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THE UNCERTAIN FUTURE OF ICSID IN LATIN AMERICA

Ignacio A. Vincentelli*

ABSTRACT

The purpose of this article is to research the historical interaction of the International Centre for Settlement of Investment Disputes (ICSID) and Latin America in an effort to suggest that the recent ICSID-unfriendly measures taken by some Latin American countries might not be an aberrational phenomenon in the region.

If, moved by the engine of ideology, the rest of Latin America follows the example of Bolivia and Ecuador (the most radical of the ICSID-hostile countries) and denounces the Washington Convention, instead creating a new forum to resolve FDI disputes at the regional level (as was recently proposed), the future of ICSID in Latin American becomes uncertain.

I. INTRODUCTION

THE story of State-investor dispute resolution is one that relates to the process of decision-making that transnational corporations undertake in risk factor analysis when considering whether to invest capital in a particular country (jurisdiction). In this sense, the international community has created a variety of international dispute or resolution methodologies, including the Washington Convention for Settlement of Investment Disputes (“Washington Convention or the ICSID Convention”),¹ and the International Centre for the Settlement of Investment Disputes (“ICSID”), that enable less developed countries (“LDCs”) to signal the Community of Nations, particularly, and perhaps most significantly, capital-exporting countries, that they have embraced a system of protection of foreign direct investments (“FDI”).² Once sent, these sig-

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1. See Int’l Ctr. for Settlement of Inv. Disputes, List of Contracting States and Other Signatories of the Convention, 2010, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English> [hereinafter *ICSID List*] (for a comprehensive list of the 156 contracting states signatories of the Washington Convention (as of Nov. 4, 2007)).
2. Thomas L. Brewer, *Int’l Inv. Dispute Settlement Procedures: The Evolving Regime for Foreign Direct Inv.*, 26 LAW & POL’Y INT’L BUS. 633, 634 (1995); see also

nals transform into 'credible commitments' to treat foreign investors fairly.³

The attitude of Latin American countries toward the Washington Convention and the ICSID has been convoluted throughout time and meaningfully disconcerting. During the first decades of its existence virtually all Latin American countries stayed away from the ICSID, preferring to adopt a system of "internationalization" of foreign investment contracts, to ensure foreign investors' respect for their investments.⁴ In the 1990s these countries radically changed their policies. In just a few years the vast majority of Latin American countries became signatories of the Washington Convention, and entered into several bilateral investment treaties ("BITs") with other nations.⁵ These steps were taken as essential means in the competitive effort of attracting foreign capitals.⁶

But recent political events and foreign policy precepts suggest that the Latin American attitude towards ICSID could be changing again. The most critical examples of recent hostility against ICSID in Latin America are found in the cases of Bolivia, Ecuador, and Venezuela. In fact, in 2007 Bolivia became the first country ever to denounce the Washington Convention, thus formally withdrawing from ICSID.⁷ Ecuador followed Bolivia's path and became the second country to denounce the Washington Convention,⁸ and the Venezuelan Supreme Court issued an opinion limiting the reach of the country's consent to submit to the Centre's jurisdiction.⁹

OECD Benchmark Definition of Foreign Direct Inv., (3d ed., 1996), available at <http://www.oecd.org/dataoecd/10/16/2090148.pdf> (foreign direct investment refers to "direct control of either assets or an enterprise in a foreign country through ownership of a substantial portion of the assets or enterprise.").

3. See Zachary Elkins, et al., *Competing for Capital: The Diffusion of Bilateral Inv. Treaties*, 2008 U. ILL. L. REV. 265, 277 (2008).
4. See generally M. SORNARAJAH, *THE PURSUIT OF NATIONALIZED PROPERTY* Chap. 2, Vol. 8. (1986).
5. United Nations Conference on Trade and Development, *Inv. Instrument Online-Bilateral Inv. Treaties*, <http://www.unctadxi.org/templates/DocSearch779.aspx> (last visited May 15, 2010).
6. See Elkins et al., *supra* note 3, at 266 (once sent, these signals transform into "credible commitments").
7. See *Venezuela and Bolivia Threaten to Leave ICSID*, LATIN LAWYER ONLINE, May 3, 2007, <http://www.latinlawyer.com/news/article/24086/venezuela-bolivia-threaten-leave-icsid/>.
8. Joshua M. Robbins, *Ecuador Withdraws from ICSID Convention*, PRACTICE LAW COMPANY, Aug. 12, 2009, <http://arbitration.practicallaw.com/2-422-1266> (Ecuador formally notified the World Bank of its decision to withdraw from ICSID on July 6, 2009; in accordance with the Article 71 of the Convention, the denunciation took effect six months after the receipt of Ecuador's notice on January 7, 2010. Similarly, since 2009 Ecuador has denounced the vast majority of its BITs).
9. Another important example, albeit omitted in this paper, of the difficult interaction between the ICSID system and the Latin American region is Argentina. Argentina's approach towards ICSID has changed back and forth in the past decade; currently, it is still unclear whether the country would be willing to honor and enforce an ICSID arbitral award. Conversely, recent positive examples in the Latin American region are found in Haiti, which notified ICSID of its ratification of the Washington Convention (a.k.a., deposit) on October 27, 2009, and Colombia, which entered into a BIT with India on January, 2009.

The purpose of this article is to research the historical interaction of ICSID and Latin America in an effort to suggest that these “opt-out” countries may not be a mere aberrational phenomenon in the region subject to surface dismissal. For this reason, Section one of this paper explores the roots of the initial Latin American rejection and subsequent acceptance of the ICSID as an effective protection for foreign investors. The first part of the section provides a brief summary of the Centre’s jurisdictional requirements with a special emphasis on the doctrinal issue of consent and the BITs as a form of expressing consent in advance.

Section two of this paper analyzes the general growing hostility against ICSID in the region. The first part of this section summarizes the origins and history of the ICSID, analyzes how Latin American countries initially approached the ICSID initiative, and explores the rise of the ICSID in the region during the 1990s. The second part of this section contains an analysis of the implications and consequences of Bolivia’s withdrawal from ICSID, and also discusses the repercussions of Ecuador’s exclusion, its subsequent denunciation, and Venezuela’s hostile approach.

Finally, the article concludes by suggesting that the system of protection of FDI in Latin America may be on the eve of a drastic change. If, moved by the engine of ideology, the rest of Latin America follows the examples of Bolivia and Ecuador and denounces the Washington Convention in favor of a new “regionalized” forum to resolve FDI disputes, the future of the ICSID in Latin America will become uncertain.

II. ICSID AND LATIN AMERICA: FROM SOUR TO SWEET. . .

A. ICSID CLAIMS & ARBITRATION WITHOUT PRIVILEGE

ICSID is an autonomous institution established by the Washington Convention in 1965, under the auspices of the World Bank.¹⁰ The stated purpose of this institution is “to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States.”¹¹ According to ICSID, the core of the

10. The World Bank, *About Us*, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:50004410~piPK:36602~theSitePK:29708,00.html> (last visited July 17, 2010) (Notwithstanding its “autonomy” and its own governing body, the ICSID is still considered an affiliate of the World Bank group. This close relationship may better appreciated by taking into account: (i) that all of ICSID’s members are also members of the World Bank [indeed, §67 of the Washington Convention establishes that it may only be adopted by countries members of the World Bank, or at least, party to the Statute of the International Court of Justice]; (ii) the World’s Bank Governor sits ex officio on ICSID’s Administrative Council; and (iii) the ICSID Secretariat’s expenses are financed out of the World Bank’s budget, although costs of individual proceedings are borne by the parties involved as per Chapter VI of the Washington Convention).

11. See Int’l Ctr. for Settlement of Inv. Disputes, Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Art. 1 § 2, Oct. 14, 1966, 575 U.N.T.S. 160 [hereinafter *Washington Convention*]; see also ICSID, *About ICSID*, http://icsid.worldbank.org/ICSID/ICSID/AboutICSID_Home.jsp (last visited July 7, 2010) [hereinafter *About ICSID*] (on its webpage, the Centre states that: “ICSID was created by the Convention as an impartial international

Washington Convention was to ease the flow of capitals between nations¹² by: (a) removing barriers to “private investment posed by non-commercial [mainly political] risks,” and (b) establishing a “specialized international method” to resolve investment disputes, which did not then exist, thus maximizing microeconomic conditions for capital-exporting countries and entrepreneurs and capital-importing nations.¹³

Once a country signs and ratifies the Washington Convention, it becomes a member of the ICSID. But becoming a member is not enough to provide foreign investors with sufficient and efficient protection. The country must act further by actually *consenting* to the Centre’s jurisdiction. This consent may be effectuated in different ways, but the most important way is known as “arbitration without privity.” Professor Jan Paulsson introduced this term in 1995 to explain a new “world” in international arbitration, which relates to the investor-state system of protection that, in his own words: “is one where the claimant need not have a contractual relationship with the defendant and where tables could not be turned: the defendant could not have initiated arbitration, nor is it certain of being able even to bring a counterclaim.”¹⁴ In his work, Professor Paulsson describes different initiatives in the investor-state system of protection arena, in which the investor may resort to arbitration notwithstanding the absence of a prior arbitration agreement. Among these devices are: national investment protection laws, BITs, the Central American Free Trade Agreement (CAFTA), and the North American Free Trade Agreement (NAFTA).¹⁵

forum providing facilities for the resolution of legal disputes between eligible parties, through conciliation or arbitration procedures. Recourse to the ICSID facilities is always subject to the parties’ consent”).

12. See Ibironke T. Odumosu, *The Antinomies of the (Continued) Relevance of ICSID to the Third World*, 8 SAN DIEGO INT’L L.J. 345, 359 (2007) (citing *Amco v. Indonesia*, 23 I.L.M. 351, 369 (1984)) (actually, the main goal was, and still is, to facilitate investment flows with a view to economic development. This position was further expanded in the case *Amco Asia Corp v. Indonesia*, “where the [ICSID] Tribunal cited the ICSID’s Convention’s preamble with approval and went on to argue that protecting investments amounts to the protection of the general interest of development and developing countries”).
13. See *About ICSID*, *supra* note 11.
14. See Jan Paulsson, *Arbitration Without Privity*, FOREIGN INV. L. J., VOL. 10, N. 2 (1995).
15. North American Free Trade Agreement, Arts. 1138, 1201, U.S.-Can.-Mex., Dec. 17, 2003 32 I.L.M. 289 (1993); see also LUCY REED, JAN PAULSSON, & NIGEL BLACKABY, *Guide to ICSID Arbitration* 66 (2004); Bayview Irrigation Dist. v. United Mex. States, ICSID case No. ARB (AE)(05/1)(2007), available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowDoc&docId=DC653_En&caseId=C246 (under §1201, Chapter 11 of the North America Free Trade Agreement, which entered into effect in 1994, by Canada, the United States, and Mexico, an investor from one of these countries may elect to sue a host country either under the UNCITRAL rules, or under the ICSID Additional Facility Rules. However, a condition precedent to select the latter path is that the investor, or the country where the investment has been made, must be a member of the Washington Convention; and, as of November 4, 2007 only the United States had ratified the Convention (Canada, for instance, signed the Convention in 2006, but has not ratified it, and consequently, it has not entered into force in that country). Another interesting aspect about the procedural framework

B. JURISDICTIONAL REQUIREMENTS OF AN ICSID CLAIM

Prior to perfecting a claim [on the merits] before the ICSID, certain jurisdictional criteria must be met: (i) the investor bringing the claim must be a national of a State member of the Washington Convention [jurisdiction *ratione personae*]; (ii) similarly, the investment must have been made in a Contracting State of the Washington Convention [also jurisdiction *ratione personae*]; (iii) the dispute must be a legal dispute arising directly out of an investment, in the terms established by caseload of the ICSID Tribunals readily available [jurisdiction *ratione materiae*]; and (iv) perhaps most importantly, express 'consent' to arbitrate must be given in writing by both parties.¹⁶ While it is not the aim of this paper to provide an extensive exegesis on these jurisdictional elements, it is critical to discuss their contours as a conceptual predicate to the development of this analysis.

The first two criteria relate to the nationality of the harmed investor and place of investment;¹⁷ the former, the nationality-membership requirement includes the exception of cases arising under the additional facility rules. For instance, in disputes arising under the NAFTA, the only cases that can be decided by an ICSID Tribunal are those involving a party related to the United States. This would be the case of a claim filed by U.S. investors against Canada or Mexico; and the case of a claim filed by Canadian and/or Mexican investors against the U.S. as well. Another interesting discussion on this topic that has been particularly relevant in Latin America is the so-called practice of "treaty shopping" and corporate engineering.¹⁸ These terms refer to a practice common in the field,

of NAFTA arbitration to comment is that the only parties entitled to bring a claim and assert jurisdiction under NAFTA, are investors from a State party. And, the term 'investment' has been broadly defined by §1139 of NAFTA, thereby widening the jurisdictional reach of a NAFTA claim. Similarly, a panel of arbitrators, headed by Mr. Bernardo Cremades, established in Bayview Irrigation District v. Mexico, that "in order to determine whether the claims fall within Articles 1115 and 1116 it is therefore necessary to determine whether the Claimants are 'investors', and whether their claims are within the scope and coverage of Chapter 11.").

16. Washington Convention, *supra* note 11, art. 25; *see generally*, REED, PAULSSON, & BLACKABY, *supra* note 15.
17. *See* Washington Convention, *supra* note 11, art. 25(2)(a)-(b) (however, it should be noted that for purposes of determining the nationality of a juridical person the Convention introduces the concept of "foreign control." §25(b)(2) of the Convention establishes that National of Another Contracting State means, "any juridical person which had the nationality of a Contracting State other than the State party [. . .] and any juridical person which had the nationality of the Contracting State party to the dispute [. . .] and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.").
18. Aguas del Tunari v. Bol., ICSID Case N.ARB/02/3 (2005); *see also* Jean Kalicki & Suzana Medeiros, *Investment Arbitration in Brazil: Revisiting Brazil's Traditional Reluctance Towards ICSID, BITs, and Investor-State Arbitration*, 24 ARB. INT'L 423, 482 (2008), available at <http://www.arnoldporter.com/professionals.cfm?u=JeanEngelmayerKalicki&action=view&id=254&viewpage=publications> (these terms refer to a practice common in the field, where sophisticated attorneys seek to structure deals by using different corporate forms, with the intention to extend to investors the protection of a third country BIT, when their own home country

where sophisticated attorneys seek to structure transactions by using different corporate forms, with the intent to extend to investors the protection of a third country BIT, where their own home country lacks BIT protection status.

Likewise, the third criterion poses the difficulty of the definition of the term "investment."¹⁹ But there is sufficient precedent²⁰ set by ICSID awards that sets the grounds to define this term that provides for useful conceptual guidance.²¹ For instance, in contractual claims,

[t]ribunals have found 'disputes arising directly out of an investment' to include disputes over capital contributions and other equity investments in companies and joint ventures, as well as non-equity direct investments via service contracts, transfer of technology, natural resource concession agreements, and projects for the construction and operation of production and service facilities in the host State.²²

Meanwhile, in non-contractual claims the tribunals have traditionally applied an even broader definition of "investment," to cover "the laying out of money or property in business ventures, so that it may produce a revenue or income."²³

Finally the last criterion, the consent, as seen above, is deemed to be fundamental for the assertion of the jurisdiction of ICSID. Consent is "the explicit expression of both parties' acceptance of ICSID arbitration."²⁴ According to §25 of the Convention, the consent must be given

does not have one protecting their investment. In *Aguas del Tunari*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (2005), an ICSID Tribunal found that national routing was a valid and legitimate exercise of the Corporation that changed its ownership structure, in order to be able to claim jurisdiction under the Bolivia-Netherlands BIT. However, Kalicki notes that such a practice is now being taken care of by recent developments in BIT drafting, in which "Contracting States include a provision allowing a party to deny the benefits of the agreement to investors that have no 'substantial business activities' in their putative home country)."

