezuela had only seen 3 of its current 15. Therefore, the states had

63 ICSID, "Occidental of Ecuador Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (ICSID Case No. ARB/06/11)," *Cases*, https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/06/11.

64 2 years, 8 months, 15 days later. ICSID, "Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/07/27)," *Cases*, https://icsid.worldbank.org/apps/ICSIDWEB/cases/pages/casedetail.aspx?CaseNo=ARB/07/27.

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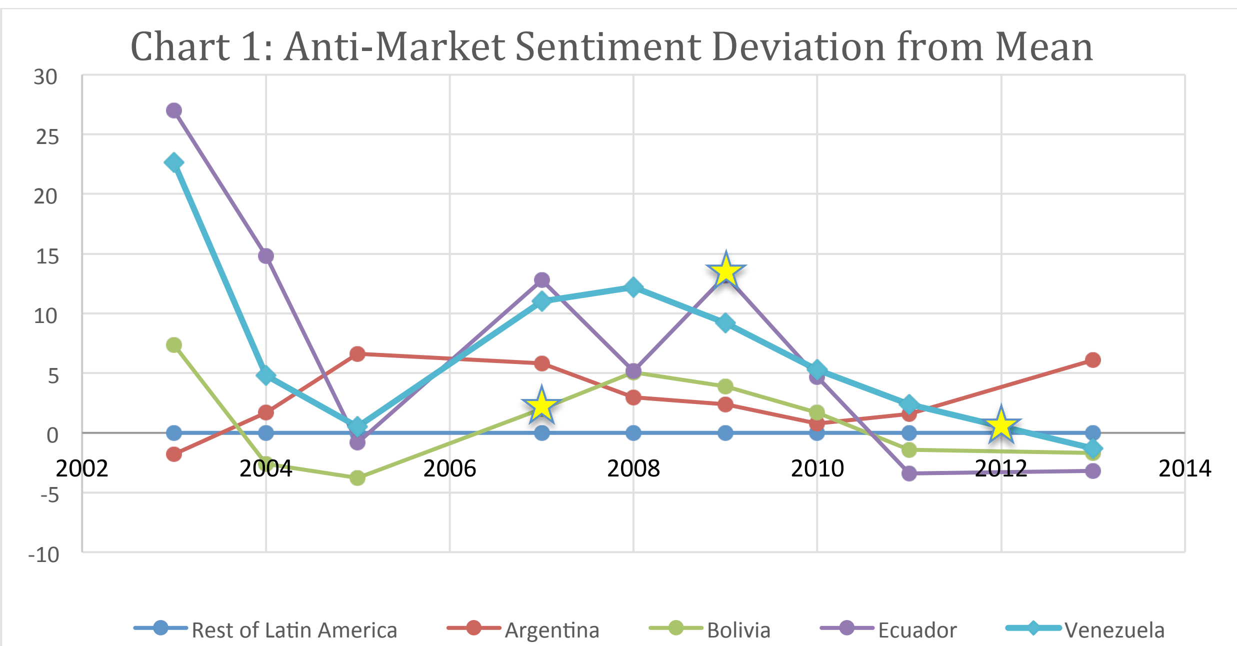
66 Data drawn from case records on ICSID's website (https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx). See Appendix II.

67 GDP is taken from the first full calendar year prior to exit: Bolivia 2006, Ecuador 2008, Venezuela 2011. World Bank, "GDP at market prices (current US$)," *Data*, 2014. http://data.worldbank.org/indicator/NY.GDP.MKTP.CD.

much less information on which to make a fatal judgment regarding ICSID membership, in addition to less painful financial injuries.

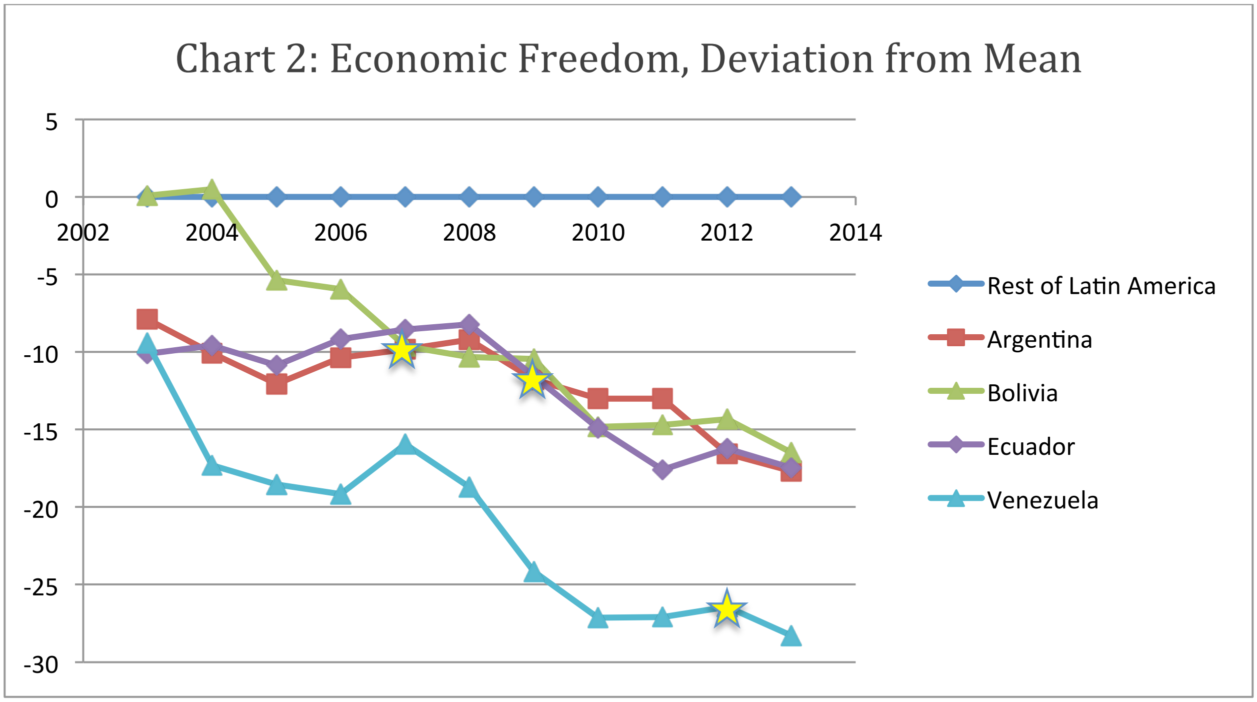
This considered, the case record and cost-based explanations deserve greater scrutiny. The states' experiences with ICSID were relatively limited at the time of exit, and did not become exceptional from other members until after they were no longer members. Furthermore, it is not clear why other states that have faced large, or relatively painful, losses have stayed. Thus, considering the costs imposed by ICSID membership seems to offer a plausible, but incomplete explanation for exit. In the following section, I consider these experiences in more specific detail, and provide an alternative explanation based upon the influence of anti-neoliberalism in the case countries. Before turning to these case studies, however, some context is needed with respect to the phenomenon that forms the basis of the thesis' main argument.



While Argentina, Bolivia, Ecuador, and Venezuela are important cases to study for all of the reasons stated above, they are of particular importance to this thesis because of their highly anti-neoliberal populations and governments. Chart 1 shows public sentiment towards market-led development in the case countries compared to the average for the rest of Latin America.[68] Specifically, it shows the difference between respondents from the case countries and respondents from the other countries in the *Latinobarometro* when they were asked whether they think a market economy is necessary for development. The "Rest of Latin America" is expressed as a constant on the X-axis, and the case countries' scores are expressed by their difference from this measure. Stars are placed where countries exited ICSID. The results indicate that, for the most part, respondents from the cases were more likely to express disagreement that markets are necessary for development than their Latin American peers. This is taken as indication that these populations are more anti-neoliberal. The data, however, are somewhat volatile, indicating that this sentiment may not be firmly held.

By contrast, Chart 2 shows a more consistent trend that distinguishes the governments of the case countries as anti-neoliberal. Specifically, the Chart displays the case countries' performances on the Index of Economic Freedom compared to their fellow Latin America ICSID members from Tables 1 and 2.[69] The data trend consistently lower than average, indicating that these countries' policies are less market-friendly that those of the countries considered earlier. This high-level observation provides sufficient evidence that these cases warrant further investigation in my case studies, in which the focus will shift to the governments in power and their policy records.

[68] *Latinobarometro*, *Banco de datos,* 2003-2013. http://www.latinobarometro.org/latContents.jsp. See Appendix I.
[69] The Heritage Foundation, "Explore the Data," *Index of Economic Freedom*. http://www.heritage.org/index/explore.



Overall, the charts distinguish the selected case countries as exceptional cases in terms of the present study's third and fourth independent variables, the implications of which will now be tested with respect to exit from ICSID. I aim to demonstrate that exit cannot be explained through arbitration history and costs alone, and that a more robust explanation is achieved when the influence of anti-neoliberalism is considered.

IV. Case Studies

A. Bolivia

Bolivia became the first state to ever denounce the ICSID Convention on May 2nd 2007, after just under 12 years of mostly uneventful membership.[70] In what follows, I test the thesis' four hypotheses: finding strong support for Hypothesis 4, but not for Hypotheses 1, 2, and 3. While it is difficult to establish a clear relationship between arbitration history, costs, or public anti-neoliberalism and Bolivia's decision to exit, a link can be made between the government's anti-neoliberal ideology and its withdrawal from ICSID.

Arbitral History

Table 6: Bolivian Arbitration History, Before and After Exit

Country	Cases	Pending	Concluded	Award Rendered	Settlement	Discontinued	Annulment attempts
Bolivia (05/01/2007)	2	1	1	0	1	0	0
Bolivia (02/01/2016)	4	1	3	1	1	2	1

As mentioned, Bolivia's history with ICSID is limited. Considering first the volume and outcomes, and not the costs, of litigation, when Bolivia exited in 2007 only two cases had been registered against it. The lone case to be concluded before its exit, *Augas del Tunari S.A. v. Republic of Bolivia*, was settled in 2006.[71] Thus, the outcome of the case was mutually agreed upon by the parties and should not have been the source of much contention on Bolivia's part. While Bolivia undoubtedly had to make certain concessions to reach this settlement, the country's experience in this respect is much different from those who find themselves at the

[70] Bolivia joined ICSID in June 1995. ICSID, *1995 Annual Report*. https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/1995%20-%20AR%20-%20Final%20EN.pdf
[71] ICSID, "Aguas del Tunari S.A. v. Republic of Bolivia (ICSID Case No. ARB/02/3)," *Cases*, https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/02/3.

losing end of an award. These respondents are declared to have violated the terms of an agreement and are forced to compensate the claimants an amount that is determined by the tribunal, not negotiated by the country's representatives like in a settlement.

The only other case in Bolivia's arbitral history that predates its exit was filed in 2006, but its tribunal did not convene until December 19, 2007 – after Bolivia was officially no longer a member of ICSID.[72] In substantive terms, then, Bolivia had only experienced one case proceeding at ICSID before it left, and even it concluded before reaching the final stages of arbitration. In sum, Bolivia's pre-exit experience with ICSID represented a mere partiality of the typical experience of members, and notably excluded the most painful aspect of membership. Put bluntly, Bolivia gave up on ICSID despite having never lost a case. By itself, Bolivia's arbitral history – two filings, one settlement, and no awards – does not provide a compelling explanation for its decision to exit.