19. REED, PAULSSON, & BLACKABY, *supra* note 15 (regarding the meaning of the phrase "legal dispute" in contractual investment disputes Reed, Paulsson & Blackaby held that "ICSID Tribunals have generally used the phrase to refer either to disputes regarding the existence or scope of a legal right or obligation, or to disputes regarding the nature or extent of the reparation to be made for the breach of a legal obligation." A classical example of this would be an expropriation of FDI made without just compensation, or a denial to honor payments of promissory notes (bonds)).
20. Notably, in the international arena, such as in the majority of Civil Law jurisdictions, judicial "precedent" is distinguishable from "stare decisis" in the sense that it does not refer to any binding authority of judicial/arbitral decisions or awards.
21. See *Autopista Concesionaria de Venez. v. Venez.*, ICSID Case No. ARB/00/5 (2001) (Decision on Jurisdiction); *Mihaly Int'l v. Sri Lanka*, ICSID Case No. ARB/00/2, Award (2002).
22. See REED, PAULSSON, & BLACKABY, *supra* note 15.
23. *Id.* (citing *Fedax v. Venez.*, ICSID Case No. ARB/96/3 (1997) (finding that the issuance of bonds/promissory notes by Venezuela, and the subsequent acquisition of them in the secondary markets by a Netherlands investor, constituted an investment in the territory under the Netherlands-Venezuela BIT).
24. *Id.* at 22, 38; see also Jason Webb Yackee, *Do We Really Need BITs? Toward a Return to Contract International Investment Law*, 3 ASIAN J. WTO INT'L HEALTH L. & POL'Y 121 (2008) (arguing investment contracts are more convenient than

in written format.²⁵ The investor normally expresses his consent to arbitrate disputes under a particular investment by submitting it to the Centre along with his request for arbitration, in accordance with §36(2) of the Convention.²⁶ On the other hand, even though states may also do this, expressing thereby their consent on a case-by-case basis, they normally give their anticipated consent through BITs and investment protection laws.

Moreover, the importance of consent was underlined on the famous Report of the Executive Directors of the World Bank on the ICSID Convention, prepared in 1965 at the origins of the Centre.²⁷ They referred to consent of the parties as being “the cornerstone of the jurisdiction of the Centre.”²⁸ Similarly, in relation to consent, the Directors stated that consent must exist prior to a request for arbitration or a request for conciliation. Some of the forms of consent permitted to satisfy the requirements of §25(1) are: (i) a clause included in an investment agreement providing for the submission to the Centre of future disputes arising out of that agreement; (ii) a *compromise* regarding a dispute which has already arisen; or (iii) a provision in the host state’s investment promotion legislation offering to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, which would still require the investor’s acceptance in writing.²⁹ The great academic discussion in this field arises from the third form of consent; specifically from the BITs, which once in force could be considered part of the country’s internal legislation.³⁰

A parallel classification of the form of consent permitted is based on the source of the consent, whether contractual or not. Sometimes investors and states enter into ‘investment contracts,’ including an arbitration clause that grants jurisdiction to the Centre.³¹ Conversely, in the vast majority of the cases, the states, in racing to get foreign capital, have consented in advance to the ICSID jurisdiction by including an arbitration

BITs for the International business Community, because with these contracts developing countries may provide investors with credible commitments, and at the same time they would be able to bargain for a suitable special treatment).

25. Washington Convention, *supra* note 11.

26. Washington Convention, *supra* note 11, art. 36(2).

27. Int’l Ctr. for Settlement of Inv. Disputes, Report of the Executive Directors of the World Bank on the ICSID Convention Ch. V, ¶ 23 (1965), available at <http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partB.htm>.

28. *See id.*

29. *Id.* at ¶ 24.

30. *See generally* CHRISTOPHER C. JOYNER, INTERNATIONAL LAW IN THE 21ST CENTURY: RULES FOR GLOBAL GOVERNANCE (2005) (in fact, this would depend in whether the particular country adopts a Monistic or a Dualistic theory of International Law. The former refers to countries that assume International law and their municipal law as a unity equally applicable. While the latter refers to countries that highlights the differentiation between domestic and International law, and require the conversion of International law into domestic laws, through the enactment of internal laws).

31. *See* Int’l Ctr. for Settlement of Inv. Disputes, Model Clauses, <http://icsid.worldbank.org/ICSID/StaticFiles/model-clauses-en/main-eng.htm> (for a comprehensive list of model clauses on the Centre’s webpage).

clause in BITs or multilateral investment treaties (“MITs”) entered with other nations,³² or even by including the sovereign’s consent to arbitration in foreign investment legislation. As explained in this section, the latter would constitute cases of arbitration without privity.

C. WHY COUNTRIES ENTERED INTO BITs

A BIT is an agreement entered into by two nations with the purpose of stimulating the investment and trade between both nations by offering a framework of protections available to investors. Usually, the process of entering into a BIT makes sense when there is a prospect that the commercial relations among one state (a capital-importer State) and the nationals of the other state (capital-exporter) may improve.³³

In part, this assertion may explain why the vast majority of the BITs bear a similar structure. According to one author, most BITs mimic two unsuccessful attempts to create a uniform approach to FDI in the international community, *i.e.*, the 1959 *Abs-Shawcross Convention*, and the 1967 *OECD Draft Convention on the Protection of Foreign Property*.³⁴ The structure of a typical BIT is formed by a set of substantive protections that states offer to investors and by a clause granting jurisdiction to foreign tribunals to solve the claims that may arise under the treaty (whether considered to be consent, or a mere unilateral offer to consent).³⁵ The substantive protections usually contained in BITs are: (i) fair and equitable treatment; (ii) nondiscriminatory treatment; (iii) non-arbitrary or unreasonable treatment; (iv) full protection and security treatment; (v) treatment as favorable as that provided to national investors; (vi) ability to repatriate proceeds of the investment to home country; (vii) no expropriation without compensation; and (viii) the host country will honour its contractual and other legal obligations owed to the foreign investor (a.k.a., the umbrella clause).³⁶

32. United States Model BIT Clause (2004), art. 24, *available at* http://ustraderep.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf (for instance, §24 of the U.S. Model BIT clause grants jurisdiction, though not exclusive, to the ICSID).

33. See Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT’L L. 639, 644 (1998) (Professor Guzman explains the BIT explosion by inferring that the confidence that investors felt that their investments will not be opportunistically expropriated by the host State, was caused by the fact that BITs “allow potential investors to negotiate for whatever protections and safeguard they feel are needed. In other words, BITs provide the investors with protections that are superior, in all forms of investor-host conflicts, to those of customary international law.”).

34. See Jason Webb Yackee, *Conceptual Difficulties in the Empirical Studies of Bilateral Investment Treaties*, 33 BROOK. J. INT’L L. 405, 415 (2008).

35. Perhaps this fact explains why the drafters of ICSID Rules devised a scheme of proceedings that are often bifurcated into separate phases to address the merits and the jurisdiction.

36. See Arif Hyder Ali & Alexandre Gramont, *ICSID Arbitration in the Americas*, GLOBAL ARB. REV. AM., 2008, at 7, *available at* <http://www.globalarbitrationreview.com/handbooks/4/sections/7/chapters/50/icsid-arbitration-americas>.

What we witnessed during the 1990s was an explosion of LDCs, in particular Latin American countries, embracing the Washington Convention, entering into hundreds of BITs, and also modifying their foreign investment legislation. We also experienced a plethora of claims against Latin American countries before this forum. When the trend commenced, BITs became "the preferred method of governing the relationship between foreign investors and host governments in developing countries."³⁷ Professors Elkins, Guzman, and Simmons provide interesting and detailed data about the advent and spread of BITs.³⁸ They hold that competition among similarly situated countries explain, both theoretically and empirically, the spread of the BITs.³⁹ They also found an empirical basis for the assertion that the most important drivers of the spread of BITs are also factors that heavily impacts investment decisions.⁴⁰ For instance, they found that BITs are more valuable where political risk is endemic.⁴¹

For these reasons, in order to attract capital, Latin American countries in the 1990s needed to enter into these treaties, or modify their internal legislation, waiving part of their immunity by agreeing beforehand to the jurisdiction of a third party,⁴² in most cases, the ICSID. With this system of protection, investors sought to effectively de-politicize investments disputes.⁴³ Indeed, they would be able to mitigate political risks normally associated with the functioning of business in Latin America by removing these disputes from the internal (and sometimes compromised) judiciaries, as well as "traditional diplomatic channels" by directly submitting them to arbitration.⁴⁴

D. THE NO-DE-TOKYO

The ICSID Convention was not initially adopted by *any* of the Latin American countries. In fact, when the Convention was first discussed in different regional meetings of the World Bank,⁴⁵ Latin American coun-

37. See Guzman, *supra* note 33, at 642.

38. See ELKINS ET AL., *supra* note 3, at 291-98.

39. *Id.* at 207.

40. *Id.*

41. *Id.*

42. Guzman, *supra* note 33, at 688 (Professor Guzman criticizes the way LDCs massively entered into BITs. In his conclusions he states that "Although BITs improve the efficiency of foreign investment, they may not increase the welfare of developing countries. BITs give an individual country the ability to make credible promises to potential foreign investors. As a result, the country is more attractive to foreign investors and will receive a larger volume of investment than it would without the ability to make such promises. The increase in investment, however, is likely to come in large part at the expense of other developing countries. *Developing countries as a group, therefore, will enjoy gains from an increase in total investment that is relatively modest. It is probable that this gain will be outweighed by the loss those countries will suffer as they bid against one another to attract investment.*") (emphasis added).

43. See generally IBRAHIM F.I. SHIHATA, TOWARDS A GREATER DEPOLITICIZATION OF INVESTMENT DISPUTES: THE ROLES OF ICSID AND MIGA (1993).

44. See Kalicki & Medeiros, *supra* note 18, at 58.

45. These regional meetings took place in Ethiopia, Chile, Switzerland, and Thailand.

tries, in bloc, opposed the idea of establishing a specialized forum for governments and foreign investors.⁴⁶ Professor Lowenfeld (along with other scholars) called this posture of Latin American countries to the Convention a “No-de-Tokyo.”⁴⁷ This posture could probably have been precipitated by a misunderstanding of the Latin American nations who never considered that the Convention, as explained above, “contained no substantive obligations, but merely an opportunity to submit in advance (or after a dispute has arisen) to international dispute settlement between an investor and a host state.”⁴⁸ If no further consent (either contractually or not) was granted, it was impossible for a state to be subjected to ICSID’s Jurisdiction.

Furthermore, back in 1971 Professor Paul Szasz, a former Secretary General of the ICSID, identified the main reasons why Latin American countries had yet to adhere to the Convention.⁴⁹ First, Professor Szasz recognized that “not all governments [were] uniformly eager to attract” FDI.⁵⁰ Second, Latin American countries feared that by adopting the Convention they would be undermining the well-established principle of international law of no-intervention.⁵¹ Third, by allowing only “foreign”

46. See Paul C. Szasz, *The Investment Disputes Convention and Latin America*, 11 VA. J. INT’L L. 256, 257 (1971).

47. See ANDREAS F. LOWENFELD, INT’L ECONOMIC LAW 541 (2d ed., Oxford Univ. Press 2008) (according to Professor Lowenfeld, “when the report of the regional meetings on the proposed [ICSID] convention came before the Board of Governors of the World Bank (*i.e.*, the full membership), at the Annual Meeting of the Bank in Tokyo in 1964, all Latin American States voted ‘no’—the first time in the Bank’s history that a final resolution had met with substantial opposition on a final vote.”).

48. Andreas F. Lowenfeld, *Inv. Agreements and Int’l Law*, 42 COLUM. J. TRANSNAT’L L. 123, 125 (2003) (citing Aron Broches, *The Convention on the Settlement of Investment Disputes*, 136 RECUEIL DES COURS 331, 349 (1972)); Aron Broches, *The Convention on the Settlement of Investment Disputes*, 136 RECUEIL DES COURS 331, 349 (1972), available at <http://www.ppl.nl/plinklet/?sid=Bibliographies&ppn=250600919&genre=article&issn=&isbn=&title=The%20Convention%20on%20the%20Settlement%20of%20Investment%20Disputes%20between%20States%20and%20Nationals%20of%20Other%20States%20/%20by%20Aron%20Broches&aurlast=Broches&aurlast=Broches&au1last=&au2last=&au3last=&au3first=&edlast=&edfirst=&ed2last=&ed2first=&ed3last=&ed3first=&source=recueil%20des%20cours&year=1972&volume=136&issue=II&spage=331-410&bibliography=recueil&table=recueil&download=&scharnier=&extensie=&id=344&url=&keyword1=&keyword1ppn=&brillid=19824>.

49. Szasz, *supra* note 46, at 260.

50. *Id.* at 260 (Professor Szasz remarked that “Whether such reluctance is based on a general *anti-capitalist*, or on a suspicion or fear of any foreign penetration, or merely on unfortunate experiences with particular foreign investors, it is enough to say that such a reaction by its nature cannot be refuted in relation to the Convention. That instrument *assumes that private international investment plays a significant role in international cooperation for economic development* [as stated in the first paragraph of the Preamble of the Convention].”) (emphasis added).

51. *Id.* at 260; see also CARLOS CALVO, DERECHO INTERNACIONAL TEÓRICO Y PRÁCTICO DE EUROPA Y AMÉRICA, 191 (1st ed. Durand & Pedone-Lauriel 1868); William Burke-White & Andreas Von Staden, *Investment Protection in Extraordinary Times*, 48 VA. J. INT’L L. 307, 310 (2008) (Szasz’s second and third identified reasons are extremely related to the Calvo Doctrine. This doctrine establishes that jurisdiction in cases arising out from foreign investment in a country falls in the country, providing that foreigners may not be given a different treatment than the

investors (as opposed to nationals) to arbitrate their disputes against host states, they were breaching the well-established principle of international law regarding equal treatment of foreigners and nationals.⁵² Fourth, the Latin American countries rejected the argument that their domestic courts were not ideal (in terms of efficiency and fairness) fora to try these claims.⁵³ Last, Latin American countries were suspicious of arbitral proceedings as opposed to judicial proceedings, primarily because of the “past association with foreign intervention, of arbitration and a private person.”⁵⁴

Meanwhile, FDI was not left unprotected in Latin America. Investors and nations bargained for tailored solutions in order to limit the exposure of the former to political risks. The result of these contractual solutions was the “internationalization” of investment contracts⁵⁵ by systematically including in these contracts sophisticated arbitration, choice-of-law, and stabilization clauses.⁵⁶

E. GRADUAL ACCEPTANCE⁵⁷

A few decades after the birth of the Convention, the Latin American countries modified their approach to it and gradually decided to embrace it. In the 1980s the first Latin American countries to join the Convention were Ecuador, Honduras, and El Salvador. In the 1990s the rest of the Latin American countries, with the exceptions of Mexico and Brazil, joined the Convention.⁵⁸

one given to nationals. Initially this doctrine was created as a legal answer of the Latin American Nations to insulate themselves from pressure and attacks of foreign countries on behalf of foreign investors. However, several decades later this doctrine was revitalized in the context of an international effort to protect foreign investment. According to a recent paper in the subject: “for investors in Latin America, the possibility of direct arbitration against a government represented a significant change from the Calvo Doctrine, according to which a government’s liability toward foreigners can be no greater than that owed to nationals. As a result, disputes between foreigners and a host country could only be decided by the country’s own legal system.”)

52. Szasz, *supra* note 46, at 261 (The same comments made on footnote 15 apply here).

53. *Id.* at 262.

54. *Id.* at 263.

55. See M. SORNARAJAH, *supra* note 4 (for a lengthy discussion of the internationalization of investment contracts).

56. *Id.* at 80 (it shall be noted that the theory of internationalization of investment contracts also presented some difficulty at its early stages, especially given the fact there was no body of laws governing a relationship in which one of the parties was not subject to International law. However, the adoption of the Restrictive Theory of Sovereign Immunity by the American legal system, favored the trend of Internationalizing Investment Contracts. This legal phenomenon began with the famous Tate letter, see 26 DEP’T OF STATE BULL., 984 (1952), which was later codified in 1976 in the Foreign Sovereign Immunities Act, 28 U.S.C. §§1602-1611, 28 U.S.C. §330. For a marvelous explanation about the absolute and restrictive theories of sovereign immunity see PEDRO MARTINEZ-FRAGA, *THE NEW ROLE OF COMITY IN PRIVATE PROCEDURAL INTERNATIONAL LAW*, 164 et seq. (2007).

57. Lowenfeld, *supra* note 48, at 121.

58. Charity L. Goodman, *Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina*, 28 U. PA. J. INT’L ECON. L. 450, 471 (2007).

Along with this significant adoption of the Convention, in the 1990s several Latin American States modified their internal legislation, and/or entered into numerous Bilateral Investment Treaties.⁵⁹ This “modification” completed the required consent (as explained above) in several cases, bringing to the ICSID an unprecedented number of claims. For instance, as of 2007, fifteen percent of the concluded matters concerned claims against Latin American States.⁶⁰ As of the present, fifty-two percent⁶¹ of the pending matters at the ICSID involve Latin American States.⁶² For this reason, one could argue that the booming of ICSID in Latin America in the 90’s, preceded by the so-called “No-de-Tokyo,” contributed to the ICSID, and the investor-State system of protection in general, earning the cognomen of “sleeping beauty.”⁶³

This gradual acceptance of the Latin American region to the ICSID system of protection could be explained by the theory of credible commitments. In support of this theory Professor Vanvelde analyzed the results of different studies on the correlation between FDI and the number of BITs signed by a particular LDC, to conclude that:

While large arbitral awards against host states could dampen the enthusiasm of host states, . . . for these agreements, they might also signal to investors the value of the agreements and lead to increased investment flows . . . *Any enhanced investment flows as a result of the investment agreements are likely to be in the direction of developing countries.* Thus, concerns by developing countries about the issuance of large arbitral awards could be more than offset *by the belief that investment agreements had contributed to increased investment flows.*⁶⁴ (emphasis added).

The problem with this statement is found in its ideological component. In other words, if it can be demonstrated that the investment commerce has grown, investment agreements must have caused such incremental development. This recourse would be the only way that a country may be

59. Stanimir Alexandrov et al., *Making Investment Treaties Work for Latin America*, ARB. REV. OF THE AM. 4 (2009), available at <http://www.globalarbitrationreview.com/reviews/13/sections/50/chapters/497/making-investment-treaties-work-latin-america/>.

60. See Jean Kalicki, *ICSID Arbitration in the Americas*, ARB. REV. OF THE AM. 5 (2007), available at <http://www.arnoldporter.com/professionals.cfm?u=JeanEngelMayerKalicki&action=view&id=254&viewpage=publications>.

61. This number excludes the four claims pending against Mexico, under the Additional Facility Rules. Otherwise, the percentage would rise up to fifty-five percent.

62. Int’l Ctr. for Settlement of Inv. Disputes, List of Pending Cases, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending> (last visited July 7, 2010) (computation made with numbers provided by ICSID).

63. See NORBERT HORN AND STEFAN KRÖLL, *ARBITRATING FOREIGN INVESTMENT DISPUTES*, 269 (2004) (According to Professor Norbert Horn, “the ICSID regime has been referred as the ‘sleeping beauty’ of investment arbitration, as in its early years only one or two cases were filed annually” [in fact, during the first six years of ICSID no case was filed], while now two or three cases are filed monthly).

64. See Kenneth J. Vandavelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT’L L. & POL’Y 157 (2005).

willing to offset the costs of large ICSID awards. Otherwise, if the credible commitments in favor of foreign investment (BITs, MITs and Investment Protection Laws granting Jurisdiction to ICSID) have not attracted significant investment to the host country, there would be no incentive for capital-importing nations to continue to assume these economic burdens.

III. ICSID AND LATIN AMERICA: FROM SWEET TO SOUR

A. GENERAL OVERVIEW OF THE GROWING RESISTANCE

Along with the strong supporters of ICSID and the investor-state system of protection, there is also a growing number of detractors and criticism. While some of the critiques seem to have more scientific grounds,⁶⁵ others appear to contain an ideological component.⁶⁶ Because BITs and the investor-State system of protection pertains to a flow of capital from capital-exporters countries to capital-importers countries, it is possible to measure whether these efforts have succeeded in bringing wealth into a particular country within a specific period of time.

Although this article does not purport to draw conclusions on whether BITs and the investor-state system of protection have succeeded in each particular country of the region, it does analyze how different Latin American countries have recently reacted to the system. Today, the warm welcome to the ICSID system has largely disappeared and the relationship between the ICSID and Latin America has soured.

On April 29, 2007 in Caracas the Presidents of Bolivia, Venezuela, Cuba, and Nicaragua held the V Summit of the Bolivarian Alternative for the People of Our America ("ALBA"), which is an alternative agreement from these countries in bloc to the investor-state system of protection

65. For instance, the United Nations Conference on Trade and Development conducted a study about BITs entered by LDCs with developed nations in the 1990s to conclude that BITs played a secondary and minor role in attracting foreign investment. See United Nations Conference on Trade and Development, *Bilateral Investment Treaties in the Mid-1990s*, at 8, 177, U.N. Sales No. E.98.II.D.8 (1998). In another study, a World Bank economist found that BITs 'act more complements than as substitutes for good institutional quality and local property rights. See Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a BIT. . .and They Could Bite*, World Bank Policy Research Working Paper No. 3121 (2003), available at SSRN: <http://ssrn.com/abstract=636541>. However, in a more recent study, Salacuse and Sullivan conducted their own study, and reviewed both of these research studies, to conclude in the opposite direction, stating that "BITs have a particularly strong effect on encouraging FDI in developing countries. In short, the grand bargain between developing and developed countries that underlies BITs, the bargain of investment promotion in return for investment protection, seems to have been achieved, although the effect of the bargain is only realized slowly after the BIT is signed." See Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs really work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain*, 46 HARV. INT'L L.J. 67, 111 (2005).

66. See generally Odumosu, *supra* note 12, at 345 (arguing that ICSID is a Neo-liberal investment protection mechanism, and that its origins are routed to the interests of TNCs in third-world countries).

encompassing the different BITs and MITs.⁶⁷ At this meeting Presidents Morales and Chavez announced that the four countries in conjunction would withdraw from the ICSID and denounce all the BITs in force.⁶⁸ Consequently, on May 11, 2008, Ecuador's President Rafael Correa publicly stated that he "had no confidence in the World Bank arbitration branch [i.e., ICSID] that is hearing U.S. oil company Occidental's lawsuit against Ecuador."⁶⁹ He also explained that "Ecuador handed over its sovereignty when it signed international accords binding it to the bank's ICSID."⁷⁰

These announcements have echoed some of the strongest criticism to the investor-state system of protection. Nonetheless, they can also be explained by the recent wave of nationalizations and expropriations of FDI undertaken in the region, which in most cases bears an ideological explanation.⁷¹ The arguments against the ICSID and the investor-state system of protection that Latin American governments advanced are focused on the following reasons:⁷² (i) ICSID awards are not subject to appeal;⁷³ (ii) the fact that a vast majority of ICSID awards have been decided in favor

67. See Press Release, Presidential Press Notice, *Países del ALBA y TCP Denuncian Convención del Ciadi* (Apr. 29, 2007), available at http://www.minci.gob.ve/noticias_-_prensa/28/13558/paises_del_alba.html (however, please note that even when the announcement did not make any distinctions about a potential withdrawal of Cuba from the ICSID Convention, this is an absurdity, since Cuba has never been a Contracting State of the Convention).

68. *Id.* (Bolivia was the first country to denounce the Convention withdrawing from ICSID. In fact, it was unclear whether other countries would ever follow its path. However, Ecuador decided to withdraw as well); see Posting of Tolga Yalkin to Blog of the European Journal of International Law, July 30, 2009, <http://www.ejiltalk.org/ecuador-denounces-icsid-much-ado-about-nothing/>.

69. See Gabriela Molina, *Ecuador Wary of World Bank Arbitration in Occidental Case*, USA TODAY, May 11, 2008, http://www.usatoday.com/money/economy/2008-05-11-3404362337_x.htm.

70. *Id.*

71. *Id.* (for instance, on May Day, 2007, when President Chavez announced the expropriation of the private participation in the four major heavy crude oil upgraders located in the Orinoco Oil Belt, he justified his decision by stating "We can't have socialism if the state doesn't have control over its resources!"); see Tim Padgett, *Chavez's Not-So-Radical Oil Move*, TIME, May 1, 2007, <http://www.time.com/time/world/article/0,8599,1616644,00.html>. (however, on many other occasions President Chavez and his closest advisors have indicated that expropriations and de-privatizations are an essential part of his plan of taking Venezuela towards socialism. In his view FDI represents the interest of imperialism, and strengthens capitalism); see *Expropiación de Empresas está Sujeta al Compromiso Social*, BOLIVARIAN NEWS AGENCY, Mar. 22, 2007, <http://www.aporrea.org/ideologia/n92267.html> (former member of Chavez Cabinet explaining that companies reluctant to embrace the Socialism of the XXI Century would be expropriated).

72. See *Bolivia se va del CIADI*, The World Bank, Nov. 3, 2007, <http://go.worldbank.org/2L60I10X80> (these reasons are enumerated in the World Bank press release (in Spanish) announcing Bolivia's exit to ICSID).

73. See REED ET AL., *supra* note 15 (even though it is technically true that ICSID awards are not subject to appeal, the Washington Convention provides grounds for the interpretation (§50), revision (§51), and annulment of the award (§52). An award may not be amended through annulment. Annulment would erase the award entirely, thereby providing the parties with a chance to re-instate the claim. However, the annulment system is designed to safeguard the integrity and not the outcome of the award).

of the private investors shows that the system lacks neutrality and impartiality;⁷⁴ (iii) only private companies may sue at this forum; and (iv) the cost to litigate these claims is very high.⁷⁵

These announcements are not galvanized by scientific or statistical data but by ideology. In other words, they are driven by a personal conviction that FDI, even if it does foster development and prosperity, is wrong, promotes imperialism, and thus deserves no effective protection. In this sense, an effective system of protection of FDI, such as ICSID, could be seen as an undue waiver of sovereignty. If this presumption proves to be true, it would be very hard, if not impossible, to predict what will be the future of ICSID in the region.

Argentina's case-study is also critical. Indeed, Argentina's still uncertain willingness to honor eventual final and binding ICSID awards will be determinative to ICSID's authority in the region.⁷⁶ After the Argentine financial crisis between 2001 and 2002,⁷⁷ dozens of claims were filed by

74. Although it is true, at least in theory, that in the majority of the ICSID cases (fifty-one percent) the tribunals have found for the investors, in practice a number of cases have significantly reduced the amounts of compensation sought by the investors. For instance, in *Autopista Concesionaria de Venez.*, ICSID Case No. ARB/00/5 (2003), the tribunal awarded the investors with the equivalent in Bolivars of \$12 million, when they were seeking relief for almost the equivalent of \$311 million.

75. The rationale of this argument is that given that prior consent is critical, and that in many cases, once a dispute has arisen, an investor is entitled to sue in ICSID due to the existence of a previous unilateral offer to consent to arbitration by the State (e.g., a BIT); but the converse would not be true, because once a dispute arises, if the State is seeking to sue the investor, it would be impossible to obtain its consent to arbitrate. However, this argument may be underestimating the bargaining power of the country, even when the dispute has arisen. Although \$36 technically entitles a country to initiate an arbitration against a foreign investor, the only case in which a government might sue an investor under the Washington Convention, would be a case in which it contracted directly with the investor. This is what happened in *Tanz. Electric Supply v. Indep. Power Tanz., Ltd.*, ICSID Case No. ARB/98/8 (2001) (the award was published on ICSID's website). Presumably this was also the case in *Gov't of the Province of East Kalimantan v. PT Kaltim Prima Coal*, ICSID Case No. ARB/07/3, because notwithstanding there is little information publicly available about this case, one may infer from the fact that both parties are related to Indonesia (in fact, East Kalimantan is an Indonesian Province), that the basis of ICSID jurisdiction was also an investment agreement with an explicit arbitration clause granting jurisdiction to the Centre. Similarly, it is reported that years ago Nicaragua initiated an ICSID claim against an investor, but later withdrew the proceedings. No other case has ever been started by a country.

76. Even though Argentina has not paid the amount ordered in the final and binding decision (after annulment proceedings) of *Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, it is still uncertain whether the country has decided not to honor voluntarily pay the amounts. Yet, since no enforcement proceeding has been started before neither domestic nor international, one may presume that the country and the company could be currently negotiating a peaceful solution.

77. See generally, PAUL BLUSTEIN, AND THE MONEY KEPT ROLLING IN AND OUT, (2006) (the master of Argentina's liberalization and opening to free-markets in the 1990's was Domingo Cavallo, President Menem's Economy Minister. In 1991 Cavallo implemented a currency convertibility system, which fixed the Argentine Peso to the U.S. Dollar. This measure, along with many others, such as privatizations and liberalizations of interest rates, were successful in halting the hyper-inflation experienced in the 1980s, and boosting the economy. However, after a few years, and given the growing budget deficit the convertibility measure became a

foreign investors against Argentina. Needless to say these events caused Argentina the dubious distinction of breaking all records as the country with more claims filed in ICSID,⁷⁸ and potentially subject to the largest monetary awards entered against it.⁷⁹

As a result of this trend, Argentina raised two defenses in most of the cases: the applicability of non-preclusive measures clause (NPM) contained in the BIT to object to such disputes; and the state-of-necessity as a doctrine of customary international law.⁸⁰ So far only two arbitral panels have dismissed the claims on the basis of the “necessity defense.”⁸¹ In response to the cases in which the arbitral tribunals have found for the investors, Argentina has started annulment proceedings under §52 of the Convention, along with a request for stay of enforcement,⁸² which has been granted by the respective ad hoc annulment committees in virtually all cases.⁸³ If these annulment proceedings end with results similar to the

sort of general subsidy which emptied the country's foreign currency reserves. For some time a chain of loans granted by multilateral institutions (principally the International Monetary Fund) provided the hard currency needed, but the country entered into an unprecedented crisis after the IMF refused to grant a \$1.7billion loan, which was essential to serve the country's debt, and to maintain the levels of liquidity available to the banking sector stable); see DOMINGO CAVALLO, *THE FIGHT TO AVOID DEFAULT AND DEVALUATION* (2002), http://www.cavallo.com.ar/wp-content/uploads/the_fight.pdf. (When the financial institutions tumbled, Cavallo—who was brought back in 2001 to the Ministry of the Economy, on an emergency basis, after his predecessor Lopez Murphy was fired eight days after being appointed—eliminated the convertibility (drastically reducing the people's savings to a third of the original value) and imposed a restriction on withdrawals to the general public (the so-called *corralito*). This caused a sociopolitical turmoil in the country, which ended in the ousting of four Presidents in three weeks).

78. See Ali & Gramont, *supra* note 36 (approximately forty percent of all of the cases registered so far at ICSID have been against governments in the Americas. A very high number of those cases have been brought against Argentina (there are currently over thirty cases pending against Argentina at ICSID, in addition to a dozen or so cases previously filed against Argentina that have since been resolved). Most of the Argentine cases arose out of Argentina's economic crisis in 2001-2002, its resulting currency devaluation and the policies adopted by the government in response to the crisis. But even if one discounted the Argentine cases entirely, a quarter of the cases at ICSID would still be against governments in the Americas). See Paolo Di Rosa, *The Recent Wave of Arbitrations against Argentina under Bilateral Investment Treaties: Background and Principal Issues*, 36 U. MIAMI INTER-AM. L. REV. 41, 73 (2004) (the explosion of cases against Argentina in the aftermath of the 2001 financial crisis was announced by Paolo Di Rosa in 2004).