Costs

Table 7: Bolivia's Costs, Before and After Exit

Time	Net Costs	Costs/GDP
Before Exit (05/01/2007)	9,864,400	0.0008614
Total (02/01/2016)	64,600,181	0.0019578

Assessing the impact of Bolivia's costs on its decision to exit is more difficult. By virtue of the arbitral history discussed above, Bolivia's pre-exit costs are limited but opaque. Outside of administrative expenses, the only cost Bolivia incurred before it left ICSID stemmed from its settlement with Augas del Tunari S.A. The details of this settlement were not released publically, so the cost it imposed on Bolivia is unknown. The costs sought by Augas del Tunari, however,

[72] ICSID, "Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia (ICSID Case No. ARB/06/2*)*," *Cases*, https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/06/2.

were reportedly $25 million[73]: a hefty sum for a poor country like Bolivia, but not record-breaking by the standards of international investment arbitration. Assuming Bolivia settled for the full amount, which is unlikely, the total cost would have been a third of the average amount awarded in international treaty arbitration.[74] This considered, it is not immediately apparent why this one settlement would inspire Bolivia's unprecedented exit from ICSID. The missing details of the outcome compound this uncertainty.

A thornier problem emerges from Bolivia's second case. In a certain sense, it is nonsensical to discuss the costs of this case in relation to Bolivia's exit; an award was not rendered until September 2014, 8 years after Bolivia denounced the ICSID Convention.[75] The argument could be made, however, that the potential costs of the case were enough to inspire Bolivia's departure from ICSID. The same charge could be raised in relation to Ecuador and Venezuela, so the thrust of this contention is worth addressing in detail.

The unclear aspect of this expected costs argument is the underlying motivation for states to pursue exit in response to this anticipation. Extending the assumption of cost aversion, the underlying rationale would presumably be to avoid these costs. The problem, however, is that exiting ICSID does not allow states to avoid responsibility for any existing obligations. Article 72 of the ICSID Convention directly addresses the consequences of exit and prevents states that leave from simply shirking their existing obligations to investors.[76] Once consent to ICSID's jurisdiction over an agreement has been conferred, it cannot be withdrawn by exiting the

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[73] PBS, "Timeline: Cochabama Water Revolt," *Frontline World*, June 2002. http://www.pbs.org/frontlineworld/stories/bolivia/timeline.html.

[74] Allen & Overy, "Investment Treaty Arbitration: How much does it cost? How long does it take?" *Publications*, February 18, 2014. http://www.allenovery.com/publications/en-gb/Pages/Investment-Treaty-Arbitration-How-much-does-it-cost-How-long-does-it-take-.aspx.

[75] ICSID, "Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia (ICSID Case No. ARB/06/2)," *Cases*, https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/06/2.

[76] ICSID. "The ICSID Convention, Regulations and Rules." (2006) [1965]. Available online: https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/main-eng.htm.

institution.[77] Therefore, if a state hopes to avoid the consequences of a dispute arising from a contract that names ICSID as a venue of arbitration, denouncing the ICSID Convention will not prevent the case from going to ICSID.

Additionally, BITs themselves contain provisions that severely restrict the parties' abilities to eschew the tenets of the agreement. Specifically, BITs contain termination clauses that extend their application past the life of the agreement. For example, in Bolivia's BIT with the United States, in the event that the treaty is terminated, "all investments that qualified as covered investments on the date of termination (i.e., 1 year after the date of written notice of termination) continue to be protected under the Treaty for 10 years from that date."[78] This specific provision is nearly universal in investment treaties, and many provide an even broader window of application – in Bolivia's BITs with France and Germany, the protection extends for 20 years after termination.[79]

Therefore, provided that a state exits ICSID, then terminates its BITs, it can only ensure that disputes arising from investments that have not yet been made will not make their way to ICSID arbitration. Depending on the terms of their BITs, however, they will still have to deal with ICSID disputes for a long time. Moreover, the wide availability of other arbitration mechanisms – such as UNICITRAL, the Permanent Court of Arbitration, the ICC International Court of Arbitration, among others – likely means that investors will find means of availing

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[77] Sergey Ripinsky, "Venezuela's Withdrawal from ICSID: What it Does and Does Not Achieve," *Investment Treaty News*, April 13 2012. https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/.

[78] *Treaty Between the Government of the United States of America and the Government of the Republic of Bolivia Concerning the Encouragement and Reciprocal Protection of Investment*, April 17 1998. http://investmentpolicyhub.unctad.org/Download/TreatyFile/463.

[79] *Treaty Between the Federal Republic of Germany and the Republic of Bolivia Concerning the Promotion and Mutual Protection of Investments*, March 23 1987, http://investmentpolicyhub.unctad.org/Download/TreatyFile/454; *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Bolivia for the Promotion and Protection of Investments*, May 24 1988, http://investmentpolicyhub.unctad.org/Download/TreatyFile/462.

themselves sooner rather than later. So the material benefit in exit for a rational actor motivated by cost calculations is a somewhat distant prospect requiring policy reversals that go well beyond ICSID membership, and that might not achieve their desired effect.

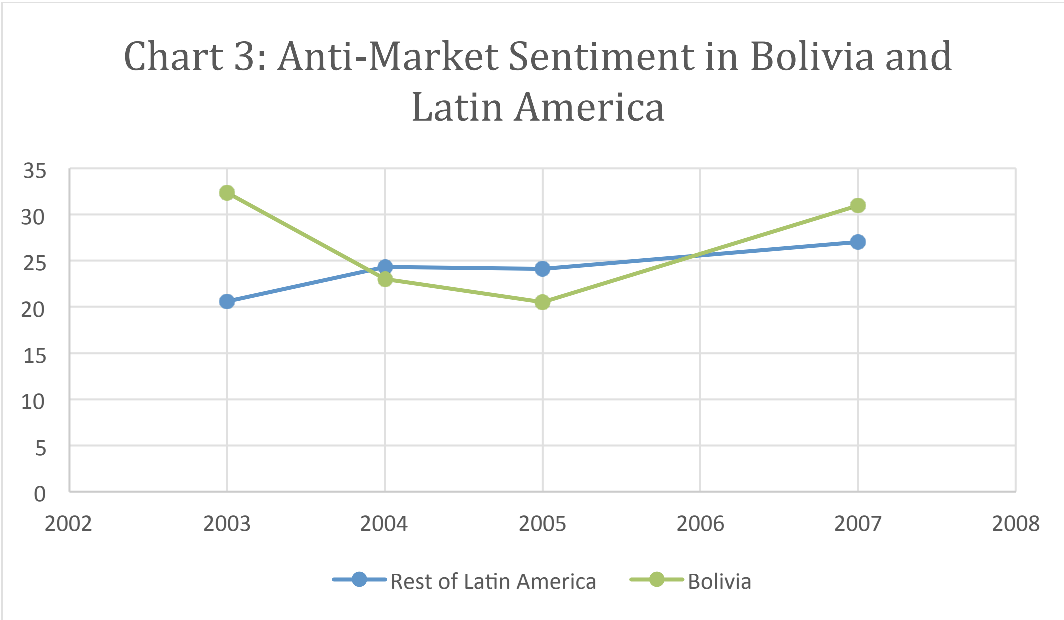
Returning to Bolivia's case, even if the state correctly assumed it would lose its case with Quiborax, and that this would result in undesired costs, exiting from ICSID would do nothing to prevent this outcome, and would further do nothing to minimize the resulting costs. Indeed, Bolivia exited and 8 years later it was still held to account. It is plausible, however, that Bolivia determined that exit would prevent Bolivia from encountering disputes over future investments at ICSID – even if it would not necessarily avoid future disputes. In 2007, Bolivia may have viewed its one settlement and a potential future loss negatively enough to justify exit, especially given the disproportionate impact costs pose for its small economy.

In terms of Hypothesis 2, "States that incur high costs due to ICSID membership are more likely to exit," the Bolivian example is inconclusive. It is possible that cost considerations contributed to Bolivia's decision to exit, but observing and assessing their impact is difficult in this case. The shadow of future costs may have contributed to Bolivia's concerns regarding ICSID, but even so, what led the country to exit requires further consideration and explication.

Anti-Neoliberalism

Anti-neoliberalism in Bolivia potentially serves as both an alternative explanation in itself, and as a connecting explanation between anticipated costs and exit. Its influence in this case is considered through two channels: the Bolivian public and the government. To establish the former's influence, exceptional levels of anti-neoliberal sentiments should be held by populace and observed through polling. For the latter, the government's positions and policies should distinguish it from the governments of comparable ICSID members.

Anti-Neoliberal Populace



Comparing the level of anti-market sentiment held by Bolivians with non-case countries from Latin America, however, does not establish the Bolivian populace as particularly anti-neoliberal in the years leading up to exit. In fact, in the two years for which data exists before Bolivia's withdrawal, a smaller percentage of Bolivians expressed anti-neoliberal sentiments than most Latin Americans.[80] Chart 3 does show a spike in anti-neoliberal sentiment between 2005 and 2007, but it only slightly outpaces the average. In this sense, popular expression of anti-neoliberalism does not seem like a strong indicator for exit in the Bolivian case. This is not to say that the Bolivian public had no role in the country's departure from ICSID, but Hypothesis 3 does not gain support in this case.

Anti-Neoliberal Government

What did distinguish Bolivia in the years preceding its exit was its change in government following elections in 2005. Leftist Evo Morales became President and his Movement for

[80] *Latinobarometro*, 2003, 2004, 2005, 2007.

Socialism (MAS) party took commanding control in Bolivia's legislative assembly.[81] While MAS only earned 12 of 27 seats in the senate, no other party held majority control of the chamber, although PODEMO came close, winning 13 seats and taking minority control.[82] Morales replaced interim President Rodriguez, who had taken over after the forced resignation of Carlos Mesa, a moderate neoliberal.[83] Under Mesa's leadership, "cosmetic" reforms were initiated in Bolivia's energy and electoral policy, but the President remained committed to the neoliberalism and cooperation with the International Monetary Fund.[84] Mesa's ouster and the election of MAS marked the culmination of a significant shift in Bolivian politics.

Table 8: Bolivian Government: 2006-present

Executive	Legislative	Average Economic Freedom Score	Latin American Average During Tenure
President: Evo Morales (01/22/2006-present)	Plurinational Legislative Assembly (formerly Congress): Movement for Socialism (MAS) (01/22/2006-present) Senate: *Poder Democrático y Social* (PODEMOS) (01/22/2006-12/05/2009) Movement for Socialism (MAS) (12/06/2009-present)	50.8	64.3

Since coming into power, Morales and MAS have overseen a massive overall of the country's economic policy: nationalizing the gas industry within their first year of office, redistributing land to communities and indigenous populations, and quadrupling the size of the

[81] ElectionGuide, "Dec. 18, 2005 - Election for President – Bolivia," *Elections*, http://www.electionguide.org/elections/id/1992/.
[82] ElectionGuide, "Dec. 18, 2005 – Election for Camara de Senadores – Bolivia," *Elections*, http://www.electionguide.org/elections/id/874/.
[83] Jeffrey R. Webber, "Carlos Mesa, Evo Morales, and a Divided Bolivia," *Latin American Perspectives* 37, no. 3, 52.
[84] Ibid., 54.

government.[85] Morales' rejection of limited government and market-friendly policy is evident in the thesis' measure of government anti-neoliberalism. During Mesa's time in power, Bolivia averaged a score of 61.4 on the Index of Economic Freedom.[86] By comparison, Evo Morales has steadily lowered Bolivia's standing on the Index, achieving an average score of 50.8.