79. See William W. Burke-White, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, 3 ASIAN J. OF THE WTO & INT'L HEALTH L. AND POL'Y 199, 202 (2008).

80. *Id.* at 205.

81. *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1 (2007) (award on the merits July 25, 2008); and *Continental Casualty Co. v. Argentine Republic*, No. ARB/03/9 (2008) (award on the merits rendered Sept. 5, 2008).

82. See Harout Samra, *Five Years Later: The CMS Award Placed in the Context of the Argentine Financial Crisis and the ICSID Arbitration Boom*, 38 U. MIAMI INTER-AM. L. REV. 667, 693 (2008) (this has been called by an author in a scholarly paper on the topic as “an effort to prolong the final resolution”).

83. However, once the annulment proceedings end the stay for enforcement is lifted and, under §54 of the Convention the award becomes binding (as if it were rendered by a national court of the contracting state). In September 2008, Argentina's Attorney General, in relation to the case *Enron Corp.*, ICSID Case no. Arb/

CMS case,⁸⁴ Argentina will end up facing the question of whether to honor its ICSID obligations. The specific issue will become whether Argentine courts are willing to enforce an award against their government.⁸⁵ A negative decision seems to be detrimental to both Argentina and the ICSID system in general. But a decision from Argentina to honor the entire amount potentially owed to prevailing claimants seems financially unfeasible in the near future.

IV. CASE STUDY: BOLIVIA, ECUADOR & VENEZUELA

A. BOLIVIA'S FORMAL WITHDRAWAL FROM ICSID: THE END OF A RELATIONSHIP⁸⁶

On May 2, 2007 Bolivia formally notified the ICSID Secretariat of its formal withdrawal from the Centre and the Washington Convention.⁸⁷ This pronouncement raised a series of legal issues. At the core of the judicial discussion of Bolivia's withdrawal and its consequences, there is an underlying discussion about the reach of consent on ICSID claims. Even where the arguments may turn out to be highly scholastic, the po-

01/3, stated that an ICSID award may not be enforceable prior recognition or validation of internal courts. A month later the ad hoc annulment committee of the case deciding a motion to lift the stay, gave Argentina a sixty-day period to reconsider its position about the "extent of its obligation to pay on the final award."

84. See Samra, *supra* note 82, at 693.

85. The question of enforceability of ICSID awards has been treated in different ICSID awards, and by several commentators. For instance, §54(1) establishes that member States shall recognize and enforce ICSID awards as if they were final judgments of a court in that State of the Convention. Likewise, in *Maritime International Nominees Establishment (MINE) v. Republic of Guinea*, Case No. ARB/84/4, Ad Hoc (1990), the Committee stated that the "ICSID Convention the ICSID Convention excludes any attack on the award in the national courts." But, the reality is different when dealing with sovereign nations. If a country arbitrarily decides not to enforce an adverse award a party may not do much, provided that such country does not have assets abroad. Some authors have argue that in such cases investors will be entitle to complain before the World Bank and the International Monetary Fund, and to trigger diplomatic protections, such as requesting their home State to start a claim on their behalf before the International Court of Justice. See Edward Baldwin et al., *Limits to Enforcement of ICSID Awards*, 23 J. OF INT'L ARB. 1, 3 (2006). The unlikelihood of obtaining these remedies due to financial feasibility and political considerations has caused these authors to call a victory of an investor in such position a "pyrrhic victory." *Id.* Probably, this explains why, even after all the trouble that Argentina has caused in enforcing ICSID awards no investor has resorted yet to these types of diplomatic protections. Investors may still have a last hope that Argentina will pay, especially, since it has recently acceded to negotiate commitment letters with claimants in annulment proceedings (e.g., Vivendi case), even if Argentina has made it clear that it will not enforce an award that does not comply with internal law. See Letter Number 109/AI/08, Letter from Osvaldo Cesar Guglielmino, General Counsel of Argentina's Secretary of the Treasury, to Mr. Frutos-Peterson, ICSID Secretary General (Nov. 28, 2008) available at <http://ita.law.uvic.ca/>.

86. Autopista Concesionaria de Venez., ICSID Case No.ARB/00/5 (2003) (title taken from a World Bank press release).

87. Marco Montanes, *Bolivia's Denunciation of the ICSID Convention*, INTERNATIONAL LAW IN BRIEF, May 16, 2007, <http://www.asil.org/ilib070727.cfm#r3>.

tential implications of adopting one posture over others may result in entirely different procedural consequences.

1. *Background*

Bolivia's decision to withdraw from ICSID arose in the midst of a drastic change in the hydrocarbons sector undertaken by the Bolivian government. Joining the trend of other Latin American Nations, President Jaime Paz Zamora (who served from 1989 to 1993), implemented in Bolivia a major legal reform in order to attract FDI.⁸⁸ During Paz Zamora's presidency, the Legislature enacted the first Investment and Privatization Acts, and the country became a member of the Multilateral Investment Agency (MIGA), the overseas Private Investment Corporation (OPIC), and ICSID.⁸⁹ Also, approximately thirty percent of the country's BITs were signed during Paz Zamora's presidency.⁹⁰

In 1994 President Sánchez de Lozada (Paz Zamora's successor), who remembered well the hyper-inflation experienced in the country in the 1980s,⁹¹ privatized several state-owned companies, including five of the largest companies in the country (through the Capitalization Act of 1994).⁹² Because of Bolivia's vast reserves of non-associated natural gas, the most important of these privatizations related to the natural gas industry. The 1996 modification of the Hydrocarbons Law was essential to

88. Jorge Quiroga, Minister of Finance of Paz Zamora's government (and later President of Bolivia), Speech for the Woodrow Wilson Center for Scholars in Washington D.C., (July 15, 1992) (transcript available in the Richter Library at the University of Miami). In his speech, Jorge Quiroga said:

"the Bolivian government wants the private sector to be perfectly aligned with the productive sector—hydrocarbons, mining, and services. That is a three-stage process. The government is selling all the productive enterprises, although there are more than sixty, such as ceramic, textiles, and small airlines. Joint ventures in hydrocarbons and mining are also being undertaken because, due to constitutional restrictions, the government cannot sell them. We are also moving into services, but regulatory framework must first be developed. Federal regulatory agencies, which we do not have, are good in certain instances. *The government does not want to transform public monopolies into private monopolies overnight, as has happened in other countries in Latin America. Subsidized credit has been eliminated in Bolivia. This will allow for an increase flow of resources from the private sector. If the government sends a signal to the private investors—'This is your area, it is open to you, we will provide an Investment Law and the necessary regulatory framework, so come [to] invest'—then I think the private sector will react.*" (emphasis added)

89. See JULIUS SPATZ, *POVERTY AND INEQUALITY IN THE ERA OF STRUCTURAL REFORMS* 10 (2006).

90. United Nations Conference on Trade and Development, Country-Specific List of BITs, <http://www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1> (last visited July 7, 2010).

91. See generally, Luis Breuer, *Hyperinflation and Stabilization: The Case of Bolivia 1984-1986*, (1989) (unpublished doctoral thesis) (on file with the University of Illinois at Urbana-Champaign).

92. See SPATZ, *supra* note 89, at 11.

the privatization of the hydrocarbons industry.⁹³ Among other controversial provisions, the new law established royalties for up to eighteen percent of the gas production.⁹⁴ Simultaneously, new contracts for the exploration and exploitation of non-associated gas were negotiated and entered into by the Bolivian government and private foreign investors, by-passing the Constitutional mandate of legislative approval. For this same reason these contracts would be invalidated some years later.⁹⁵ It is important to underscore, however, that FDI bloomed in Bolivia overall during the 1990s.⁹⁶

Sánchez de Lozada's first term (1993-1997) was followed by a former dictator and retired General, Hugo Banzer (1997-2001).⁹⁷ President Banzer continued the trend of privatization and 'modernization,' and put a special emphasis on the eradication of coca plantations, until he had to resign because of a serious medical condition.⁹⁸ His Vice-President, Jorge Quiroga, took office and concluded the term a year later.⁹⁹ Sánchez de Lozada subsequently served a second term, in which he heavily raised taxes, after the adoption of an IMF program, and faced the turmoil of the so-called 'gas war.'¹⁰⁰ After fifteen days of riots President Sánchez de Lozada resigned and his Vice-President Carlos Mesa assumed office (2003-2005).¹⁰¹ In 2004 President Mesa called for a National Referendum on a new Hydrocarbons Law, which was voted in his favor.¹⁰² The new law proposed a raise in the taxes associated with production and increased the percentage of State participation in hydrocarbons activities, including the production of oil and gas.¹⁰³ It still did not receive the gen-

93. Eugenio Cerutti & Mario Mansilla, *Bolivia: The Hydrocarbons Boom and the Risk of Dutch Disease*, 4 (Int'l Monetary Fund, Working Paper No. 08/154, 2008), available at <http://www.imf.org/external/pubs/ft/wp/2008/wp08154.pdf>.

94. *Id.*

95. *Id.*

96. Julius Spatz, *FDI and Economic Growth in Developing Economies: How Relevant are Host-Economy and Industry Characteristics?*, 13 TRANSNAT'L CORPS. 52, 86 (2004).

97. Manuel E. Contreras & Maria Luisa Talavera Simoni, *The Bolivian Education Reform: Case Studies in Large-Scale Education Reform*, 2 EDUCATION REFORM AND MANAGEMENT PUBLICATION SERIES 1, 10 (2003), available at <http://www.oei.es/oeivirt/Bolivian.pdf>.

98. LARRY STORRS & NINA SERAFINO, ANDEAN REGIONAL INITIATIVE (ARI): FYI2002 ASSISTANCE FOR COLUMBIA AND NEIGHBORS, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS 1 (2001), available at <http://fpc.state.gov/documents/organization/6566.pdf>.

99. *Id.*

100. See Roberto Chacon de Albuquerque, *The Disappropriation of Foreign Companies Involved in the Exploration, Exploitation, and Commercialization of Hydrocarbons in Bolivia*, 14 L. & BUS. REV. AM. 21, 31 (in 1883, Bolivia lost its coastline to Chile in the War of the Pacific. The riots of the gas-war were a consequence of a plan to build a pipeline to pump gas to the Chilean coasts to be exported to Mexico and the United States. This turned out to be a terrible idea due to a historical rivalry with Chile).

101. Benjamin Dangel, *An Overview of Bolivia's Gas War*, UPSIDE DOWN WORLD, <http://upside-downworld.org/gaswar.htm> (last visited July 7, 2010).

102. Contreras & Simoni, *supra* note 97, at 32, 36.

103. Center for Energy Economics, *Appendix & Companion to: Chapter 16-Hydrocarbon Sector Regulation and Cross-Border Trade in the Western Hemisphere*, 2-3

eral approval of both the population and the investors.¹⁰⁴ A few days later President Mesa resigned and the Bolivia's Chief Justice, Mr. Eduardo Rodriguez, assumed office for a six month period (2005-2006) until the leftist leader Evo Morales was elected on a general election (2006-2009), and subsequently reelected (2009- present).¹⁰⁵

In his inaugural speech Morales explicitly stated "it is true that Bolivia needs partners, not owners of our natural resources . . . We'll guarantee the foreign companies the right to recover what they invested, and also the right to have some profit; but, we just want the people to benefit from these resources."¹⁰⁶ In this sense, one of the first measures taken by President Morales' government was to issue Decree 28701 nationalizing the entire hydrocarbon industry.¹⁰⁷ The following day, May 1, 2006, President Morales militarized the oil and gas fields to ensure the decree's enforcement.¹⁰⁸ Exactly one year later Bolivia formally notified the ICSID Secretariat of its withdrawal from the Washington Convention.

On January 25, 2009 President Morales' proposal of a new constitution was passed by referendum with the approval of sixty-one percent of the population.¹⁰⁹ Bolivia's new constitution has been described as pro-indigenous and reluctant to FDI.¹¹⁰ An important change that merits underscoring is the new Article 366, which states that in the hydrocarbons sector foreign companies will not be able to sue Bolivia in any foreign jurisdiction nor resort to international arbitration or diplomatic protection.¹¹¹ This provision reinforces Bolivia's reluctance to appear before

(Univ. of Tex. at Austin, Working Paper 2007), available at http://www.beg.utexas.edu/energyecon/documents/CEE_Hydrocarbon_Regulation_Appendix.pdf.

104. See ELEODORO MAYORGA & ALEJANDRO TAPIA, *THE GAS ERA* 164 (2006).

105. *Election Tracker*, GLOBAL MONITOR, <http://www.angus-reid.com/tracker/view/8124> (last visited July 7, 2010).

106. See Lindsay Sykes Pinto, *Resolving the Bolivian Gas Crisis: Lessons from Bolivia's Brush with International Arbitration*, 39 GEO. WASH. INT'L L. REV. 947, 949 (2007).

107. *Id.* at 955 (noting that "Morales deployed soldiers to Bolivia's petroleum fields on the same day the Decree was issued, drawing international attention and prompting statements of concern from Bolivia's largest investors, Brazil and Spain. Although these investors renewed and strengthened their threats to take Bolivia to international arbitration, none followed through: all ultimately signed new contracts within the timeframe specified by Decree 28701 and remain operating in Bolivia today").

108. CLARE M. RIBANDO, *BOLIVIA: POLITICAL AND ECONOMIC DEVELOPMENTS AND RELATIONS WITH THE UNITED STATES*, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, 10-11 (2007), available at <http://www.fas.org/sgp/crs/row/RL32580.pdf>.

109. Adam Kott & David Rosenblum Felson, *Chavez and Morales Force Sweeping Land Reform Measures*, LATIN AM. ON THE EDGE, May 5, 2009, <http://www.the-cuttingedge.com/index.php?article=11296&pageid=13&pagename=Analysis>.

110. See Fernando Cabrera, *Bolivian Voters Approve New Constitution as Government Continues to Nationalize Oil Assets*, INV. TREATY NEWS, Feb. 4, 2009, <http://www.investmenttreatynews.org/cms/news/archive/2009/02/04/bolivian-voters-approve-new-constitution-as-government-continues-to-nationalize-oil-assets.aspx>.

111. ADRIAN BARRENECHES & DANIEL MARIACA, *Bolivia, The International Comparative Legal Guide to: Gas Regulation* 35 (2010), available at <http://www.iclg.co.uk/khadmin/Publications/pdf/3388.pdf>.

ICSID.¹¹² But even with a constitutional provision outlawing ICSID and other foreign tribunals' jurisdiction, an ICSID panel will still be entirely independent to find jurisdiction in the case a claim arises in such forum.

2. *Bolivia Membership Status*

Given that Bolivia's withdrawal was formally communicated to the ICSID's Secretariat on May 2, 2007, in accordance with §72's six-month rule, the last day in which Bolivia was effectively considered a Contracting State of the Washington Convention was November 2, 2007.¹¹³ Therefore, it was perfectly understandable why the ICSID Secretariat registered the case *E.T.I. Euro Telecom International N.V. v. Republic of Bolivia*,¹¹⁴ on Wednesday October 31, 2007.