Morales' anti-neoliberal ambitions quickly expanded to the international level, where he established himself as a vocal critic of capitalism, and explicitly attempted to foment dissent against ICSID. On April 29th 2007, at the 5th Annual Summit of the Bolivarian Alliance for the People of Our Americas (ALBA), Morales urged Venezuela and Nicaragua to abandon the World Bank institution.[87] He submitted a proposal for the organization to adopt, which announced the states' intentions to withdraw from ICSID and stated: "(We) emphatically reject the legal, media and diplomatic pressure of some multinationals that... resist the sovereign rulings of countries, making threats and initiating suits in international arbitration."[88] Three days later, Morales sent a written notice of denunciation to the ICSID Secretariat, which announced Bolivia's formal denunciation of the ICSID Convention on May 2nd, 2007, to take effect in November of that year.[89]

The context of Bolivia's exit from ICSID, and in particular the actions of Evo Morales preceding it, are illustrative of a critical exit intended to publically rebuke the institution. Bolivia had grievances from its experience with ICSID, but more generally, the Morales-led government had a fundamental ideological problem with the nature of the organization and the concept of

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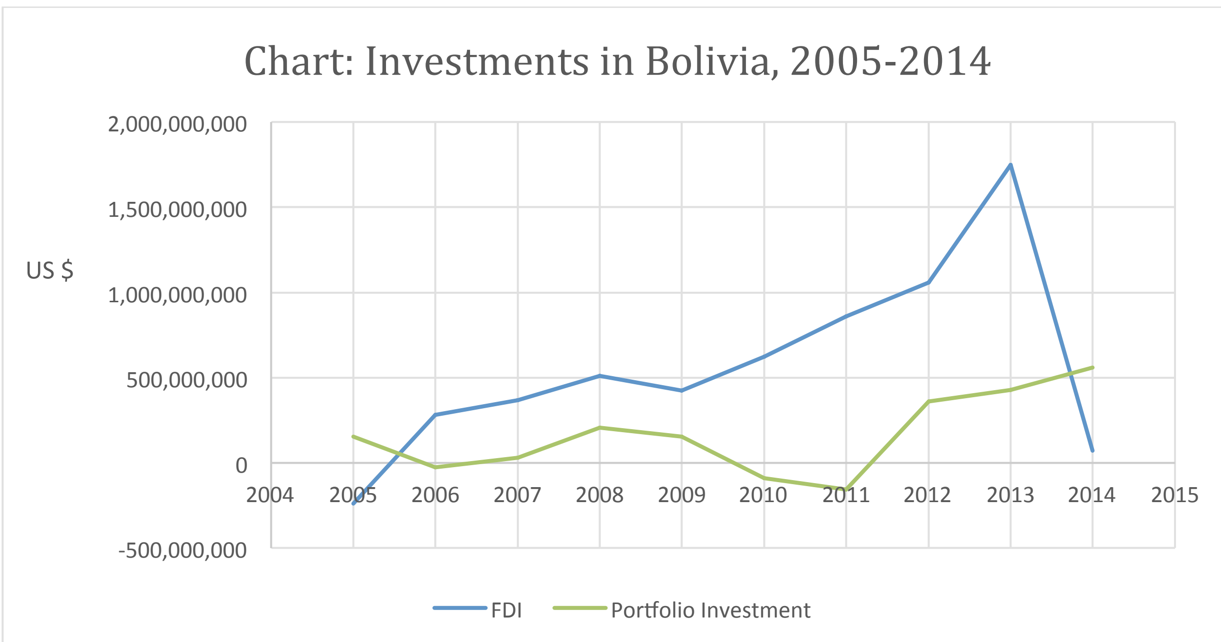
[85] Federico Fuentas, "The Morales government: neoliberalism in disguise?" *International Socialism* 134 (2012), n.p. http://isj.org.uk/the-morales-government-neoliberalism-in-disguise/#134fuentes_9.
[86] The Heritage Foundation, "Explore the Data," *Index of Economic Freedom*. http://www.heritage.org/index/explore.
[87] Reuters, "Latin leftists mull quitting World Bank arbitrator," *Reuters*, April 7, 2007, http://www.reuters.com/article/2007/04/30/us-bolivia-venezuela-nationalizations-idUSN2936448520070430.
[88] Ibid.
[89] Silvia Katrina Fiezzoni, "The Challenge of UNASUR Member Countries to Replace ICSID Arbitration." *Beijing Law Review* 2, no. 3 (2011): 137.

investor-state arbitration. Bolivia did not simply seek reprieve from the obligations of membership, it sought to condemn ICSID and the corporations that avail themselves of its services. Notably, Morales viewed his conflict with ICSID as part of a broader struggle against the prevailing economic order – hence his lobbying at the ALBA summit and his claim that "[t]he governments of Latin America, and I think the world, never win the cases. The multinationals always win."[90] Thus, Bolivia's anti-neoliberal government exited ICSID as a form of protest, in line with the expectations of hypothesis 4 and the broader theory of this thesis.

Robustness



The story I have described focuses on Bolivian politics and the key roles played by influential figures, but there were possibly larger macroeconomic forces at play influencing Bolivia's ability to walk away from ICSID. Namely, if Bolivia could have simply replaced the capital that came in the form of FDI with portfolio investments – stocks, banknotes, and bonds – it could have avoided the inconveniences presented by active foreign investments while

[90] Evo Morales, quoted in Reuters, "Latin leftists mull quitting World Bank arbitrator," *Reuters*, April 7, 2007, http://www.reuters.com/article/2007/04/30/us-bolivia-venezuela-nationalizations-idUSN2936448520070430.

collecting the funds they desired. This possibility would have made exit less risky with respect to investment. The dramatic chart above compares the level of foreign direct investment in Bolivia with the level of portfolio investment from 2005-2014.[91] While the steep dive in FDI in 2014 is the most eye-catching feature of the graph, with respect to Bolivia's exit from ICSID, there is no indication of a substitution effect that could have influenced this. With two exceptions, FDI outpaces portfolio investment before after exit. Regarding the FDI crash in 2014 – it is likely the result of Bolivia terminating several of its BITs in 2013 and releasing its new (and very restrictive) law on foreign investment the following year.[92] This, however, is beyond the scope of the current case study.

Conclusion

The Bolivian case is a puzzling one that presents a challenge for this research. The evidence and analysis provided above lend support to one of this project's main contentions –that anti-neoliberal governments are inclined to pursue exit from ICSID – but the research design's other expectations have been more difficult to substantiate. Given Bolivia's extremely limited arbitral history and inconsistent evidence of anti-neoliberal sentiment among the populace, Hypotheses 1 and 3 are not supported by this case. The findings with respect to costs are inconclusive; while potential costs loomed on Bolivia's horizon in 2007, financial damages were not a central concern in Bolivia's campaign against ICSID. Moreover, Hypothesis 2's expectation ("States that incur high costs due to ICSID membership are more likely to exit") is only met if the unknown costs of Bolivia's first settlement or the post-exit costs of its second

[91] World Bank, "Foreign direct investment, net inflows (BoP, current US$)," *Data*, http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD; "Portfolio Investment, net (BoP, current US$)," http://data.worldbank.org/indicator/BN.KLT.PTXL.CD.

[92] Martin Dietrich Brauch, "Opening the Door to Foreign Investment? An Analysis of Bolivia's new Investment Promotion Law," *Investment Treaty News*, August 11, 2014. http://www.iisd.org/itn/2014/08/11/opening-the-door-to-foreign-investment-an-analysis-of-bolivias-new-investment-promotion-law/.

case are factored into the assessment. This considered, Hypothesis 2 is also not supported. The preceding case study of Bolivia provides more support for an ideological, not material, explanation. The Morales government's anti-neoliberal ideology influenced their view of ICSID, which they viewed as an unacceptable threat to their vision for Bolivia's economy. Further evidence is required to establish a consistent pattern in these observations, which brings the thesis to its next case study: Ecuador.

B. Ecuador

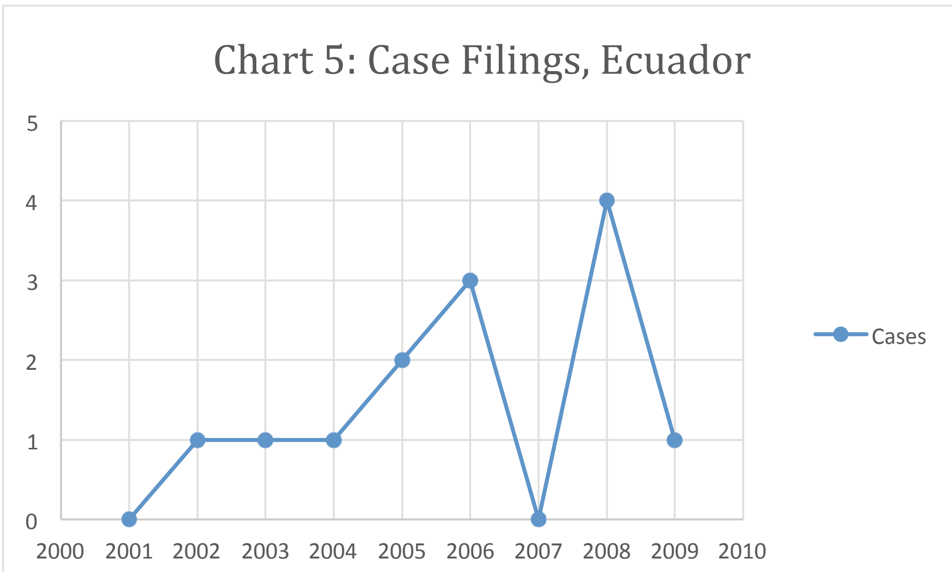
Following the events of the 2007 ALBA summit and Bolivia's exit, more states seemed poised to leave ICSID, particularly Venezuela and Nicaragua. Somewhat surprisingly, however, it was Ecuador that became the second state to denounce the ICSID Convention on July 2nd 2009. In the following case study, I test the thesis' four hypotheses, finding partial support for Hypothesis 1, inconclusive support for Hypothesis 2, and strong support for Hypotheses 3 and 4. Ecuador presents rich evidence for thesis' consideration, and provides further confirmation of a connection between anti-neoliberal ideology and exit from ICSID.

Arbitral History

Table 9: Ecuadorian Arbitration History, Before and After Exit

State	Cases	Pending	Concluded	Award Rendered	Settlement	Discontinued	Annulment attempts
Ecuador (07/01/2009)	12	5	7	3	3	1	1
Ecuador (02/01/2016)	13	2	11	5	3	3	2

Ecuador's pre-exit arbitral history is distinct for two reasons: its number of filings and the relative success the state has had in ICSID proceedings. First, without considering the instigating circumstances of the claims against it, Ecuador has been named as a respondent to a disproportionate number of ICSID filings. By 2009, the country had become one of the most sued states in the Centre, despite being one of its smaller and more recent members. In 2008 alone, four cases were launched against the small Andean country. Chart 5 shows the concentration of Ecuador's entire caseload within a period of 7 years. With the exception of 2007, cases were increasingly brought forward each year. While the filings abruptly stop after 2009, considered from the perspective of that year, cases against Ecuador seemed to form a growing trend.



This observation, however, gives little indication regarding how Ecuador was performing in these cases. As Table 9 shows, over half of the cases concluded before exit were either settled or discontinued – with only three making it to the award stage. Fortunately (from a research standpoint) two of these decisions have been published, and the result of the other can be drawn from the publically available record of its subsequent annulment proceedings. This latter case, *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, was rejected on jurisdictional grounds, a decision that was later (unsuccessfully) challenged by the claimant.[93] Consequently, Ecuador won a technicality. The state was not so lucky in its dispute with Duke Energy Electroquil Partners and Electroquil S.A.[94] The tribunal in that case determined Ecuador had breached its 1993 BIT with the U.S., awarding the claimant $5,578,566. This is no small sum of money, but it is only slightly more than half the value of the median award issued in international investment arbitration cases and well below the average, so it was by no means an exceptional result.[95] Finally, there was *Empresa Eléctrica del Ecuador, Inc. (EMELEC) v. Republic of Ecuador* which concluded exactly one month before Ecuador denounced the ICSID Convention.[96] The claimant in that case did not prove a sufficient grievance to the tribunal, who also determined that he lacked sufficient standing to represent the interests of EMELEC. As a result, Ecuador was not required to pay any compensation. In sum, before it left ICSID, Ecuador had only lost one case in which it actually had to compensate an investor.[97]

Costs

Table 10: Ecuador's Costs, Before and After Exit

Time	Net Costs	Costs/GDP[98]
Before Exit (07/01/2009)	62,890,730	0.0010183
Total (02/01/2016)	1,113,332,905	0.0110321

[93] ICSID, *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador, (ICSID Case No. ARB/03/6)*, https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/03/6.
[94] ICSID, *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador (ICSID Case No. ARB/04/19)*, https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/04/19.
[95] Allen & Overy, "Investment Treaty Arbitration: How much does it cost? How long does it take?" *Publications*, February 18, 2014. http://www.allenovery.com/publications/en-gb/Pages/Investment-Treaty-Arbitration-How-much-does-it-cost-How-long-does-it-take-.aspx.
[96] ICSID, *Empresa Eléctrica del Ecuador, Inc. (EMELEC) v. Republic of Ecuador (ICSID Case No. ARB/05/9)*, https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/05/9.
[97] This is assuming that the unpublished case constituted a loss for Ecuador.
[98] GDP is taken from the first full calendar year prior to exit: Bolivia 2006, Ecuador 2008, Venezuela 2011. World Bank, "GDP at market prices (current US$)," *Data*, 2014. http://data.worldbank.org/indicator/NY.GDP.MKTP.CD.

In terms of its record and costs, therefore, Ecuador performed reasonably well – especially given the amount of litigation it faced. But the latter consideration betrays a legitimate concern for the Ecuadorian government; namely, that it was becoming an increasingly common target of lawsuits. Hypothesis 1, which expects states that "appear and lose frequently" will exit, therefore finds partial support. Ecuador appeared before ICSID more frequently than its relative stature in the institution would suggest. The second half of the hypothesis – losing – is not supported, hence Hypothesis 1's incomplete satisfaction.

While Ecuador's heavy caseload lends support to Hypothesis 1, it did not produce sufficient costs to satisfy Hypothesis 2. Ecuador's level of pre-exit costs/GDP was actually lower than the relative costs of other small states who have faced fewer cases (e.g. Costa Rica and Paraguay). Given its caseload, Ecuador should have expected higher costs that it had actually incurred. Furthermore, it bears reiteration that there is a disconnect between case filings, anticipated costs, and the decision to exit ICSID. As described in detail in the Bolivian case, exit does not provide relief from current or near future expected litigation and costs. States may be able to eventually avoid ICSID disputes (in 10-20 years) if they also terminate their BITs, but even so there remain many options for aggrieved investors. Additionally, an explanation based on potential costs relies on the assumption that Ecuador was pessimistic about its chances in these cases, despite having avoided large losses through its first seven hearings. More generally, it also suggests that Ecuador was unconvinced that the investment-promoting benefits of ICSID were worthwhile.

Anti-Neoliberalism

Anti-neoliberalism can potentially explain why, despite the fact it would do little to protect the country from costs or cases, Ecuador would pursue exit from ICSID. If Ecuador's people and government were ideologically opposed to open market global capitalism, they would be less inclined to view potentially greater foreign investment as a benefit, or trust a branch of the World Bank to oversee its cases fairly. So while the fact that several high-profile (and potentially high-cost cases) were set for arbitration when Ecuador left should not be ignored, their significance is perhaps best understood in consideration of Ecuador's ideological perspective, in terms of public opinion and government policy.

Anti-Neoliberal Populace

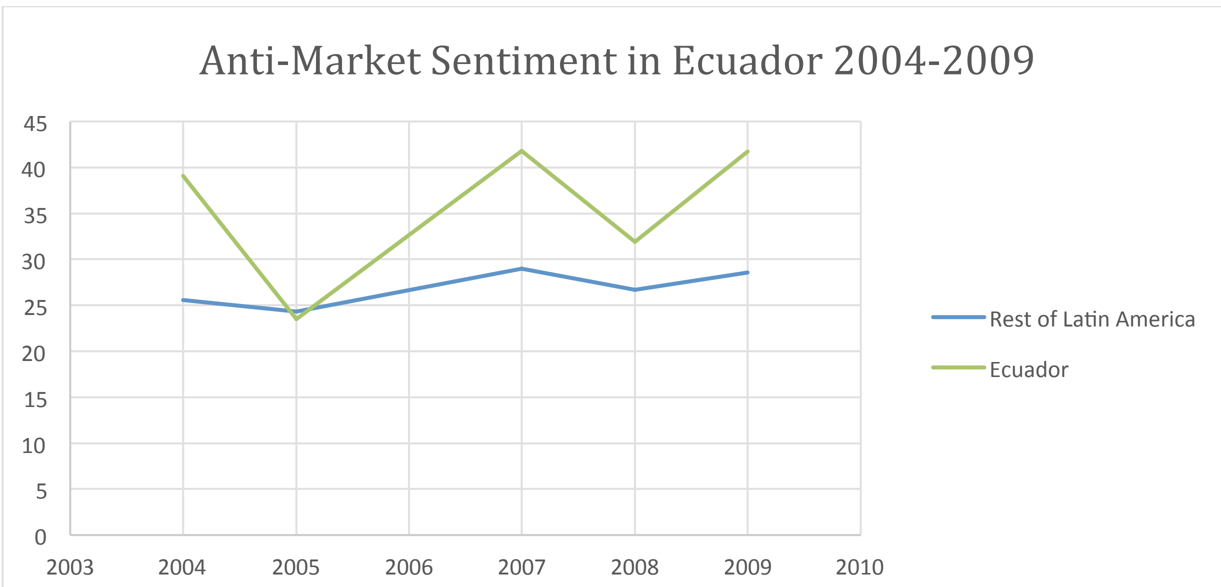


Chart 6 shows a mostly sustained level of anti-neoliberal views among Ecuadorians in the years leading up to the country's departure from ICSID. After a dip to average in 2005, Ecuador moves 13.15% above the rest of Latin America mean in 2009. While the data are somewhat unstable, in this case they provide indication for exit along the lines of Hypothesis 3 – that states with anti-neoliberal populaces are more likely to exit. In Ecuador's case, there is actually a direct observation that can be made with respect to the populace's role in exit. In July 2008, 64% of Ecuadorians voted in favour of the country's new constitution,[99] which, among other reforms,

[99] Jennifer N. Collins, "Rafael Correa and the Struggle for a New Ecuador," *Global Dialogue* 10 (2008), 37.

made it illegal for Ecuador to submit itself to international arbitration.[100] While this was likely not the clinching issue of this vote, it speaks to the popular support for anti-neoliberal policy in the country. Thus, Hypothesis 3 finds support in Ecuador, but it also raises the need to consider the role of the government – the initiator of the constitution referendum – in this case.

Anti-Neoliberal Government

Table 11: Government Anti-Neoliberalism in Ecuador: 2007-present

Executive	Legislative	Average Economic Freedom Score	Latin American Average During Tenure
President: Rafael Correa (01/15/2007-present)	National Assembly: PAIS Alliance (09/20/2007-present)	50	64.3

Ecuador's new constitution was the culmination of President Rafael Correa's "citizen revolution," that began with his election at the end of 2006.[101] Correa sought to end the influence of what he viewed as corruption in Ecuador – from sources internal and external. Almost immediately, he held a referendum to establish the National Assembly (in place of the existing Congress) and secure a mandate to create a new constitution.[102] After the referendum passed, the new Assembly was quickly filled with Correa supporters in its first election.[103] Now with firm control of the governmental levers, Correa and the PAIS Alliance set to work expanding social programs and the country's tax base. In 2008, Ecuador's spending on health more than doubled, as did spending on housing assistance.[104] Meanwhile, total revenues burgeoned in part from the

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[100] Fernando Carbrera Diaz, "Ecuador Continues Exit from ICSID," *Investment Treaty News*, June 8 2009. http://www.iisd.org/itn/2009/06/05/ecuador-continues-exit-from-icsid/.
[101] Collins, "Rafael Correa and the Struggle for a New Ecuador," 37.
[102] Nicholas Kozloff, *Revolution! South America and the Rise of the New Left*, (New York: Palgrave Macmillan, 2008), 14.
[103] ElectionGuide, "Referendum – April 15 2007 – Ecuador," *Elections*, http://www.electionguide.org/elections/id/84/.
[104] Mark Weisbrot and Luis Sandoval, "Update on the Ecuadorian Economy," *Centre for Economic and Policy Research*, June 2009, 7. http://cepr.net/documents/publications/ecuador-update-2009-06.pdf.

government's increased tax on oil profits.[105] In Correa's own assessment, Ecuador's "long neo-liberal night," came to an end.[106] Under his leadership, Ecuador has averaged a score of 50 on the Index of Economic Freedom, well below the norm for other Latin America countries, and lower than Ecuador's previously substandard scores.[107]

The Ecuadorian Government's anti-neoliberalism has informed its criticism and rejection of ICSID. Before officially taking office, in 2006 President-elect Correa was quoted denying the legitimacy of ICSID and its jurisdiction over the *Occidental* dispute. A statement on his website explained his objection that "Ecuador has never agreed, at any moment, to submit itself to ICSID jurisdiction."[108] Of course, this is factually untrue, suggesting that unless the comment stemmed from sheer ignorance (which seems unlikely), Correa's disapproval of the institution was grounded not in legality but in legitimacy, insofar as Correa refused to recognize that an institution of the World Bank could wield authority over his country's sovereignty. On May 30th, 2009, he announced Ecuador's intention to withdraw from ICSID, calling the Centre an "atrocity."[109] He explained his motivation as "the liberation of our countries because [ICSID] signifies colonialism, slavery with respect to transnationals, with respect to Washington, with respect to the World Bank and we cannot tolerate this."[110] On July 2nd, Correa signed a bill that made Ecuador's exit from ICSID the law of the land.[111] Thus, Ecuador pursued exit in a similar

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105 Ibid., 8.

106 Kozloff, *Revolution! South America and the Rise of the New Left*, 14.

107 Ecuador's average score was 54.9 from 2000-2006. The Heritage Foundation, "Explore the Data," *Index of Economic Freedom*. http://www.heritage.org/index/explore.

108 Rafael Correa, quoted in David Biller, "Correa rejects ICSID jurisdiction in Oxy claim," *BNamericas*, December 14, 2006. http://www.bnamericas.com/en/news/privatization/Correa_rejects_ICSID_jurisdiction_in_Oxy_claim.