There are grounds to believe that by registering this case the ICSID did not take any posture on the following discussion about consent, since at that date, Bolivia was still technically a member State of the Washington Convention. The authors Tietje, Nowrot, and Wackernagel, however, believe otherwise. The ICSID Secretariat, by registering the case, found that the case was not 'manifestly outside the jurisdiction of the Centre,' in the sense established by §36(3) of the Convention.¹¹⁵ According to these authors, by taking this action the ICSID Secretariat adopted a position contrary to the potential argument that Bolivia was not subject to the Centre's jurisdiction since the date of the notification of denunciation (May 2, 2007), and not six months later, as established in §72.¹¹⁶

3. *From 'Offer to Consent' to [just] 'Consent'*

The effects of a Bolivia's denunciation of the Washington Convention raise the topic of the interplay between §25(1), §72 and, §71 of the Convention. The first two articles contain references to the consent of the parties, while the third section relates to right to denunciation. But none

112. See *id.* (article 366 provides that all foreign companies with activities in the hydrocarbons productive chain on behalf of the State will be subjected to the Sovereignty of the State, the laws, and the authorities of the State. No foreign tribunal or jurisdiction will be recognized in any event, and [these companies] may not resort to any instance of international arbitration or diplomatic channels to resolve their disputes).

113. MIQUEL SOLANES & ANDREI JOURAVLEV, REVISITING PRIVATIZATION, FOREIGN INVESTMENT, INTERNATIONAL ARBITRATION, AND WATER, RECURSOS NATURALES E INFRAESTRUCTURA 9 (2007), available at <http://www.iatp.org/tradeobservatory/library/cfm?refID=101503>.

114. See *E.T.I. Euro Telecom Int'l N.V. v. Republic of Bol.*, ICSID Case No. ARB/07/28 (2008).

115. Washington Convention, *supra* note 11, at § 36(3) (section 36(3) of the Washington Convention establishes that "The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register").

116. See CHRISTIAN TIETJE ET AL., ONCE AND FOREVER? THE LEGAL EFFECTS OF A DENUNCIATION OF ICSID 12, INSTITUTE OF ECONOMIC LAW OF THE MARTIN LUTHER UNIVERSITY HALLE-WITTENBERG SCHOOL OF LAW (2007), available at www.wirtschaftsrecht.uni-halle.de/Heft74.pdf.

of them explicitly defines what constitutes such consent. As part of the Chapter II of the Convention, regarding the jurisdiction of the Centre, §25(1) establishes that:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. *When the parties have given their consent, no party may withdraw its consent unilaterally.* (emphasis added).¹¹⁷

As part of Chapter VI of the Convention, which contains the final provisions, §72 establish that:

Notice by a Contracting State pursuant to Articles 70 or 71 *shall not affect the rights or obligations under this Convention* of that State or of any of its constituent subdivisions or agencies or of any national of that State *arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.*¹¹⁸ (emphasis added).

And, §71 of the same section establish that: “[a]ny Contracting State *may denounce* this Convention by written notice to the depositary of this Convention. The denunciation shall take effect *six months* after receipt of such notice.”¹¹⁹ Then, the critical question is whether the effects of the protection contained in §71 may be extended due to the mandate of §25(1), even after the denunciation of the Washington Convention under §72. Any analysis in this area must pay special attention to the different sources of consent, whether contractual (through an investment agreement), or non-contractual (through Investment Protection Laws, BITs, or MITs). For instance, if a BIT is found to constitute consent in the meaning of §25(1), the denunciation of the Convention as per §72, may not affect the ability of investors who are nationals of the other contracting country of the BIT, to hail the host country before the ICSID, during the existence of such consent, which is also to say “during the validity of the BIT.”

The most controversial issue here is the legal nature of the arbitration clause contained in most BITs. In this particular issue there are some differing points of view. While some scholars believe that at most a BIT contains a unilateral offer to consent to the jurisdiction of the Centre which must be “perfected” by further acceptance by the investor, others believe that a BIT pledges the consent of the country to submit to the jurisdiction of the Centre during the validity of such instrument. The potential applicability of any of these views in Bolivia is clear: the supporters of the offer to consent theory believe that no other case could be filed by or against Bolivia before the ICSID, after November 2, 2007; while the

117. Washington Convention, *supra* note 11, art. 25(1).

118. Washington Convention, *supra* note 11, art. 72.

119. Washington Convention, *supra* note 11, art. 71 (emphasis added).

detractors believe otherwise.¹²⁰

4. Offer to Consent

Professor Christoph Schreuer is of the opinion that “a provision on consent in a BIT is merely an offer by the respective States that requires acceptance by the other party . . . [which], may be accepted by a national of the other State party to the BIT.”¹²¹ In this sense, “consent is only perfected after it has been accepted by both parties. Therefore, a *unilateral offer* of consent by the host State through legislation or a treaty before a notice under Arts. 70 or 71 would not suffice.”¹²²

This line of reasoning implies that the only way an investor may sue the host state before ICSID after denunciation is by having given notice in writing of his consent as required by §25(1), and thus perfecting the consent. Under this theory, the investor must always “perform some reciprocal act to perfect consent.”¹²³ Consequently, if the country has withdrawn its unilateral offer to consent prior the perfection of such consent, the investor will no longer be able to sue before ICSID. The consequences of his position were recently reiterated by Professor Schreuer in relation to Bolivia’s case.¹²⁴ By the same token, perhaps the most cited text in this subject is a discussion between Aron Broches and various country representatives at the origins of the Washington Convention. This conversation certainly reflects the position of the founding fathers of the Convention. At some point, Broches explained that the effects of the Convention would be extended after denunciation. In contractual cases:

Mr. Broches replied that the intention of Article 73 [today’s §72] in the text submitted to the Directors was to make it clear that *if a State had consented to arbitration, for instance by entering into an arbitration clause with an investor, the subsequent denunciation of the Convention by that State would not relieve it from its obligation to go to arbitration if a dispute arouse.*¹²⁵ (emphasis added).

...

120. I am of the opinion that by registering this case the ICSID did not take any posture on the following discussion about consent, since Bolivia was still technically a member State of the Washington Convention, at that date. However, the authors of a comprehensive study on the subject (discussed below) believe otherwise.

121. See CHRISTOPH SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 7 (2001).

122. *Id.* at 1286.

123. *Id.* at 206.

124. See *Bolivia Notifies World Bank of Withdrawal from ICSID, Pursues BIT Revisions*, INVESTMENT TREATY NEWS, May 9, 2007, http://www.iisd.org/pdf/2007/itn_may9_2007.pdf (Here, Professor Schreuer goes even further by stating that “If you look closer . . . the six month notice period offers very little comfort to investors and potential litigants.”); see Sebastian Manciaux, *La Bolivie se Retire du Cirdi* (Sept. 2007), available at www.transnational-dispute-management.com (last visited on Nov. 23, 2008) (it is also important to add Professor Sebastian Manciaux of the University of Bourgogne to the list of proponents of the offer to consent theory).

125. INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, *HISTORY OF THE ICSID CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES VOL II*, 1009 (1968).

Mr. Broches replied that *if the agreement with the company included an arbitration clause and that agreement lasted for say 20 years, that State would still be bound to submit its disputes with that company under that agreement to the Centre.*¹²⁶ (emphasis added).

The conversation touched upon the subject of subsequent application of the Convention after denunciation in non-contractual and indefinite cases. Here, the participants expressly discussed the drafting of the current §72, to ensure a correct outcome in the hypothetical case of a country withdrawal from the Convention, while having BITs in force, mentioning the Centre.

Mr. Gutierrez Cano said that Article 73 [today's §72] in the new text was lacking a time limit beyond which the Convention would cease to apply. Unless such time limit was introduced States would be bound indefinitely. *He had in mind the case in which there was no agreement between the State and the foreign investor but only a general declaration on the part of the State in favor of submission of claims to the Centre and a subsequent withdrawal from the Convention by that State before any claim had been in fact submitted to the Centre. Would the Convention still compel the State to accept the jurisdiction of the Centre?*¹²⁷ (emphasis added)

By answering Mr. Gutierrez-Cano's question, Broches, who is considered the father of the Convention,¹²⁸ establishes his position on the offer to consent discussion. It is important to remark that his answer was given in the context of explaining the scope and reach of §72, which is the source of this entire discussion. He said that:

A general statement of the kind mentioned by Mr. Guiterrez-Cano [a BIT with an ICSID arbitration clause] *would not be binding on the State which had made it until it had been accepted by the investor. If the State withdraws its unilateral statement by denouncing the Convention before it has been accepted by any investor, no investor could later bring a claim before the Centre.* If, however, the unilateral offer of the State has been accepted before the denunciation of the Convention, then disputes arising between the State and the investor after the date of denunciation will still be within the jurisdiction of the Centre.¹²⁹ (emphasis added).

With these words Aron Broches noted that the consent that may be contained in BITs is a mere offer to consent, subject to acceptance by the investor. In fact, in an early scholarly article about the Centre, Broches specifically stated that:

the consent of the investor may be evidenced by an express statement to that effect made to the host State, or it may be given at the time when the investor institutes proceedings against the host State. *It must, however, be remembered that each party's consent becomes*

126. *Id.* at 1010.

127. *Id.*

128. Lowenfeld, *supra* note 48, at 123.

129. Int'l Ctr. for Settlement of Inv. Disputes, *supra* note 125, at 1010.

*irrevocable only after both parties have given it. Therefore, in the examples last mentioned [one of them refers to a BIT case], the host State could withdraw its consent as long as the investor had not equally consented.*¹³⁰ (emphasis added).

It is also important to remark that most of these discussions have been widely interpreted by the detractors of this theory in their writings. So even when the words of Mr. Broches seem to be self-explanatory, some authors (as seen below) try to find an explanation that would not invalidate the opposing theory: The strength of this offer-to-consent theory resides precisely in its historical roots, which links it to the very foundation of the Centre. Recently, a French author stated that:

[t]his viewpoint appears less than convincing as all the history of the Convention, combined with the writings of the most qualified authors, and customary international law point in the same direction: an offer to arbitrate is a proposal to do a thing. . . usually accompanied by an expected acceptance, counter-offer, return promise or act.¹³¹

In sum, if Bolivia's only source of non-contractual consent to ICSID jurisdiction were contained in its Investment Protections Law, the proponents of the offer-to-consent theory would not have much of a problem. Once the law has been abrogated, the consent would have disappeared for of everybody. The problem arises when the parties of the dispute in question try to assert jurisdiction on a BIT. Here, the proponents of this view hold that even when the BIT in question is still in effect (because it has not been denounced or it is still in effect under the term established by the survival clause) after the expiration of the six months established in §72 the country, in this case Bolivia, may no longer be hailed into ICSID.

5. [just] Consent

This theory comprises different readings to the aforementioned interplay between §25(1), §71, and §72 of the Washington Convention. First, Professor Gaillard argues that great weight should be given to the actual language of the BITs. According to this author, wherever there is consent and not an offer to consent in the BIT, ICSID would still have jurisdiction even after denunciation.¹³² Second, another study proposes the use of dynamic interpretation. The authors of this study state that:

130. Broches, *supra* note 48, at 353.

131. Julian Fourret, *Denunciation of the Washington Convention and Non-Contractual Investment Arbitration: "Manufacturing Consent" to ICSID Arbitration?*, 25 J. INT'L ARB. 80, 80 (2008). In fact, Fourret adopts a drastic position by considering that this discussion is a fake one, invented by the creativity of practitioners in the field. *Id.* at 81. To him "[. . .] it seems easy to determine the correct interpretation: consent is an exchange and not a unilateral act;" to support his findings he quotes the findings of an ICSID tribunal in the case *Salini v. Kingdom of Morocco*, ICSID ARB/00/4 (July 23, 2001) (Decision on Jurisdiction). *Id.* at 87.

132. Emmanuel Gaillard, *The Denunciation of the ICSID Convention*, 237 N.Y. L. J. 3 (2007).

[i]t seems to be more than appropriate to apply the principle of dynamic treaty interpretation also to the ICSID Convention and thereby provide an understanding of the regulatory interplay of its articles 25 and 72 in conformity with present-day conditions of consenting to ICSID arbitration that does not run contrary to the original and current object and purpose of the Convention.¹³³

Finally, two practitioners from a prestigious law firm have published an article supporting this theory through an approach linked to the international obligation to State consent.¹³⁴ This approach is based primarily on the dissenting vote of Arbitrator Francisco Orrego Vicuña in the case *Waguhi Elie Georg Siag & Clorinda Vecchi v. Egypt*,¹³⁵ and general principles of international law, specifically those related to good faith and unilateral declarations.

a. Professor Gaillard's Point of View:

E. Gaillard explains that "consent to ICSID jurisdiction does not result from a State's status as Contracting Party to the Convention but, in accordance to §25(1), requires both parties' written consent to the Centre's jurisdiction."¹³⁶ Then the explanation on consent begins by commenting on the discussion transcribed above between Aron Broches and other country representatives.¹³⁷ His posture in this particular area is simple, but very interesting:

[h]ad the drafters of the ICSID Convention intended to refer to a State's 'agreement to consent' rather than to its 'consent,' they would have so provided. As a result, a denouncing State's consent to the jurisdiction of the Centre based on an investment protection treaty depends on the terminology used in the arbitration clause contained in that treaty.¹³⁸

To clarify his position Professor Gaillard divides the types of consent contained in the different BITs as "unqualified consent," and "agreements to consent."¹³⁹ An example of the former is found in the language of §11 of the Bolivia-Germany BIT (use of the word 'shall'),¹⁴⁰ and an

133. CHRISTIAN TIETJE ET AL., *supra* note 116, at 23.

134. See generally Michael Nolan & F.G. Sourgens, *The Interplay Between State Consent to ICSID Arbitration and Denunciation of the ICSID Convention: The (Possible) Venezuela Case Study*, TRANSNAT'L DISPUTE MGMT., Sept. 2007, available at http://www.milbank.com/NR/rdonlyres/A49BAAD9-E6C3-40C8-ABC1-7DFA99B4E3FB/0/TDM_Nolan_Sourgens_Milbank.pdf.

135. *Siag v. Egypt*, ICSID ARB05/15 (Apr. 15, 2007) (Decision on Jurisdiction).

136. Emmanuel Gaillard, *Anti-Arbitration Trends in Latin America*, 237 N.Y. L. J. 2 (2008).

137. Gaillard, *supra* note 132.

138. *Id.*

139. *Id.*

140. Treaty Concerning the Promotion and Mutual Protection of Investments, Bol.-F.R.G., art. 11, ¶ 3, Mar. 23, 1987, 1706 U.N.T.S. 29497 (section 11(3) of the Bolivia-Germany BIT establishes that: "If both Contracting Parties are parties to the Convention of 18 March 1965 on the settlement of investment disputes between States and nationals of other States, any disputes between either Contracting Party and an investor, as referred to in the article, *shall be submitted*, in accordance with

example of the latter may be found in §8 of the Bolivia-United Kingdom BIT (use of the word 'may').¹⁴¹ In his opinion, "where an unqualified consent exists, as opposed to an agreement to consent, the rights and obligations attached to this consent should not be affected by the denunciation of the ICSID Convention."¹⁴²

b. Tietje, Nowrot & Wackernagel Study:

These German Professors advocate for the dynamic treaty interpretation established in the *Tyrer v. United Kingdom* case, before the European Court of Human Rights. In this case, an International Treaty was considered "a living instrument which . . . must be interpreted in the light of present-day conditions."¹⁴³ Accordingly, these Professors propose the application of this same methodology (*i.e.*, the so-called "dynamic interpretation" of treaties) to the discussion of the founding fathers of the Washington Convention, in particular, to Mr. Broches' remarks. They believe that their suggestion finds strong support in §31(3)(c) of the Vienna Convention of the Law of Treaties, which establishes the general rule of treaty interpretation and proscribes that "there shall be taken into account, together with the context: (c) any relevant rule of International law applicable in the relations between the parties."¹⁴⁴

The application of the dynamic treaty interpretation methodology to ICSID cases would drive these Professors to look at the "extraordinary number of international investment agreements that have entered into force since the adoption of the ICSID Convention, in particular more than 2,500 BITs, but also the more than 240 other international agreements that deal with economic activities and also contain investment provisions."¹⁴⁵

Aside from the socio-economic and legal developments, another element to consider in this innovative methodology is the cause of such developments. Accordingly, these authors found that "all of these agreements are at least primarily also aimed at the promotion of foreign

the rules of the laid Convention, to mediation and arbitration by the International Centre for Settlement of Investment Disputes.") (emphasis added).

141. 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, U.K.-Bol., art. 8, ¶ 2, May 24, 1988, 1640 U.N.T.S. 1990 (section 8(2) of the Bolivia-United Kingdom establishes that: "Where the dispute is referred to international arbitration, the investor and the Contracting Party concerned in the dispute *may agree to refer the dispute* either to: (a) the International Center for the Settlement of Investment Disputes[. . .]") (emphasis added).

142. Gaillard, *supra* note 132.

143. *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. 31 (1978).

144. Vienna Convention on the Law of Treaties, art. 31, ¶ 3(c), May 23, 1969, 1155 U.N.T.S. 331 (even though when The Vienna Convention on the Law of Treaties would be applicable as a primary source of law only to Contracting States, its content is nowadays widely considered part of the customary provisions of International law and applicable as established in §38(b) of the Statute of the International Court of Justice).

145. CHRISTIAN TIETJE ET AL., *supra* note 116, at 23.

investment and, in order to reach that goal, at providing private investors with additional legal safeguards.”¹⁴⁶ Thus, the principle of dynamic treaty interpretation would provide a “balanced interpretative approach of upholding the original and still current objects and purposes of the ICSID Convention by taking into account subsequent developments in the realm of international law.”¹⁴⁷ Finally, by applying this principle to the issue of consent, these authors find that “if the respective BIT provides for consent this may only be revoked by bringing to a final end the legal effects of the BIT.”¹⁴⁸ In other words, Professors Tietje, Nowrot, and Wackernagel believe that Bolivia might be taken before ICSID after November 2, 2007, as long as its BITs referring to the jurisdiction of the Centre are still in effect, which includes the duration of the survival clauses.

c. Nolan & Sourgens Approach:

As briefly mentioned above this approach takes into consideration the dissenting vote Arbitrator Francisco Orrego Vicuña in the case *Waguïh Elie Heorg Siag & Clorinda Vecchi v. Egypt*, and general principles of International law, specifically those related to good faith, and unilateral declarations. According to Orrego’s partial dissent:

[. . .]the common situation became one where the State expresses its consent in the treaty and later the investor expresses its own consent in either a separate instrument or by simply applying to the Centre for the registration of its claim. *At that point the expression of consent became decoupled and separated by a lapse of time, many times long. It has been often understood that the consent of the State was an offer, which upon acceptance by the investor became the consent to arbitration.*

This is the situation later reflected in Rule 2 of the ICSID Institution Rules which takes the “[d]ate of consent” to mean, when both parties did not act simultaneously, the date in which the second party acted, which is usually the case of the investor.

*Yet, the date in which the State expresses its consent in the treaty is not just an offer. It is much more than that and it has special legal effects, including obligations of the host State under the treaty and the prohibition to exercise diplomatic protection by the other Contracting Party. The date of expression of consent for the State is that of the entry into force of the treaty or some other instrument which embodies consent. When this consent is later matched by the consent of the foreign investor, the required conditions for submitting the dispute to arbitration are met, but the respective expressions of consent do not appear to change their dates.”*¹⁴⁹ (emphasis added).

146. *Id.*

147. *Id.* at 28.

148. *Id.* at 27.

149. Siag, *supra* note 135.

According to these authors, the core of Professor Orrego's remarks has a dichotomous foundation: even though the Washington Convention was drafted following a contractual type of consent in mind, this would not "affect the nature of international obligations incurred by the States in their ICSID consent."¹⁵⁰ Hence, in their view, the consent given by a state in their BITs would amount to international obligations of such nation. The nature of these unilateral declarations was established in the case *New Zealand v. France* (a.k.a., the Nuclear Test Case), in which the International Court of Justice highlighted the differences between a private unilateral promise and a public unilateral promise, holding that the latter constitutes an International obligation binding upon such country.¹⁵¹ In words of Nolan and Sourgens: "promises made by sovereigns are qualitatively different from those made by private individuals, as axiomatically all promises of the sovereign on the international stage are binding as a matter of international law."¹⁵²

Finally, these authors conclude their interesting theory by stating that if the consent contained in BITs is deemed as a valid International obligation of a country, this finding would be contrary to the offer-to-consent theory. Therefore, the consent of BITs would be sufficient to assert ICSID's jurisdiction, even after a country denounces the Washington Convention. In their own words:

[i]f undertakings to arbitrate investment disputes with private investors in bilateral investment treaties and national investment laws *are understood as independent international obligations*, that a state's consent to ICSID arbitration operates as more than an offer to arbitrate. *An implication is that denunciation by a state should not necessarily be viewed as immediately putting an end to the investor's ability to invoke ICSID jurisdiction for an arbitration against that state.*¹⁵³ (emphasis added).

Accordingly, under this theory, Bolivia could still be sue in ICSID by investors nationals of countries with which Bolivia maintains BITs with ICSID arbitration clauses in force.¹⁵⁴

150. Nolan, *supra* note 134, at 25-26.

151. *Nuclear Tests (N.Z. v. Fr.)*, 1974 I.C.J. 457, 472 (Dec. 20).

152. Nolan, *supra* note 134, at 28.

153. *Id.* at 31.

154. Other notable practitioners from all over the world have advocated for a similar result. For instance, Timothy G. Nelson, from Skadden, Arps, Slate, Meagher & Flom in New York, says that: "any implication that withdrawing from ICSID closes the door on expropriation cases is simply incorrect." *Bolivia Withdraws from ICSID*, LATIN LAWYER, May 2007, http://www.americasnet.net/news/Bolivia_ICSID.pdf. Similarly, Jose Rafael Bermudez, from Bermudez, Nevett, Mezquita & Lopez in Caracas, holds that "any BITs containing consent to ICSID would stand, and that the Venezuelan government would have to also denounce those treaties to fully withdraw." *Id.* Of course, after denouncing the BITs, the survival period would have to lapsed, in order to fulfill a complete exit from ICSID.

6. *A Look Into the Future, and the Availability of Potential Avenues for Investors Harmed by Bolivia*

Currently, it is impossible to predict with certainty what position is going to be adopted by ICSID Secretariat or by an ICSID Tribunal. The explanation about consent seems to be too abstract, but with significant potential consequences. On the one hand, it seems like the natural path would be to follow the offer-to-consent theory as this was advocated by the drafters of the Convention. But the other theory is supported by at least three persuasive explanations that seek to tailor any solution on a case-by-case basis, either by looking at the actual language of the BITs, or by undertaking a comprehensive dynamic interpretation.

For this reason, the safest grounds would probably be to expect that the theory of offer-to-consent is going to be applied, and hence, that Bolivia may no longer be hailed into ICSID. Despite the fact that Bolivia's move to withdraw from ICSID may potentially bring disastrous consequences to future inflows of FDI, our attention now must focus on the already existing FDI in Bolivia. Here, the logical issue that arises is whether existing foreign investors in Bolivia will be left totally unprotected in the eventual case that the government, for instance, decides to expropriate them without paying just compensation.

The answer is probably no. The vast majority of Bolivia's BITs, for example, contemplate the possibility of resorting to UNCITRAL ad hoc arbitration, an option that may be particularly appealing at this stage, especially given that Bolivia is a signatory of the New York on the Recognition and Enforcement of Foreign Arbitral Awards. Notwithstanding this, there are some BITs concerning Bolivia, like the Bolivia-Belgium BIT, which refers to ICSID,¹⁵⁵ and other avenues (such as the International Chamber of Commerce (ICC) in Paris, and the Arbitration Institute of the Stockholm Chamber of Commerce) but does not refer to UNCITRAL ad hoc arbitration.

155. Bilateral Investment Treaty (BIT), Belg.-Bol., art. 11, ¶ 3, Apr. 25, 1990 (section 11(3) of Bolivia-Belgium BIT establishes that: En cas de recours à l'arbitrage international, le différend est soumis à l'un des organismes d'arbitrage désignés ci-après, au choix de l'investisseur : le Centre international pour le Règlement des Différends relatifs aux investissements (CIRDI), créé par "la Convention pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats", ouverte à la signature à Washington, le 18 mars 1965, lorsque chaque Etat partie au présent Accord sera membre de celle-ci. Aussi longtemps que cette condition n'est pas remplie, chacune des Parties contractants consent à ce que le différend soit soumis à l'arbitrage conformément au règlement du Mécanisme supplémentaire du CIRDI; le Tribunal d'Arbitrage de la Chambre de Commerce Internationale, à Paris; l'Institut d'Arbitrage de la Chambre de Commerce de Stockholm. Si la procédure d'arbitrage est introduite à l'initiative d'une Partie contractante, celle-ci invitera par écrit l'investisseur concerné à exprimer son choix quant à l'organisme d'arbitrage qui devra être saisi du différend. Accord entre l'Union économique belgo-luxembourgeoise et le Gouvernement de la République de Bolivie concernant l'encouragement et la protection réciproques des investissements)."

The question that has been asked here is whether the famous “Most-Favored-Nation” clause (“MFNC”), which is included very often in BITs, can be used to extend the UNCITRAL ad hoc arbitration option to other cases. For instance, as seen above, investors from Belgium do not have the option to initiate an UNCITRAL ad hoc arbitration against Bolivia; however, at the same time their BIT contains the MFNC in §12, which establishes that: “for all the issues related to the treatment of investments, the investors from either Contracting party enjoy, on the territory of the other party, the most-favored-nation treatment.”¹⁵⁶

The case-law of the different arbitral tribunals in this particular issue seems to be inconsistent. In the cases *Mafezzini*,¹⁵⁷ *Siemens*,¹⁵⁸ *Gas Natural*,¹⁵⁹ and *Suez*,¹⁶⁰ different tribunals interpreted “silence or ambiguity as indicative that the MFNC included, with certain limits, procedural provisions.”¹⁶¹ On the other hand, in the cases of *Plama*,¹⁶² *Salini*,¹⁶³ and *Telenor*¹⁶⁴ different tribunals found it impossible to use the MFNC to “by-pass a limitation in the very same BIT when the parties have not chosen language in the MFN clause showing an intention to do this, as has been done in some BITs.”¹⁶⁵ Therefore, it remains unclear whether the MFNC could be used for extending jurisdiction to an ad hoc arbitral tribunal, governed by the UNCITRAL rules. But, in the rare cases where UNCITRAL arbitration is not an option, an ICC arbitration could then be an ideal venue for the investors.

156. *Id.* art. 12. (section 12 provides “Pour toutes les questions relatives au traitement des investissements, les investisseurs de chacune des Parties contractantes bénéficient, sur le territoire de l’autre Partie, du traitement de la nation la plus favorisée”).

157. *Mafezzini v. Spain*, ICSID ARB/97/7 (2000) (Decision on Jurisdiction) (the tribunal held that “if a third-party treaty contained provisions for the settlement of disputes that are more favorable to the protection of the investor’s rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most-favored-nation clause as they are fully compatible with the *ejusdem generis* principle”).

158. *Siemens A.G. v. Argentina*, ICSID ARB/02/8 (2004) (Decision on Jurisdiction).

159. *Gas Natural SDG, S.A v. Argentina*, ICSID ARB/03/10 (2005) (Decision of the Tribunal on Preliminary Questions on Jurisdiction) (The tribunal held that “[u]nless it appears clearly that the State parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution of disputes that may arise most-favored-nation provisions in BITs should be understood to be applicable to dispute settlement”).

160. *Suez v. Argentina*, ICSID ARB/03/17 (May 16, 2006) (Decision on Jurisdiction).

161. Alejandro Faya Rodriguez, *The Most-Favored-Nation Clause in International Investment Agreements*, 25 J. INT’L ARB. 95, 104 (2008).

162. *Plama Consortium Ltd v. Bulgaria*, ICSID ARB/03/04 (2005) (Decision on Jurisdiction) (the tribunal held that “an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.”).

163. *Salini Costruttori S.p.A. v. Jordan*, ICSID ARB/02/13 (2004) (Decision on Jurisdiction).

164. *Telenor Mobile Commc’n A.S. v. Hungary*, ICSID ARB/04/15 (2006) (Award).

165. *Id.* at ¶ 92

B. ECUADOR'S OIL AND GAS EXCLUSION AND
SUBSEQUENT WITHDRAWAL

1. *Background*

The adoption of free-market policies began in Ecuador in the presidency of Sixto Durán Ballén in the early 1990s.¹⁶⁶ President Durán implemented a series of free market policies in order to open the country to foreign capital.¹⁶⁷ For these means, Ecuador became part of the World Trade Organization ("WTO") in 1996,¹⁶⁸ and signed approximately twenty-five percent of its BITs during the last year of Durán's presidency.¹⁶⁹ Notwithstanding the efforts to liberalize FDI, the political instability of Ecuador grew after Durán; in fact from 1996 to 2000 Ecuador had four presidents. But, from 1992 to 1994 the levels of FDI tripled "and subsequently doubled from 1996 to 1998."¹⁷⁰ Even though unprecedented levels of inflation (more than 100 percent) accelerated the crisis in 1998, the inflows of FDI remained stable. In part, this increase happened because the "lion's share" of the FDI in the 1990s went to the oil and gas sector (more than 80 percent),¹⁷¹ and those type of investments, once completed, tend to be less volatile and last for longer periods of time.

President Mahuad aggravated the social and political turmoil in Ecuador in 1998 when he announced the decision to *dollarize* the economy by making its currency, the *Sucre*, obsolete.¹⁷² Two years later Mahuad was ousted and his Vice-President Gustavo Noboa assumed office.¹⁷³ Noboa restored some of the lost stability during his presidency when the dollarization, announced by Mahuad, was implemented and when he undertook important infrastructure projects, such as the construction of a major pipeline.¹⁷⁴ Noboa's successor, Colonel Lucio Gutiérrez assumed control of the government on January 15, 2003, but was later impeached for charges of corruption and ousted from power.¹⁷⁵ Alfredo Palacio, Gutiérrez' Vice-President, assumed office for the remaining twenty

166. *Ecuador*, ENCYCLOPEDIA BRITANNICA, available at <http://www.britannica.com/EBchecked/topic/178721/Ecuador>.

167. *Ecuador*, CIA WORLD FACTBOOK, 1996, <http://www.umsl.edu/services/govdocs/wofact96/79.htm>.

168. UNITED NATIONS CONFERENCE ON TRADE AND DEV, INVESTMENT POLICY REVIEW: ECUADOR 88 (2001), available at http://www.unctad.org/en/docs/iteipcmisc2_en.pdf.

169. *Id.* at 59.

170. *Id.* at 1.

171. *Id.* at 10.

172. See Hale E. Sheppard, *Dollarization Of Ecuador: Sound Policy Dictates U.S. Assistance To This Economic Guinea Pig Of Latin America*, 11 IND. INT'L & COMP. L. REV. 79, 86 (2000).

173. *Id.* at 88-89.

174. *Id.* at 88-93.