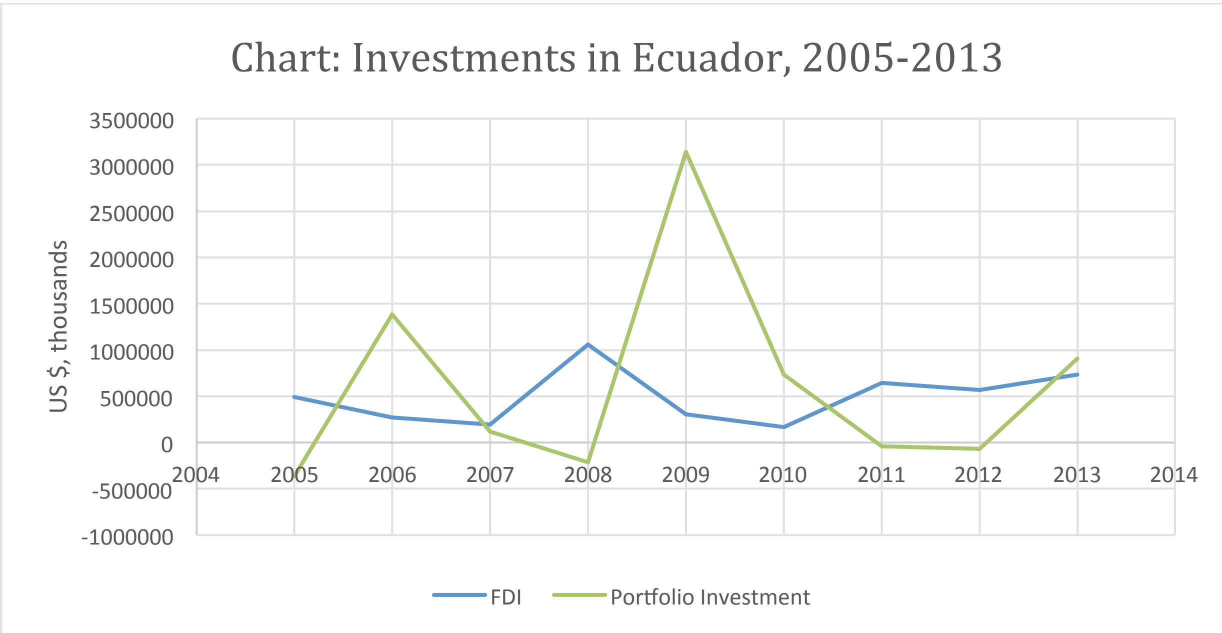
109 Ibid.

110 Ibid.

111 David Casallas, "Correa ends Icsid [sic] relationship, six cases still pending," *BNamericas*, July 3rd 2009. http://www.bnamericas.com/en/news/electricpower/Correa_ends_Icsid_relationship,_six_cases_still_pending?idioma=en.

manner to Bolivia – publically challenging ICSID's legitimacy and motives, then denouncing its Convention and exiting in protest to its operation and very existence.

Robustness



Infamously, however, in addition to serving as Ecuador's final full year of membership in ICSID, 2008 was also the year of the worst financial crisis since the 1930s, which had profound effects on the global economy during the time of Ecuador's exit. These shifting macroeconomic forces may have influenced the outcome described above. Chart 7 shows Ecuador's FDI and portfolio investments in the time before and after exit and provide a startling backdrop to the country's withdrawal.[112] Most notably, Ecuador became flush with portfolio investment in 2009 –from a negative value in 2008 to over $3 billion the following year. The fact that Ecuador's official currency is the U.S. dollar might have had some influence here – despite the crisis' origination in the United States, the incredible uncertainty at the time meant that the greenback

[112] World Bank, "Foreign direct investment, net inflows (BoP, current US$)," *Data*, http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD; "Portfolio Investment, net (BoP, current US$)," http://data.worldbank.org/indicator/BN.KLT.PTXL.CD.

was considered a relatively stable currency.[113] As capital fled markets like Argentina and Venezuela, a chunk may have ended up as USD banknotes in Ecuador.

Much of the 2009 spike observed here though was Ecuador's own doing. That year, in an effort to curtail the country's debt, the government announced it would buy back its defaulted bonds. This move was a remarkable success, allowing Ecuador to retrieve 91% of its defaulted bonds, paying only $900 million for $2.9 billion worth of them, and reducing the nation's foreign debt by a third.[114] This considered, the boom in portfolio investment here is not indicative of a substitution of FDI by portfolio investment – at least not in any long-term sense. While a fantastic move with respect to its debt, if Ecuador thought that accumulating portfolio investment by buying back its bonds signalled that it could rely less on FDI, it was mistaken. The strategy would have incredibly risky; while Ecuador has moderate capital controls,[115] the "hot money" invested in the country posed the risk of fleeing at almost any time. Indeed, the blip proves ephemeral – returning to negative figures in 2011. Depending on the government's short-sightedness, the availability of passive capital could have influenced their calculations in exiting ICSID, but this does not seem likely given the somewhat artificial nature of Ecuador's portfolio in 2009. Indeed, Ecuador's *net inflows* of portfolio equity in 2009 were only $2,438,425, suggesting the domestic story described in this case study does not unduly discount broader economic factors.[116]

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[113] The odd phenomenon of US currency appreciation during the crisis has been described by Robert N Mccauley and Patrick Michael McGuire, "Dollar Appreciation in 2008: safe haven, carry trades, dollar shortage, and over hedging," *BIS Quarterly Review*, December 2009. http://www.bis.org/publ/qtrpdf/r_qt0912i.pdf.
[114] The Economist, "Ecuador's winning strategy," *The Economist*, June 17 2009. http://www.economist.com/node/13854456.
[115] Andrés Fernández, Michael W. Klein, Alessandro Rebucci, Martin Schindler, and Martín Uribe, "Capital Controls Measures: A New Dataset," *IMF Working Paper*, http://www.imf.org/external/pubs/ft/wp/2015/wp1580.pdf.
[116] World Bank, "Portfolio equity, net inflows (BoP, current US$)," *Data*. http://data.worldbank.org/indicator/BX.PEF.TOTL.CD.WD?page=1.

Conclusion

In 2009, Ecuador faced much stronger material grievances against ICSID than Bolivia did in 2007. Its caseload was one of the highest among all members, and had been mounting since the first filing against it in 2002. Surprisingly, however, Ecuador had mostly avoided the costly losses that many other ICSID members had faced to that point. This considered, Hypothesis 1 finds partial support, but Hypothesis 2 does not. Stronger evidence – and a stronger explanation for exit – come from consideration of the anti-neoliberalism present in Ecuador's populace and its government. These forces combined to put Rafael Correa in power, reform Ecuador's constitution against international investment arbitration, and ultimately leave ICSID. In this case, there is room for complementarity between the material and ideological factors at play. It is likely that Ecuador's arbitral history and costs gained salience from the anti-neoliberal perspective of the country's population and government. Overall, however, Ecuador's exit depended heavily on deliberate government policy, supported by the public, to remove the influence of international capitalist forces from Ecuador.

C. Venezuela

Venezuela is perhaps the least surprising of the three positive cases. It left in 2012, finally acting upon a threat that it had been making since 2007.[117] It is, however, a complex case that is challenging to explain. Testing the thesis' four hypotheses with the Venezuelan case finds partial support for Hypotheses 1 and 3, as well as support for Hypothesis 4, but not for Hypothesis 2. While litigation records factored into Venezuela's grievances more than the other cases, their

[117] Nathan Crooks and Jose Orozco, "Chavez Says Venezuela Won't Accept World Bank Arbitration," *BloombergBusiness*, January 9 2012. http://www.bloomberg.com/news/articles/2012-01-08/venezuela-won-t-accept-icsid-verdict-on-exxon-chavez-says.

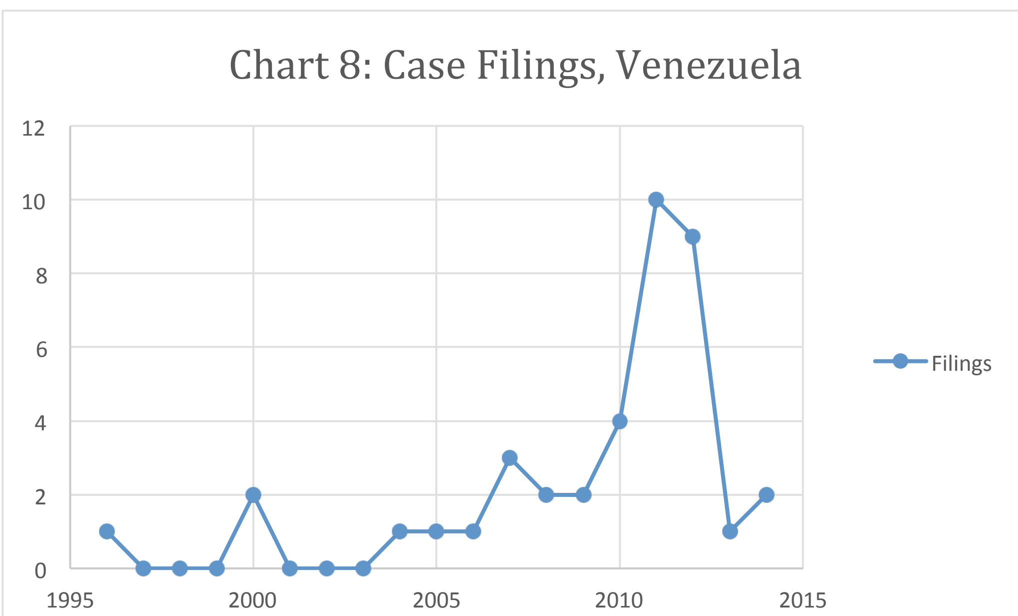
connection with exit is best accounted for by considering the role of anti-neoliberal ideology in Venezuelan politics.

Arbitral History

Table 12: Venezuelan Arbitration History, Before and After Exit

State	Cases	Pending	Concluded	Award Rendered	Settlement	Discontinued	Annulment attempts
Venezuela (01/23/2012)	27	21	6	3	1	2	0
Venezuela (02/01/2016)	39	25	14	15	1	5	2

Venezuela's pre-exit case history is both extensive and limited. The country withstood 27 case filings before exiting, but only 6 of those cases had concluded – fewer than Ecuador, whose total case list was less than half of Venezuela's. This gap resulted from the fact that the majority of Venezuela's cases were filed in the two years immediately before its exit, a trend captured by Chart 8. A prominent spike occurs in 2011, when 10 cases were launched against Venezuela at ICSID.



While the sheer rate of litigation is staggering, the outcomes of the six concluded cases should be more informative regarding the implications this held for Venezuela. Two of the three cases in which an award was rendered before Venezuela left ICSID have been published. Venezuela's first case, with Fedax N.V., was concluded in 1998 but the details are unknown. Five years later, in *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, the tribunal found that Venezuela had breached a concessions contract for highway improvements with a Venezuelan construction company with ties to an American corporation.[118] Venezuela was ordered to pay $12,089,929 for lost profits and contract negotiation costs.[119] The country had better luck in the final case against Brandes Investment Partners, LP, which concluded 8 years later. In this instance, the tribunal declared that ICSID had no jurisdiction over the dispute, leaving it without competency to determine the merits of the case.[120] So while Venezuela had to foot half the bill for a proceeding that went nowhere, it did not have to compensate the claimants. Therefore, when Venezuela left in 2012, it had not lost a case requiring compensation for investors in over 8 years, and its most recent experience was a technical victory.

Once again, close inspection of the outcomes achieved by states in pre-exit disputes at ICSID does not expose a systematic pattern of losses. On the whole, Venezuela's known results seem fairly balanced: a settlement and a loss, but also two discontinuances and a favourable award. The only pre-exit trend that can be clearly observed is the jump in cases shown by Chart 8. So while Hypothesis 1's expectations about the results of litigation are once again unfulfilled,

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[118] ICSID, *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/00/5)* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC610_En&caseId=C192.

[119] Ibid, 112.

[120] ICSID, *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/08/3)*, Page 34. http://www.italaw.com/sites/default/files/case-documents/ita0101.pdf

its anticipation regarding frequent indictment is satisfied, earning partial support. Furthermore, this variable provides the strongest indication of the timing of Venezuela's decision.

Recognizing this, the rationale behind deciding to exit remains yet unclear. It bears repeating that by leaving, states do not prevent investors from suing them on the basis of existing BITs. In the best possible scenario, exiting only allows states to avoid arbitration over future investments and IIAs. So even if Venezuela was experiencing a deluge of filings, and expected to face more, exiting ICSID would have no immediate effect in stemming the tide.

Costs

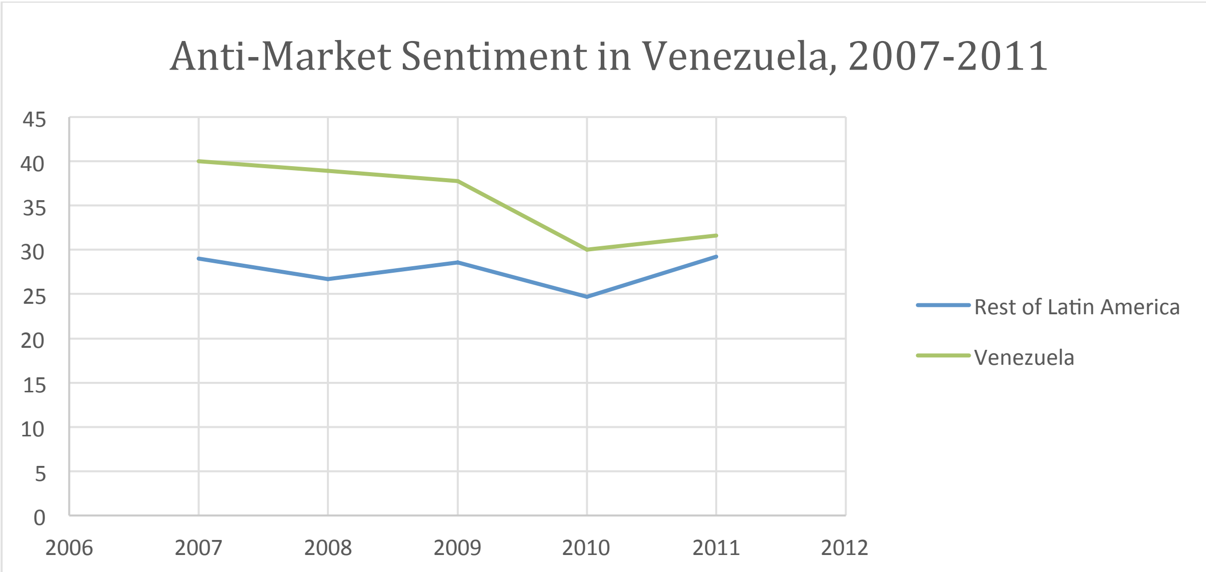
Table 13: Venezuela's Costs, Before and After Exit

Time	Net Costs	Costs/GDP
Before exit (01/23/2012)	149,343,148	0.0004719
Total (02/01/2016)	3,605,331,102	0.0094557

Despite the high costs of managing 21 pending cases, and considering the costs incurred through the six previous cases, Venezuela's costs from this high volume of litigation were not extremely high. In 2011, its total costs across all years of membership before exit barely registered in comparison to its GDP, and amounted to the equivalent of less than 3% of the FDI Venezuela received that year.[121] Admittedly, there are unknowns excluded from this estimate – just one unpublished award and one settlement. This considered, however, while the mostly administrative costs Venezuela faced were high enough to distinguish the country in an absolute sense, when the country's size is taken into consideration its costs are not exceptional, leaving Hypothesis 2 unsupported.

[121] World Bank, "Foreign direct investment, net inflows (BoP, current US$)," *Data*, http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD.

Anti-Neoliberal Populace



Anti-neoliberalism can potentially explain why exit was an appealing policy response despite its questionable material benefits, but examining Venezuelans' views on market-led development is only marginally revealing with respect the decision made in this case. While Venezuelans were typically more likely to express anti-neoliberal views, these numbers decline in the years leading towards exit, becoming less and less distinguishable from respondents in other Latin America countries. Hypothesis 3 is partially supported as Venezuela's populace is demonstrably more anti-neoliberal than average, but the influence of this with respect to exit is obscured by the unanticipated diminishment of this distinction immediately before exit.

Anti-Neoliberal Government

Whereas Venezuela's population grew less anti-neoliberal over time, its government's policies became increasingly anti-neoliberal the longer it stayed in power. First elected in 1998, Hugo Chavez quickly set changes in motion that were precursors to larger ambitions to be realized later. Almost immediately after his election, Chavez called a referendum that eliminated the Senate, extended the President's term in office, and outlawed privatization of oil reserves.[122] In 2005, the government started making use of a 2001 law that allowed for the seizure of unproductive or title-less land. More drastic economic intervention began in 2007, when the government nationalized huge segments of Venezuela's oil, telecommunications, and power industries, a trend that expanded to finance, gold, and transportation between 2009 and 2011.[123] Accordingly, under Chavez's leadership, Venezuela has dropped from 56.1 on the Index of Economic Freedom to 36.1.[124] The relatively moderate period between 1999 and 2003, however, inflates the average score shown in Table 14. Between 2004 and 2013, Venezuela's score dropped 18 points – a reflection of the governments increasing interference in the economy during this time.

Table 14: Government Anti-Neoliberalism in Venezuela: 1999-2013

Executive	Legislative	Average Economic Freedom Score	Latin American Average During Tenure
President: Hugo Chavez (02/02/1999-03/05/2013)	National Assembly: Movement for the Fifth Republic (MVR)/United Socialist Party of Venezuela (PSUV) (07/30/2000-onwards)	50	64.3

Around the same time when Chavez was planning ambitious industry takeovers in 2007, Venezuela voted in support of Evo Morales' proposal to the members of ALBA to abandon ICSID.[125] Chavez went as far as announcing plans to withdraw entirely from the World Bank and

122 ElectionGuide, "Referendum – Dec 15, 1999 - Venezuela," *Elections*, http://www.electionguide.org/elections/id/93/.
123 Reuters, "Factbox: Venezuela's nationalizations under Chavez," *Reuters*, October 7 2012. http://www.reuters.com/article/us-venezuela-election-nationalizations-idUSBRE89701X20121008.
124 The Heritage Foundation, "Explore the Data," *Index of Economic Freedom*. http://www.heritage.org/index/.
125 Reuters, "Latin leftists mull quitting World Bank arbitrator." *Reuters*, April 7, 2007. http://www.reuters.com/article/2007/04/30/us-bolivia-venezuela-nationalizations-idUSN2936448520070430.

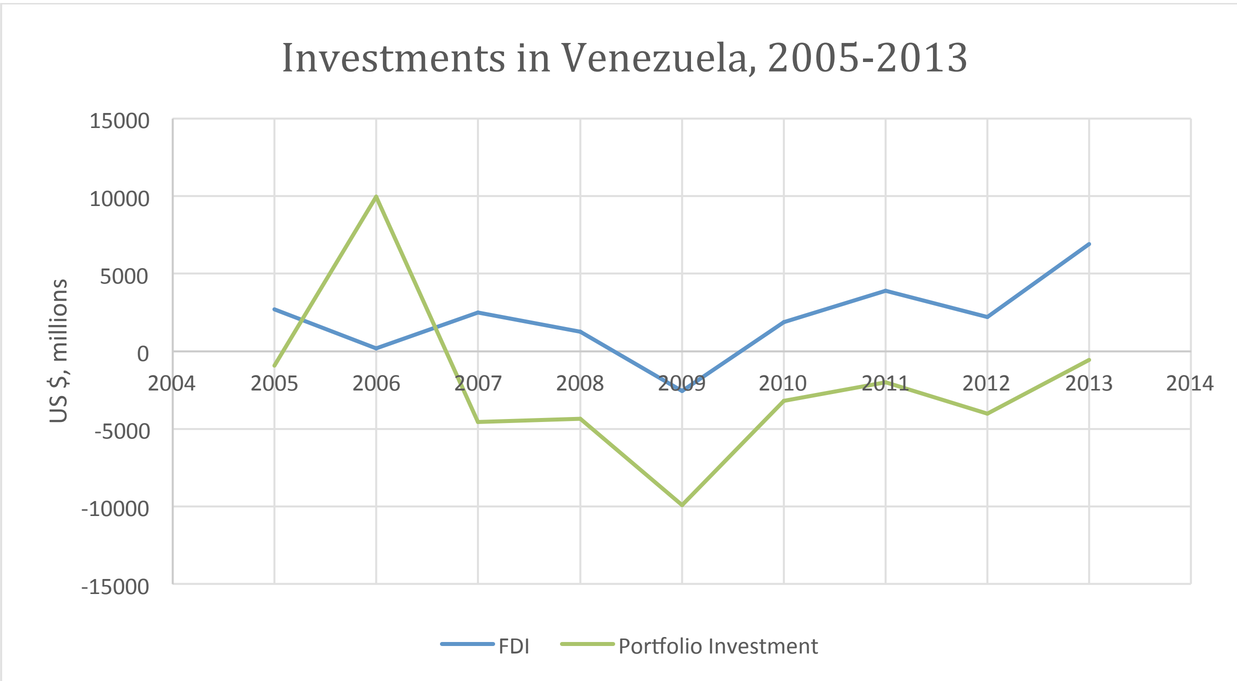
the IMF.[126] As was typically the case with him, however, Chavez's threats rang hollow for some time – until they resurfaced in 2011.[127] This time, Chavez ordered the government to devise plans for Venezuela's exit strategy.[128] The resulting discussions between high-level officials had to address several challenges: as experts noted, Venezuela stood to gain little from withdrawing, which would not affect current and many future claims against the country and would present an administrative, economic, and diplomatic nightmare for the government.[129] In addition to potentially spooking already wary investors, the move would have necessitated overhauling Venezuela's entire BIT regime, which included 23 agreements at the time, through renegotiations with its foreign partners.[130] Yet, despite all the reasons not to go through with the threat, Venezuela denounced the ICSID Convention on January 24th 2012.

The fact that exit provided only questionable material benefit to Venezuela while posing significant risks indicates that the government's motivation was likely not the result of a cost-benefit rationalization. At the same time, however, the timing of its exit is difficult to explain without considering the material circumstances surrounding it. In 2007, Venezuela proved that it was willing to publically vilify ICSID and toy with the notion of leaving simply to spite the World Bank. Actually triggering this action, however, required mounting litigation against Venezuela in 2011. These lawsuits manifested a severe repudiation of the government's vision for the Venezuelan economy. While exit did nothing to curb the legal process this entailed, in a war of symbols, Venezuela decided to respond with the most symbolic, and final, weapon it had left. Thus, Venezuela's anti-neoliberal government exited as a form of protest in line with the

[126] Saul Hudson, "Venezuela to quit IMF, World Bank," *Reuters*, April 30, 2007. http://mobile.reuters.com/article/idUSN3047381820070501.
[127] Benedict Mander, "Chavez wants out of ICSID (again)," *Financial Times*, September 12 2011. http://blogs.ft.com/beyond-brics/2011/09/13/chavez-wants-out-of-icsid-again/.
[128] Jose de Cordoba, "Chavez Takes Steps to Exit Global Forum," *The Wall Street Journal*, September 13, 2011. http://www.wsj.com/articles/SB10001424053111903285704576560760106674594.
[129] Ibid.
[130] Ibid.

thesis' expectations, but becoming the target of heavy litigation proved to be the instigating factor, although not the ultimate explanation, for its withdrawal.

Robustness



Constraints and opportunities in Venezuela's case could have arisen from the global economy. Chart 10 shows levels of investment in Venezuela before and after the Chavez administration denounced ICSID.[131] While this does not evidence substitution of FDI by portfolio investment, it does raise another factor that could account for Venezuela's initial reluctance to leave. Shortly after Chavez threatened to denounce ICSID in 2007, the country's economy contracted and the global recession took hold. Notably, investment fled Venezuela, depriving the economy of capital. Exiting in this context could have exacerbated this problem by scaring off the few investors that were still left. Chavez may have bided his time until the economic conditions were more favourable to exit.

[131] World Bank, "Foreign direct investment, net inflows (BoP, current US$)," *Data*, http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD; "Portfolio Investment, net (BoP, current US$)," http://data.worldbank.org/indicator/BN.KLT.PTXL.CD.