175. Roberto Ortiz de Zárate, *Lucio Gutiérrez Borbúa*, CONFEDERATION OF INDIGENOUS PEOPLE OF BOLIVIA, NOV. 11, 2009, http://www.cidob.org/es/documentacion/biografias_lideres_politicos/america_del_sur/ecuador/lucio_gutierrez_borbua.

months.¹⁷⁶ In the following elections in 2006, Noboa won the first round, but lost the second round to Rafael Correa, who was running on an anti-establishment platform that won him the presidency.¹⁷⁷

Correa's victory came in a particularly stressful year for Ecuador's FDI. In fact, by 2006 "Ecuador was in the final stages of negotiating a free trade agreement (FTA) with the United States, but that progress stalled with an April 2006 hydrocarbons law mandating revisions in contract terms."¹⁷⁸ In May 2006, the Palacio Administration ordered the seizure of the assets of Occidental Petroleum, who was at the time Ecuador's largest investor.¹⁷⁹ This late measure of President Palacio resulted in one of the largest claims ever filed before ICSID.¹⁸⁰

After assuming office, Correa announced his decision to halt the FTAs talks, and in October 2007 the Correa administration imposed a new tax on many foreign oil companies operating in Ecuador, ordering them to pay ninety-nine percent of their extraordinary income to the government.¹⁸¹ Probably, to avoid a wave of new claims related to oil and gas the Ecuadorian government decided to exclude its consent to arbitrate this class of claims, and more recently, decided to denounce the Washington Convention and all its BITs.¹⁸² Notwithstanding this, in the last years major oil companies have sued Ecuador before ICSID. Once any of these still pending cases reach a final decision, its eventual enforcement or non-enforcement and any potential consequences for Ecuador will ultimately test the effectiveness of the ICSID system as an ideal mechanism to protect FDI.¹⁸³

176. Roberto Ortiz de Zárate, *Alfredo Palacio González*, CONFEDERATION OF INDIGENOUS PEOPLE OF BOLIVIA, Mar. 1, 2010, http://www.cidob.org/es/documentacion/biografias_lideres_politicos/america_del_sur/ecuador/alfredo_palacio_gonzalez.

177. *See Ecuador Swears in New President*, BBC NEWS, Jan. 16, 2007, <http://news.bbc.co.uk/1/hi/world/americas/6262555.stm>.

178. *Background Note: Ecuador*, U.S. DEPT OF STATE, May 24, 2010, <http://www.state.gov/r/pa/ei/bgn/35761.htm>.

179. *Ecuador Cancels an Oil Deal with Occidental Petroleum*, N.Y. TIMES, May 17, 2006, at C12.

180. *Occidental Petroleum Corp. v. Ecuador*, ARB/06/11 (2008) (Decision on Jurisdiction) (According to an Associated Press release, Occidental Petroleum is seeking more than \$1 billion in relief. *Ecuador Has 'No Confidence' in World Bank Review*, TAIPEI TIMES, May 12, 2008, at 10. Regarding the legal nature of the claim, according to the decision on jurisdiction by the arbitral tribunal in the case Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador: "On 15 May 2006, the Minister of Energy and Mines notified OEPC of his decision to terminate the Participation Contract by declaring its *caducidad*. The Claimants filed their Request for Arbitration two days later on 17 May 2006.").

181. *Ecuador Rejects U.S. Free Trade Pact*, TRADE OBSERVATORY, Dec. 10 2006, <http://www.iatp.org/tradeobservatory/headlines.cfm?refID=96647>; *Ecuador decides to keep 99 percent of oil windfall profits*, AFP, Oct. 4 2007, http://afp.google.com/article/ALeqM5iU8Xf_ly2O3xFcBcDUrBEPVeMZXQ.

182. Memorandum from John L. Gardiner et al., Partners, Skadden, Arps, Slate, Meagher & Flom, *Ecuador Moves to Denounce and Leave* (June 17, 2009) available at http://www.martindale.com/members/Article_Atachment.aspx?od=124454&id=730598&filename=asr-730600.Ecuador.pdf.

183. Notwithstanding its withdrawal from ICSID, there are six claims against Ecuador still pending in ICSID. These are: *Corporación Quiport S.A. v. Ecuador*, ICSID

2. *Legal Analysis of Ecuador's Exclusion*

On December 4, 2007 the Republic of Ecuador formally notified to the ICSID Secretariat that it would not consent to Centre's jurisdiction in "disputes that arise in matters concerning the treatment of investment in economic activities related to the exploitation of natural resources, such as oil, gas, minerals, or others."¹⁸⁴ The basis of such notification is found in §25(4) of the Washington Convention:

Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, *notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre*. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).¹⁸⁵ (emphasis added).

In fact, these kinds of exclusions serve the purpose of limiting the scope of the Centre's jurisdiction, as was established in the case *Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic*.¹⁸⁶ In this case the tribunal reasoned that if a Contracting State wishes to exclude a particular investment from the reach of the Convention, §25(4) provides a more suitable way to do so, rather than challenging the meaning of the term 'investment' under the Convention. The tribunal reasoned that the "acceptance of the Centre's jurisdiction with respect to the rights and obligations arising out of its agreement creates a strong presumption that it considered its transaction to be an investment within the meaning of the ICSID Convention."¹⁸⁷ Furthermore, the arbitral tribunal stated that:

ARB/09/23 (construction of airport facilities); *Murphy Exploration & Prod. Co. Int'l v. Ecuador*, ICSID ARB/08/4 (regarding hydrocarbon concession; alleged breach of Ecuador-U.S. BIT); *Burlington Res., Inc. v. Ecuador*, ICSID ARB/08/5; *Perenco Ecuador Ltd v. Ecuador*, ICSID ARB/08/6 (regarding hydrocarbon concession; alleged breach of Ecuador-France BIT); *Repsol YPF Ecuador, S.A. v. Ecuador*, ICSID ARB/08/10 (regarding a contract of oil exploration); *Occidental Petroleum Corp. v. Ecuador*, ICSID ARB/06/11 (regarding hydrocarbon concession).

184. Communication No. 56354/GM from the Minister of Foreign Relations of Ecuador to ICSID's Secretary General, (Nov. 23, 2007) (providing La República de Ecuador no consentirá en someter a la jurisdicción del CIADI, las diferencias que surjan en materias relativas al tratamiento de una inversión, que se deriven de actividades económicas relativas al aprovechamiento de recursos naturales como petróleo, gas, minerales u otros. Todo instrumento contentivo de la voluntad previamente expresada por la República del Ecuador en someter esta clase de diferencias a la jurisdicción del Centro, que no se haya perfeccionado mediante el expreso y explícito consentimiento de la otra parte previa la fecha de presentación de esta notificación, es retirado por la República del Ecuador, con eficacia inmediata a partir de esta fecha).

185. Washington Convention, *supra* note 11, art. 25(4).

186. Gaillard, *supra* note 132 (citing *Ěeskoslovenska Obchodní Banka, A.S. v. Slovakia*, ICSID ARB/97/4 (1999) (Decision on Objections to Jurisdiction) (Professor E. Gaillard represented the Respondents in this case).

187. *Ěeskoslovenska Obchodní Banka, A.S. v. Slovakia*, Decision on Objections to Jurisdiction, ICSID ARB/97/4, at ¶ 66 (1999).

It is worth noting, in this connection, that a Contracting State that wishes to limit the scope of the Centre's jurisdiction can do so by making the declaration provided for in Article 25(4) of the Convention. The Slovak Republic has not made such a declaration and has, therefore, submitted itself broadly to the full scope of the subject matter jurisdiction governed by the Convention.¹⁸⁸ (emphasis added).

Applying the tribunal's reasoning to Ecuador, after the December 4, 2007 notification the country has limited the scope of the Centre's jurisdiction in disputes arising from natural resources investments, including oil & gas, mineral, and others. In other words, by limiting the scope of ICSID's jurisdiction, Ecuador may not be sued anymore in those types of cases. An interesting consideration at this point is that some of the detractors of the offer-to-consent theory in BITs do not see any problem in a country effectively excluding the Centre's jurisdiction for a particular class of claims. For instance, Professor Gaillard wrote that:

While §72 of the Convention sets forth the effect of a state's denunciation in relation to its rights and obligations under the Convention, there is no comparable provision addressing the effect of a notification pursuant to §25(4). *An investor's position is therefore more uncertain, even where the investment was made prior to the state's notification under §25(4).*¹⁸⁹ (emphasis added).

Professor Gaillard's explanation is based on the nature of the notification and not on the consent of the parties, which in turn is required by §25(1) in order to assert the jurisdiction of the Centre in a particular case. Such consent, once given may not be withdrawn.

According to Gaillard a §25(4) notification is neither an expression of consent nor a lack thereof.¹⁹⁰ But the issue that has been omitted from this reasoning is what would happen when the consent for a particular dispute arises from a BIT that is still in force and the host country has subsequently excluded that particular class of claims. If, under Professor Gaillard's approach, the country may successfully exclude a particular type of claims from the Centre's jurisdiction, but may not do it through the denunciation of the Washington Convention (in case of having BITs with unqualified consent language still in force), then it would be possible to arrive to the counter-intuitive conclusion that in many situations exclusion is a more radical move than denunciation.

A significant legal issue that may arise from the topic of exclusion is whether exclusion may be used retroactively. This was addressed in the third case ever filed in ICSID, a contractual arbitration case: *Alcoa Minerals Jamaica v. Jamaica*.¹⁹¹

In 1968, Alcoa entered into an investment contract with Jamaica for the construction of an Alumina refining plant in exchange for a series of tax

188. *Id.* at ¶ 65.

189. Gaillard, *supra* note 132.

190. *Id.*

191. *Id.*

concessions, including a 'no-further-tax' clause and long-term leases for the mining of bauxite.¹⁹² This agreement contained an ICSID arbitration clause.¹⁹³ In 1974 the Jamaican government indicated that the revenue from the mining of bauxite would be unilaterally increased, but since the parties could not reach an agreement on this issue, the government imposed a new tax on bauxite by enacting the Bauxite Act, which dramatically increased the government's revenue from the mining of bauxite.¹⁹⁴ But prior to the enactment of the Bauxite Act the Jamaican government notified the Centre, in accordance with §25(4), of the exclusion of disputes arising out from investments related to natural resources.¹⁹⁵ For this reason, when Alcoa decided to sue Jamaica before ICSID, Jamaica, relying on §25(4), did not appear before the ICSID Tribunal.¹⁹⁶ Nonetheless, the Tribunal found jurisdiction by deciding the issue of whether Jamaica's notification had the effect of withdrawing natural resources investment disputes from the scope of Jamaica's prior consent to arbitrate.¹⁹⁷

The Tribunal's ruling in *Alcoa* on the consent to arbitrate is of crucial importance today. The tribunal found that the sole agreement of the parties to stipulate an ICSID arbitration clause constituted the consent required by §25(1), which may not be unilaterally withdrawn thereafter. Section 25(4)'s notification, according to the Tribunal, only operates for the future. A decision finding otherwise, "would very largely, if not wholly, deprive the Convention of any practical value."¹⁹⁸ To celebrate this decision an author wrote that "the Alcoa Minerals result demonstrates the success of the ICSID Convention in dealing with the problem of State obligation to arbitrate, and the decision is a reassurance to the many investors presently relying upon ICSID arbitration clause."¹⁹⁹

Even though the Alcoa case involved a form of contractual consent (a *clause compromissoire*), it does reveal that a country may not step back on the issue of consent once it has acquired an irrevocable international obligation, such as the obligation that Jamaica had to appear before ICSID in cases related to its 1968 Alumina/Bauxite contract with Alcoa. The case with Ecuador is potentially structurally different. After the formal notification of the exclusion it is clear that the country may not be haled into ICSID in cases concerning new investments. But the afore-

192. W. Michael Tupman, *Case Studies in the Jurisdiction of the International Centre for Settlement of Investment Disputes*, 35 INT'L & COMP. L. Q. 813, 821 (1996).

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 822.

197. *Id.*

198. *Id.*

199. See John T. Schmidt, *Arbitration Under the Auspices of the International Centre for the Settlement of Investment Disputes (ICSID): Implications of the Decision on Jurisdiction in Alcoa Minerals Jamaica, Inc. v. Government of Jamaica*, 17 HARV. INT'L L. J. 90, 93 (1976).

mentioned issue of foreign investments done in light of BITs in effect, prior to the formal notification, remains unanswered.

In order to answer this question one should undertake an analysis of the issue of consent similar to the one performed with Bolivia's denunciation of the Washington Convention. For instance, under the theory of offer-to-consent Ecuador will no longer be bound to appear before ICSID in cases that have not been filed prior to the notification of the formal exclusion, even if the investments were made before the exclusion and under the coverage of a BIT that is still in force. Conversely, under the theory of [just] consent Ecuador could still be subject to the Centre's jurisdiction in cases related to natural resources, notwithstanding the formal notification, if the investments were made prior to such notification under the coverage of a BIT that is still in force. Notwithstanding this, some supporters of the latter agree with the former result.²⁰⁰

The jurisdictional outcome of these five cases, *Murphy*, *Burlington*, *Quirport*, *Perenco*, and *Repsol*, will be extremely important for the Ecuadorian economy, and also for the future of the ICSID in the region. If the ICSID tribunals decide to assert jurisdiction in these cases, Ecuador may be on the eve of facing potentially disastrous financial distress. On the one hand, such events could accelerate and give momentum to a move in the Latin American region against ICSID. On the other hand, these eventual decisions, as happened with the *Alcoa* case in the 1970s, may "better secure the good faith performance of investment agreements . . . [by showing] that foreign investment need not be subject to national whim."²⁰¹ Arguably, such a scenario could positively impact the fate of ICSID in the long run.

C. VENEZUELA'S INVESTMENT PROTECTION APPROACH

1. Background

The father of Venezuelan opening for FDI in the early 1990s was President Carlos Andrés Pérez, whose second term in office lasted four years.²⁰² After an impeachment on corruption charges, the Supreme Court ousted him from power in 1992.²⁰³ Pérez's presidency undertook a major reform in the country that has been called "neo-liberal." Among the most relevant aspects of such reform were: (i) a major privatization of the country's public companies, including a national airline, the national phone company, and different electricity companies; (ii) a liberalization of the interest rates, which, up until then were fixed by the Ministry of Finance; and (iii) a rise of the price of gas.

These reforms proved to be very unpopular. In fact, Pérez experienced great political turmoil during his second term in office. The first major

200. See Gaillard, *supra* note 132, at 2.

201. Schmidt, *supra* note 199, at 108.

202. H. MICHAEL TARVER, *THE RISE AND FALL OF VENEZUELAN PRESIDENT CARLOS ANDRÉS PÉREZ VOLUME 2: THE LATER YEARS 1973-2004* (2005).

203. *Id.*

hardship of Pérez's presidency took place only twenty-five days after he took the presidential oath, on February 27, 1989.²⁰⁴ An unprecedented social revolt (known as the *Caracazo*) marked the unpopularity of the free-market reforms proposed by Pérez in his presidential campaign. Years after the *Caracazo*, Pérez suffered two failed *coup-d'Etats* in February and November of 1992 respectively.²⁰⁵ A highlight of the February 4, 1992 *coup-d'Etat* was the appearance on television of Lieutenant Hugo Chávez, who was one of the heads of the defeated rebels. In a brief speech addressed to his colleagues, Chávez called for a cease-fire, personally assumed responsibility, and recognized the failure of the coup "for now."²⁰⁶

After Pérez's impeachment, the head of the Venezuelan Congress, Ramón J. Velásquez, served for the remainder of the presidential term.²⁰⁷ In 1993 elections, former President Rafael Caldera was elected for a second term in office.²⁰⁸ During Caldera's second presidency, Venezuela experienced a rapid downward economic spiral. The government's response included the continuation of several of the unpopular economic measures adopted by Pérez. Among the measures implemented in the framework of a program called *Agenda Venezuela*, were: the liberalization of the interest rates, the raise of the price of fuel, the devaluation of the currency rate, the imposition of a foreign currency exchange control regime, and the further opening of the oil sector to FDI, through the continuation of a program called the *Apertura Petrolera*.²⁰⁹

But the social, economical, and legal scenario would radically change in Venezuela after the December 1998 elections, when Chávez gained power. The arrival of a former insurrectionist to power, four years after being condemned by the incumbent President Caldera, would drastically halt the free-market measures implemented by the past governments. In fact, when President Chávez took office in February 1998, he promised a major reform of the National Constitution, and the saturation of a new

204. George Ciccariello-Maher-Counterpunch, *The Fourth World War Started in Venezuela*, VENEZUELA ANALYSIS.COM, Mar. 5, 2007, <http://venezuelanalysis.com/analysis/2253>.