Conclusion

Venezuela's departure from ICSID marked the culmination of an ideological struggle between *Chavismo* and the institutional remnants of the Bretton Woods system. For all his fiery rhetoric, however, Chavez was more calculating than his Bolivian and Ecuadorian counterparts in pursuing this course of action. While he was happy to decry ICSID, the World Bank, and the IMF in 2007, he exercised caution in carrying out his threats. It was not until investors had the audacity to mount a challenge against his machinations for the economy that Chavez sought to fire back. Overall, the story is a familiar ideological one, but the material conditions play a role in structuring its conditions and influencing the government's behavior. More than the previous cases, it shows how even a highly ideological government is constrained by the practical implications of their policies. The following case of Argentina explores this tension in detail.

D. Argentina

Like Bolivia, Ecuador, and Venezuela, in the last ten years, Argentina has publically criticized ICSID and has considered ending its relationship with the institution. Of the four countries, Argentina's encounters with ICSID have been the most bitter and contentious, having faced far more cases than even Venezuela. Yet, Argentina is the only one that has remained a member of ICSID. In the following, I examine the extent to which Argentina embodies the characteristics anticipated by the thesis' four hypotheses, and offer considerations regarding what may have prevented it from leaving ICSID.

Arbitral History

Table 15: Argentine Arbitration History

State	Cases	Pending	Concluded	Award rendered	Settlement	Discontinued	Annulment Attempts
Argentina	53	18	35	20	9	11	15

Argentina has been sued at ICSID more than any other country, and the competition is not close. Moreover, by all indications, these cases have not gone particularly well for the respondent. Of the 20 awards rendered in cases involving Argentina, official records are available for 10. Of these decisions, only 3 did not force Argentina to provide compensation to the claimant. Of the seven that did, Argentina was able to successfully annul the compensation awarded in one,[132] bringing their record to 4 and 6 in terms of avoiding payouts (in known outcomes). Frustratingly, Argentina successfully annulled the ruling of an additional case, which awarded $133.2 million to an American gas company, but despite "manifest errors in law" in the original decision, the compensation was upheld and Argentina still had to pay.[133] This annulment 'victory', therefore, did not improve Argentina's overall 40% success rate, which is below the average for international investment arbitration, wherein the state wins 59% of the cases.[134] Thus, Hypothesis 1 is not supported. If frequently appearing and losing at ICSID leads to exit, Argentina should be the clearest example of this relationship, but it is not.

Costs

Table 16: Argentina's Costs

Country	Net Costs	Costs/GDP
Argentina	543,506,931	0.001010875

Argentina's poor record but also its high number of cases have driven up its costs to third most all-time, and first among active members. In the latter regard, it is not a close contest –

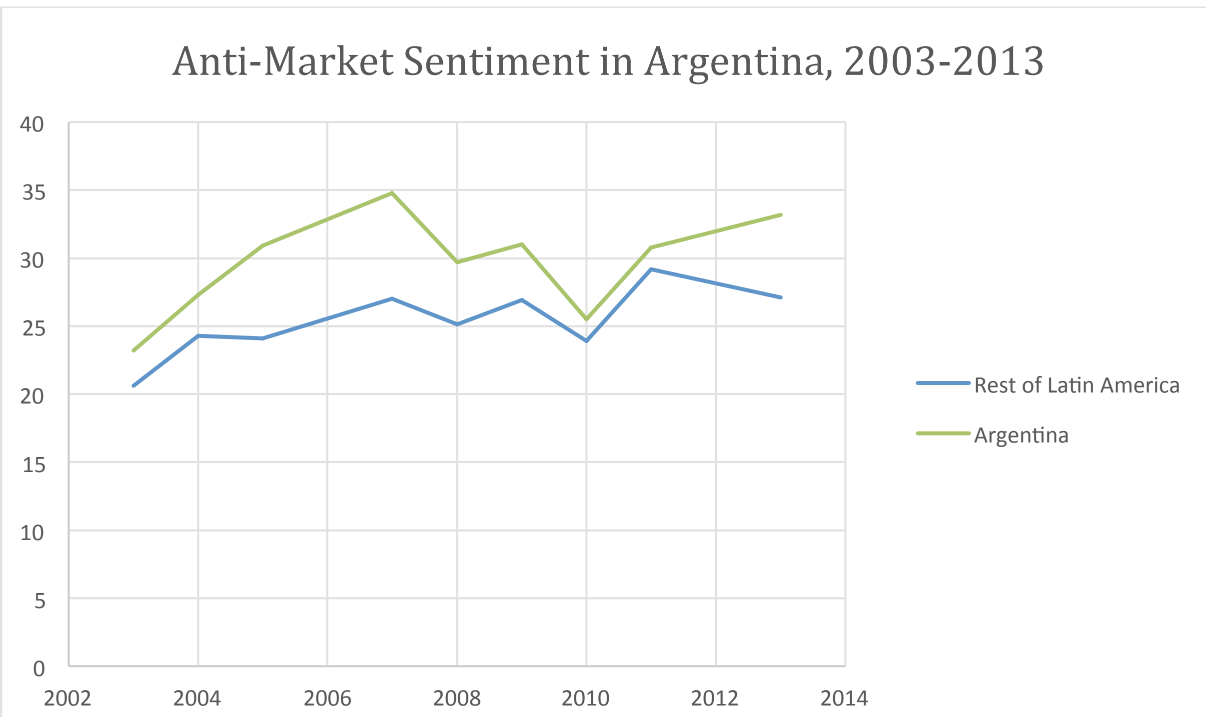
[132] ICSID, *Sempra Energy International v. Argentine Republic (ICSID Case No. ARB/02/16) (Annulment Proceeding)*. https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1550_En&caseId=C8.

[133] ICSID, *CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/08) (Annulment Proceeding)*, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC687_En&caseId=C4.

[134] Allen & Overy, "Investment Treaty Arbitration: How much does it cost? How long does it take?" *Publications*, February 18, 2014. http://www.allenovery.com/publications/en-gb/Pages/Investment-Treaty-Arbitration-How-much-does-it-cost-How-long-does-it-take-.aspx.

second-place Mexico's costs ($240 million) are less than half of Argentina's. While Argentina's large economy means that its enormous losses at ICSID are less painful than they are for some other countries, Argentina is still an outlier when its costs are scaled to GDP. With respect to the former ICSID members, only Ecuador faced a higher costs/GDP ratio when it exited compared to the one Argentina currently faces. Therefore, Hypothesis 2 is not supported. Despite incurring some of the highest ever costs – in both absolute and relative terms – for an active ICSID member, Argentina has not withdrawn.

Anti-Neoliberal Populace



Argentina is also a strong case with respect to this study's measures of anti-neoliberalism. Of the four case countries, the Argentine population was the most consistently anti-neoliberal compared to the Rest of Latin America average. While it never dropped below this latter measure, Argentina did not diverge as greatly from it as Ecuador and Venezuela did. This considered, despite holding more persistent views, the Argentine populace was less inclined to extreme moments than Ecuadorians and Venezuelans. Argentina is therefore less of an outlier on this measure than it was in terms of litigation and costs, but still a strong case for the model. Despite this, Hypothesis 3's expectation that "states with anti-neoliberal populaces are more likely to exit" is not satisfied.

Anti-Neoliberal Government

Table: Government Anti-Neoliberalism in Argentina: 2007-2015

Executive	Legislative	Average Economic Freedom Score	Latin American Average During Tenure
President: Nestor Kirchner (05/25/2003-12/10/2007)	National Congress: Justicialist-led coalition & Senate: Justicialist	53.9	63.9
President: Cristina Kirchner (12/10/2007-12/09/2015)	National Congress: Front for Victory (FPV)-led coalition & Senate: Front for Victory (FPV)	49.1	64.3

Measuring for government anti-neoliberalism once again reveals Argentina to be model case in all respects except the dependent variable. Both of the Kirchner-led governments between 2003 and 2015 were anti-neoliberal. In particular, during Cristina Kirchner's time in power, Argentina oversaw expansion of social programs, the imposition of capital and trade controls, and the renationalization of YPF, the nation's largest oil company.[135] Given the connection the thesis has drawn between the ideology that supports these kinds of policies and leaving ICSID, why has Argentina stayed?

By all available evidence, Argentina has remained a member despite the preferences of senior officials in the Argentine government. Shortly before Venezuela's denunciation in 2012, the Argentine Congress considered passing a bill that strongly criticized ICSID's operations, and

[135] Jonathan Gilbert, "Argentina: Oil nationalization and capital controls divide a nation," *Christian Science Monitor*, October 3 2012. http://www.csmonitor.com/World/Americas/2012/1003/Argentina-Oil-nationalization-and-currency-controls-divide-a-nation.

called for exit.[136] This initiative sparked some interest at the time, but the bill never got out of purgatory. A year later, after some public speculation about Argentina's continued membership, it was announced that President Kirchner would support an Ecuadorian proposal to establish a Latin American alternative to ICSID at that year's summit of the Community of Latin America and Caribbean States (CELAC). Additionally, she was reportedly working with her party's representatives in Congress to introduce and pass a bill that would terminate all 59 of Argentina's BITs, with the intention of limiting ICSID's jurisdiction over future investments in Argentina, paving the way for eventual withdrawal from the organization.[137] Further confirmation of Argentina's seemingly imminent withdrawal came a week later, when Eduardo Barcesat, Chief Legal Advisor to Argentina's Treasury, announced the government's intention to quit ICSID, describing the institution as a "tribunal of butchers."[138] This flurry of activity and criticism, however, never progressed to concrete government action. While anti-neoliberal sentiments seemed to be guiding the country out of ICSID in 2013, they ultimately dissipated and Argentina stayed put, however reluctantly.

This deviancy from the thesis' model is puzzling, but there are contextual factors that may offer explanations for the government's cold feet, despite its anti-neoliberal preferences. In this regard, it is worth examining the political and economic conditions facing Argentina at the time when exit was under consideration.

On the former front, moderate forces within the government may have dissuaded the anti-neoliberal members in the Kirchner administration from following through with exit. They may

[136] Fernando Ezequiel Solanas, Alcira Susana Argumedo, Jorge Justo Cardelli, and Fabian Dulio Rogel, Expediente 1311-D-2012, Congreso de la Nación Argentina, March 21, 2012. http://www1.hcdn.gov.ar/proyxml/expediente.asp?fundamentos=si&numexp=1311-D-2012.
[137] Carlos Arbìa, "El Gobierno quiere irse del CIADI para evitar nueva embestida de acreedores," *El Cronista*, http://www.cronista.com/economiapolitica/El-Gobierno-quiere-irse-del-CIADI-para-evitar-nueva-embestida-de-acreedores-20130125-0041.html.
[138] Ibid.

have even influenced Kirchner herself. Comparatively and constitutionally speaking, the President of Argentina is a weak office. Under Article 99 of the Argentine Constitution, the "Executive Power shall in no event issue provisions of legislative nature, in which case they shall be absolutely and irreparably null and void."[139] When Kirchner started making moves to cut ties with ICSID, she went to members of Congress to ask for a bill. Unlike Morales, Correa, and Chavez, Kirchner could not implement legislation herself. What is unexplained, however, is why Kirchner opted for this legislative route, instead of simply denouncing the BITs, or indeed, ICSID, herself. While some Argentine constitutional scholars argue that the President must seek Congressional approval to denounce treaties, this is not the common practice.[140] Kirchner's decision to go to Congress is therefore rather surprising; she was adding an unnecessary step to the usual denunciation process. This indicates a degree of uncharacteristic hesitation on Kirchner's part. Had she been resolved in her decision to terminate Argentina's BITs and leave ICSID, it would have served little purpose to go to Congress first. Even so, however, had Kirchner pushed hard for a bill to be implemented, her disciplined party would have likely capitulated, notwithstanding their reservations. In this situation, then, Kirchner must have held lingering doubts about withdrawing that tempered her determination, and led her consider the country's options with her party's representatives in Congress.

At the time, Argentina's government was in a delicate position. Throughout 2013, Kirchner's leadership was under scrutiny due to a sputtering economy and her party's poor performance in the midterms against the party of her onetime political ally, Sergio Massa.[141]

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[139] Departmento de Biblioteca y Centro de Documentación, *Constitution of the Argentine Nation*, Section 99 (p. 16). http://www.biblioteca.jus.gov.ar/Argentina-Constitution.pdf.
[140] Jose Maria Ruda. "The Role of the Argentine Congress in the Treaty-Making Process – Latin America," *Chicago-Kent Law Review* 67, no. 2, 1991, 493.
[141] Ignacio de los Reyes, "Argentina: End of the Kirchner Era?" *BBC*, October 29, 2013. http://www.bbc.com/news/world-latin-america-24725498

With anti-neoliberal measures such as capital controls falling out of favour, and mounting crticism over rampant inflation, moderates within her own party were calling on her to enlist the help of "technocrats" to help the country recover economically.[142] Furthermore, at the time, Argentina was facing the music for its history of intransigence towards investors. In August 2013, the country lost a crucial court case in its fight to avoid repaying debts from the 2001 default, suggesting that going forward, a less antagonistic approach might be in the government's best interest.[143] Given this context, a suggestion to cancel BITs and leave ICSID likely would have been anathema. A radical move that would put Argentina further in line with the ALBA-member countries and out of sync with the markets was not politically saleable at the time. While it is unlikely that Kirchner's party would have blocked her outright, her tentativeness in these circumstances provided an opportunity to influence her change of heart. Skepticism of the party (and Kirchner)'s handle on the economy and relations with investors produced conditions unfavourable to a hasty departure from ICSID. This can be further established by considering the investment climate in Argentina, which is shown in the robustness check below.

Robustness

As was the case with Venezuela, considering Argentina's levels of investment during the time period when exit was considered does not show that substitution was occuring between FDI and portfolio investment, but may indicate a further constraint on the proponents for leaving ICSID. Chart 12 depicts Argentina's highly fluxous levels of investment between 2005-2014.[144] After the global recession, Argentina had made a shaky recovery between 2011-2012, but this

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[142] N.A., "Worst of times for Argentine President Cristina Kirchner," *World Review*, November 27 2013. http://www.worldreview.info/content/worst-times-argentine-president-cristina-kirchner.

[143] Cara Levey and Daniel Ozarow, "Argentina: Where vultures dare," *Al Jazeera*, August 28, 2013. http://www.aljazeera.com/indepth/opinion/2013/08/201382871453651736.html.

[144] World Bank, "Foreign direct investment, net inflows (BoP, current US$)," *Data*, http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD; "Portfolio Investment, net (BoP, current US$)," http://data.worldbank.org/indicator/BN.KLT.PTXL.CD.

proved ephemeral went investment dropped again in 2013. In particular, FDI was plummeting while Kirchner and her party were considering what to do with the country's BITs and its involvement with ICSID. This bleak picture provided a discouraging backdrop to discussions on reforming Argentine policy towards foreign investors. Exiting at this time would have done little to improve the country's investment prospects.

Conclusion

Given Argentina's continued membership in ICSID, none of the study's hypotheses are supported in this case. While certain Argentine officials, including President Kirchner, attempted to instigate a movement out of the institution, these efforts were eventually abandoned. The reason for this remains puzzling, although the thesis has observed political and economic constraints facing Argentina in 2013 that may have discouraged exit. Looking to Argentina's future, it is likely that whatever impetus there was to leave ICSID left with Kirchner after her mandate ended at the end of 2015. The recent election of Mauricio Macri and his right-wing Republican Proposal party will likely keep Argentina in ICSID for the forseeable future.[145]

[145] The Editorial Board, "Argentina's Transformative Election," *The New York Times*, November 26, 2015. http://www.nytimes.com/2015/11/27/opinion/argentinas-transformative-election.html.

V. Conclusion: Anti-Neoliberal Governments and International Cooperation

This thesis has examined state exit from the International Centre for the Settlement of Investment Disputes to develop a specific theory that considers the role of anti-neoliberal ideology in this phenomenon. Through four case studies of three positive cases and one negative case, incomplete support has been found for material explanations for exit based on arbitral history and costs, as well as an ideological explanation based on anti-neoliberal populaces. Robust support, however, has been found for an explanation based on anti-neoliberal governments, which is confirmed in three of the four cases. While Argentina did not succeed in exiting ICSID, the thesis has shown how anti-neoliberal elements within the government attempted to lead the country out of the institution. Thus, within the four cases, anti-neoliberal government has proven to be a necessary but insufficient condition for exit.

Against expectations, case filings seem more influential than actual records in terms of exit. Hypothesis 1 anticipated that states that appear and lose frequently in ICSID cases should be more likely to exit, but this was generally not the case. Closer examination of Bolivia, Ecuador, and Venezuela's case records showed that the countries had actually fared relatively well in the cases on the public record but left anyway. Conversely, Argentina's frequent and often punishing trips to ICSID have not caused it to leave. The unexpected finding here was that a spike in litigation was associated with exit in Ecuador and Venezuela's cases. This is surprising because exiting did not allow the states to avoid these lawsuits, and it suggests that states might decide to exit with incomplete information; in other words, they may not wait to find out if they win or lose their cases before leaving.

Relatedly, cost incurrence does not seem to indicate when states will exit, but the prospect of high future costs may. Before they left, Bolivia, Ecuador, and Venezuela costs were not exceptionally high. Their costs only skyrocketed after they were no longer members. Argentina, on the other hand, has incurred massive costs but has not left. A counterargument that states leave in response to anticipated costs is perplexing for similar reasons to the ones outlined above.

While arbitral history and costs provide some indication of states' grievances with ICSID, by themselves, they do not provide a satisfactory explanation for why states exit ICSID. As the thesis has taken pains to argue, exit does not allow for immediate material benefits or relief from litigation. Eventually, if a state pursues the right measures, it can potentially impose a limit on the potential for future ICSID arbitration – but the international investment regime proves pervasive and mazelike, offering investors many options for relief, but states few options for escape.

Anti-neoliberal indicators have not only found greater empirical support in this project, they also provide a clearer explanation for exit. The evidence indicates, however, that anti-neoliberal driven exit is largely a government-led, and not necessarily bottom-up, phenomenon. With the exception of Ecuador, the public's role seems limited to electing the governments who to some extent pursue their own agendas with respect to ICSID. While Bolivia and Venezuela showed that governments can leave ICSID even when public anti-market sentiments are inconsistent or waning, Argentina demonstrates that a consistently anti-neoliberal populace will not necessarily get its presumably preferred policy outcome. Hypothesis 3's expectation that States with anti-neoliberal populaces are more likely to exit is thus only partially supported.

Hypothesis 4, however, is supported in three of the four cases. In the positive cases, exit was pursued by anti-neoliberal governments as a part of broader agendas that re-envisioned the countries' role in the global market. Exit was an emotional and ideological response to the perceived injustices perpetrated by ICSID, even when evidence of victimization was not observable in losses or costs incurred at the institution. Even the material impact of ICSID membership on these states, however, is best understood in consideration of the governments' anti-neoliberalism. While exit provided no relief for Ecuador or Venezuela when they experienced spikes in litigation, it allowed them to respond to a perceived external challenge to their ideological projects.

Argentina's continued membership in ICSID is challenging to explain. The thesis has introduced considerations that may account for the government's hesitancy, but ultimately Argentina is a deviant case in this study. Challenging political and economic circumstances may have dissuaded the government from initiating exit, which was advocated by anti-neoliberal Argentine officials. Further qualitative research into intra-governmental politics during Kirchner's second term in office would be beneficial for elucidating this puzzling case.

To the author's knowledge, the thesis uses the best publically available data on ICSID and anti-neoliberalism, but this research would have benefitted from greater data availability. Other measures of interest when considering anti-neoliberalism were Latin American views on globalization and free trade, but inconsistent polling and data collection made this impractical. More generally, the exploratory nature of this research meant that it often discovered potential items for research once the project was already well underway. In particular, understanding of the Argentine case would be improved by interviews with government officials, which is generally true of all the cases examined.

This thesis has shown how Bolivia, Ecuador, and Venezuela's exits from ICSID were largely symbolic and initiated out of protest. The countries' anti-neoliberal governments left ICSID in an attempt to discredit and spite the institution. While some of the thesis' findings lend support to criticisms that have been made of ICSID – mainly, how the high costs of participation impose disproportionate costs on small states – its primary finding has been that the problems associated with membership can be perceived differently depending on a government's ideology. In particular, examining anti-neoliberal ideology has provided robust explanations for why states have exited ICSID.

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<u>Appendix</u>

I. Latinobarometro

2003
“(P22N.F) Only with a market economy can (country) become a developed country
[1] Strongly agree
[2] Agree
[3] Disagree
[4] Strongly disagree
[0] Don´t know, No answer”

2004
“(P22STD) Only with a market economy can (country) become a developed country
[1] Strongly agree
[2] Agree
[3] Disagree
[4] Strongly disagree
[0] Don´t know, No answer”

2005
“P25STA.- Do you strongly agree, agree, disagree or strongly disagree with the following statement: Only with a market economy can (country) become a developed country (P25STA)
[1] Strongly agree
[2] Agree
[3] Disagree
[4] Strongly disagree
[0] Don´t know, No answer”

2006
N/A

2007
“**Q54ST.** Do you strongly agree, agree, disagree, or strongly disagree with each of the following phrases that I am going to read? […] Q54STB. Only with a market economy can (country) become a developed country.”

2008
“ Q57ST. Do you strongly agree, agree, disagree or strongly disagree with each the following statements? […] **Q57ST.E** Only with a market economy can (country) become a developed country.”

2009
Q81ST. Are you strongly agree (1), agree (2), disagree (3) or strongly disagree (4) with each of the phrases that I will read […]**Q81ST.C** The market economy is the single system in which (country) can become developed.

2010
"Q75ST. Are you strongly agree (1), agree (2), disagree (3) or strongly disagree (4) with each of the phrases that I will read Q75ST.B The market economy is the single system in which (country) can become developed."

2011
"Q69ST/N. Do you strongly agree (1), agree (2), disagree (3) or strongly disagree (4) with each of the phrases that I'm going to read? […] Q69ST.B The market economy is the only system through which (country) can become developed."

II. ICSID Costs

Country	Party & Tribunal Costs	Award Costs	Recovered Costs	Total Costs
Venezuela	192355800	3417398499	4423197	3605331102
Argentina	261406600	468958153	186857822	543506931
Mexico	83847400	205193486	18798587	270242299
Egypt	138101600	51774130	30962379	158913351
Spain	123305000	4704769	1105799	126903970
Ukraine	69050800	27555622	2851302	93755120
Peru	64118600	9555386	6881149	66792837
Kazakhstan	54254200	21922700	12163792	64013108
Romania	59186400	19154919	15973324	62367995
Costa Rica	49322000	20065900	11057992	58329908
Paraguay	14796600	39699874	0	54496474
Ecuador	59267000	4277600	13287661	50256939
Guatemala	14796600	36740964	5312107	46225457
Chile	13677000	32082000	3066383	42692617
Bolivia	19728800	4384540	4423197	19690143
El Salvador	19728800	4384540	4423197	19690143
Grenada	14796600	0	1310926	13485674
Guyana	4932200	0	0	4932200
Nicaragua	4932200	0	0	4932200