205. *Id.*

206. *See id.*

207. Human Rights Foundation, International Council, <http://www.humanrightsfoundation.org/internationalcouncil.html>.

208. *Rafael Caldera: President of Venezuela 1969-74 and 1994-1999*, TIMES, Dec. 29, 2009, <http://www.timesonline.co.uk/tol/comment/obituaries/article6969744.ece>.

209. The *Apertura Petrolera* program was based on a lax interpretation given to section 5 of the Organic Law that Reserves to the State the Industry and Trade of Hydrocarbons of 1975 (a.k.a., the Nationalization law). This article provided for the joint participation of private capital along with the State, in: (i) operating agreements; (ii) strategic associations (e.g., Cerro Negro, Petrozuata, Sincor, and Hamaca upgrading projects); and (iii) association agreements. By the same token, the State had to retained control over these projects, in accordance with the same section 5 of the Nationalization Law. The program was gradually implemented in three stages or 'rounds.' The first and second rounds took place during Pérez, and Velásquez, and the last one was carried out by Caldera. *See* Decree 1404 of 1/20/76, available at <http://www.glin.gov/view.action?glinID=1501>.

economic system.²¹⁰ In 1999, a new Constitution was passed by a National Constituent Assembly, and following the passage of the new Constitution the Chávez Administration gradually implemented a major legal reform, including the enactment of a new Hydrocarbons Law in 2001.²¹¹ Such reforms gave momentum to major strikes and public manifestations of discontent, which resulted in the ousting of Chávez in April of 2002 for two days. Shortly after his return to power, Chávez became more drastic in the implementation of his programs. Finally in February 2005, President Chávez said for the first time that his programs and policies were all directed towards the "Socialism of the 21st Century."²¹²

Meanwhile, the Chávez Administration announced the strict application of the Hydrocarbons Law of 2001 through the implementation of the programs *Plena Soberanía Petrolera*²¹³ and *Siembra Petrolera*.²¹⁴ These programs involved a process of renegotiation of oil contracts with private investors and a consequent dramatic increase of the country's share in the profits. The *Apertura Petrolera* had died. Yet some of the investors resisted until the end, to the mandated process of migration from a private to a mixed corporate form, involving a majority stake in the hands of the State. These investors, ExxonMobil and ConocoPhillips, preferred to sue Venezuela before ICSID during the last trimester of 2007.²¹⁵

Whilst announcing the arrival of Socialism to Venezuela, Chávez commenced a series of expropriations and nationalizations that changed the panorama for foreign investors and FDI. The first expropriations were targeted at agricultural farms and two of the highest-profile cases were *Hato La Marqueseña*, and *Hato El Charcote*.²¹⁶ The latter belonged to the Vestey Group, from the United Kingdom, who decided to sue Venezuela before ICSID in 2006.²¹⁷ Recently, some other strategic areas that have been targeted by the government include: telecommunications, by

210. *Background Note: Venezuela*, U.S. DEPT OF STATE, Feb. 25, 2010, <http://www.state.gov/r/pa/ei/bgn/35766.htm>.

211. *Id.*

212. See Mary Pili Hernández, *¿Qué es el Socialismo del Siglo XXI?*, APPOREA, Dec. 13, 2006, <http://www.aporrea.org/ideologia/a22833.html>; see also *Venezuela: The Chávez Effect*, REVISTA: HARV. REV. LATIN AM., Fall 2008.

213. FINANCIAL AND OPERATIONAL INFORMATION, PETRÓLEOS DE VENEZUELA S.A. AND SUBSIDIARIES 30 (2007), available at <http://www.pdvsa.com/interface.sp/database/fichero/free/3271/245.pdf>.

214. See generally Rafael Ramírez, President of Petroleos de Venezuela, Presentation of PDVSA's Strategic Plans, and Plan Siembra Petrolera at Caracas Hilton Hotel (Aug. 19, 2005) available at <http://www.pdvsa.com>.

215. See *Mobil Corp. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/07/27 (2007); *ConocoPhillips Co. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/07/30 (2007).

216. *Reports on Venezuela: UNPD and ECLA Indicators, Democracia y Desarrollo Democracy and Development*, VENEZUELA TODAY, Sept. 14, 2005, http://www.venezuelatoday.org/05-09-14_in.htm.

217. See *Vestey Group Ltd v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/06/4 (2006) (some press releases have reported that the parties settled the case a month after the filing of the claim in ICSID on March 14, 2006); see *UK Farm Group Settles BIT Claim Over Venezuelan Land Seizures and Invasions*, INV. TREATY NEWS, April 11, 2006, http://www.iisd.org/pdf/2006/itn_april11_2006.pdf.

the announcement of the de-privatization of the national phone company (CANTV); electricity, by the announcement of the de-privatization of the Caracas' power company (*Electricidad de Caracas*); and cement, by the announcement of the acquisition of the four largest cement companies (Andino, Caribe-Holcim, LaVega-Lafarge, and Vencemos-Cemex). These cases have also resulted in two ICSID claims against Venezuela.²¹⁸

Notwithstanding that Venezuela has settled four of the six cases already before ICSID,²¹⁹ the only two cases that have reached to an arbitral award did not involve large amounts.²²⁰ Venezuela has taken some anti-arbitration measures directly targeted to potential claims that may arise out of the recent expropriations and nationalizations. Aside from the hostile political discourse against ICSID, the two most important anti-arbitration steps taken by the country are the denunciation of the Venezuela-Netherlands BIT²²¹ and the Supreme Tribunal's Decision number 1541 of October 17, 2008.²²² Yet the effects of these anti-arbitration measures remains to be seen in the other four cases against Venezuela currently outstanding before ICSID,²²³ and in any other potential claim that may be filed in the near future.

2. *Investment Protection Law and Decision 1541*

This decision was delivered by the Constitutional Chamber of the Venezuelan Supreme Tribunal, which is the highest court in the country, and also the only court whose decisions set binding judicial precedent (*erga omnes* effects). An interesting aspect about this decision is that it was rendered after a petition for the interpretation of §258 of the Venezuelan Constitution, filed by representatives of Venezuela's Attorney General

218. See *Brandes Inv. Partners, LP v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/08/3 (2008) (the Brandes Fund owned a minority stake in CANTV); *CEMEX Caracas Invs. B.V. and CEMEX Caracas II Invs. B.V. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/08/15 (2008).

219. Cases settled: (i) *GRAD Assocs., P.A. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/00/3 (2000); (ii) *I&I Beheer B.V. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/05/4 (2005); (iii) *Eni Dación B.V. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/07/4 (2007); and (iv) *Vestey Group*, Case No. ARB/06/4 (2006).

220. The Venezuelan cases that have been decided on the merits by an ICSID Tribunal are: *Autopista Concesionaria de Venez.*, ICSID Case No. ARB/00/5 (2001) (Decision on Jurisdiction) (in which the tribunal awarded the investors \$12 million of the over \$150 million requested); and, *Fedax NV v. Neth.*, ICSID Case No. ARB/96/3 (1998) (Award) (in which the tribunal awarded the investors with approximately \$810,000, when \$600,000 were recognized by Venezuela).

221. Gaillard, *supra* note 132, at 3 (Venezuela notified the Netherlands of the termination of the Venezuela-Netherlands BIT, to become effective on December 31, 2008; nonetheless, the BIT's survival clause would keep the instrument in force for an extra 15 year period of time).

222. See Decision 1541 of the Constitutional Chamber of the Venezuelan Supreme Tribunal, published on Oct. 17, 2008, available at <http://www.tsj.gob.ve>.

223. The Venezuelan cases still outstanding in ICSID are: (i) *Vannessa Ventures Ltd. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB(AF)/04/6 (2004); (ii) *Mobil Corp.*; (iii), *ConocoPhillips Co.*; (iv) *Brandes Inv. Partners*; and, (v) *CEMEX Caracas Invs. I & II*.

Office.²²⁴ Such constitutional mandate provides that “the law shall encourage arbitration, conciliation, mediation and any other alternative means for resolving conflicts.”²²⁵ The object of the Attorney General’s petition of interpretation was to limit the constitutional reach of §22 of the Law Concerning the Promotion and Protection of Investment (LPPI), thereby excluding any consent of the Republic to arbitration on the basis of a unilateral consent contained in this provision. Section 22 of the LPPI establishes that:

Any dispute arising between an international investor whose country of origin has in effect an agreement for promotion and protection of investments with Venezuela, or any disputes to which the provisions of the Articles of Association of the Multilateral Investment Guarantee Agency (MIGA) or the Convention for the Settlement of Investment Disputes between States and Nationals of other States (ICSID) *shall be submitted to international arbitration* under the terms provided for in the respective treaty or agreement, should it so provide, without prejudice to the possibility of using the systems of litigation provided for in the Venezuelan laws in force, when applicable.²²⁶ (emphasis added).

The motivation of the Attorney General’s petition was narrowed to concerns caused recently by disputes arising from the renegotiation of the major oil & gas projects, in other words, as a response to ExxonMobil and ConocoPhillips ICSID claims. Furthermore, the Tribunal in the ‘whereas’ section of the decision referred to the petitioners arguments and established that:

[the possibility of] hailing Venezuela into arbitral tribunals is present, *as a reaction of some companies that have felt affected by nationalists measures taken by the Government*, such as: those related to the affirmation of the absolute sovereignty over the oil (plena soberanía petrolera) *through the elimination of the Strategic Associations operating in the Orinoco’s Oil Belt and its conversion into mixed corporations*, in the form established by the Hydrocarbons Law.²²⁷ (emphasis added).

The approach adopted by the Supreme Tribunal was based on a purposive interpretation of the language of the law. The Supreme Tribunal analyzed the Investment Protections Laws of fourteen countries to conclude that the “international tendency is to establish clear dispositions [in the law] in regards to the unilateral consent of the State to the jurisdiction of an arbitral tribunal.”²²⁸ Likewise, the Supreme Tribunal relied upon the

224. Moreover, the representatives of the Attorney General who filed the petition of interpretation are closely related to the current management of PDVSA, Venezuela’s state-owned oil company.

225. Constitution of the Bolivarian Republic of Venez. art. 258.

226. Inv. Promotion and Protection Law, Code Civil [356] art 22 (Venez.).

227. El Tribunal Supremo de Justicia [Supreme Tribunal], Decision 08-0763 (Venez.) available at <http://www.tsj.gov.ve/decisiones/scon/Octubre/1541-171008-08-0763.htm>.

228. *Id.*

opinion of Professor Schreuer, who said that,

[T]he host State may offer consent to arbitration in general terms to foreign investors or to certain categories of foreign investors in its legislation. However, *not every reference to investment arbitration in national legislation amounts to consent to jurisdiction*. Therefore, the respective provisions in national laws must be studied carefully.²²⁹ (emphasis added).

Thus, the Supreme Tribunal held that the meaning of the phrase “shall be submitted to international arbitration *under the terms provided for in the respective treaty or agreement*” contained in §22 of the LPPI, “denotes . . . that the intent of the legislator relates expressly and unequivocally to the internal content of the respective treaties,”²³⁰ and not to a unilateral consent of the Republic to submit any investment dispute to arbitration. According to the Tribunal, a converse interpretation would cause the absurd result that a sole mention of the Washington Convention by the Municipal Law of a country would automatically translate into the assertion of the country’s consent, as required by §25(1) of the Convention, to submit a particular dispute to arbitration.²³¹

Moreover, in a scholarly article by Ms. Hildegard Rondon de Sanso, who is a prominent former Justice of the Venezuelan Supreme Court and a very influential figure linked to the Venezuelan Oil industry, she expressed her rejection for an interpretation of §22 LPPI as establishing unilateral consent.²³² Ms. Rondon de Sanso heavily criticized former legislator Dr. Allan Brewer Carías, who said that the words “shall be submitted to international arbitration” in §22 LPPI implies the express consent of the country to submit the controversies to international arbitration.²³³ Interesting enough, Ms. Rondon de Sanso tries to make an exegetical distinction in the norm, which also contains the phrase “as established thereunder” (“*si así éste lo establece*”).²³⁴ Ms. Rondon de Sanso found further fundamental grounds to the decision 1541 in the current legal framework of Venezuela. But Ms. Rondon de Sanso’s own opinions expressed in the media reveal political or ideological biases in her legal analysis of this area.²³⁵ For instance, another prominent and respected

229. Christoph Schreuer, *Consent to Arbitration*, Feb. 27, 2007, http://www.univie.ac.at/intlaw/wordpress/pdf/88_con_arbitr_89.pdf.

230. Decision 1541, *supra* note 222.

231. *Id.*

232. Hildegard Rondon de Sanson, *El Consentimiento del Estado para el Arbitraje en el CIADI y la Interpretación del Artículo 22 de la Ley de Inversiones de Venezuela*, ACADEMIA NACIONAL DE DERECHO Y CIENCIAS SOCIALES DE CÓRDOBA, Jan. 11, 2009, <http://www.acaderc.org.ar/doctrina/articulos/el-consentimiento-del-estado-para-el-arbitraje-en>.

233. *Id.*

234. *Id.*

235. See Hildegard Rondón de Sansón, *Ciadi, Arbitraje y Ley de Inversiones*, APORREA, FEB. 25, 2009, www.aporrea.org/actualidad/a73220.html (Ms. Rondon de Sanso stated that “[c]on el paso del tiempo, el Convenio del CIADI ha demostrado que no posee el régimen de solución de controversias que más nos favorezca, ya que nos obliga a someternos a un derecho que es la negación de los principios con-

practitioner in Venezuela opined that “[i]t is widely thought that the government’s request for interpretation of article 22 was an attempt to weaken the position of certain foreign investors currently pursuing ICSID cases against Venezuela.”²³⁶

By the same token, it is important to remark that the Supreme Tribunal found its decision to be consistent with the accepted principles of international law in this matter.²³⁷ For this reason, the Tribunal referred to the criterion developed by an ICSID tribunal in the case *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*,²³⁸ according to which “even though the consent contained in a law may not be interpreted broadly or narrowly, it can only be interpreted objectively under the principle of good faith. . . .”²³⁹ Therefore, the Supreme Tribunal distinguished the Venezuelan provision from similar provisions of other countries, such as the one discussed in *Southern Pacific*, finding this reading to be in accord with the international principle of good faith.

It is likely that the most important effect of Decision 1541 would be that if an ICSID tribunal asserts jurisdiction on the basis of the unilateral consent of the Republic as contained in §22 of the LPPI, a potential adverse award would not be enforceable within the boundaries of Venezuela. In fact, the Supreme Tribunal expressly stated that “in case that the decision of the respective organism violates the internal juridical system, such decision would be unenforceable in the Republic.”²⁴⁰

An interesting study of the issue of consent to ICSID arbitration as contained in §22 LPPI disagrees with the Supreme Tribunal’s finding.²⁴¹ The author of this study tries to reconcile a textual interpretation of the norm with the ultimate goals of the investor-State system of protection, by stating that: “[t]he fact that the law uses the term ‘shall’ and not ‘may’ could be of tremendous importance if a foreign investor were to rely on this provision to bring a case before ICSID, as it could make the allega-

tenidos en nuestro proceso hasta llegar, incluso al extremo de no priorizar la decisión de la cuestión de competencia, sino de permitir que la misma se debata conjuntamente con el fondo (que es como ponerse los zapatos antes que las medias). En síntesis, el arbitraje es para Venezuela, ir a litigar ante jueces extranjeros, con un idioma y un sistema procesal que nos son ajenos. Además, los tribunales que se ubican según los intereses de los árbitros, implican onerosísimos desplazamientos, no solo de los abogados y representantes, sino también de los expertos y los testigos. Lo anterior exige que se replantee si existe la necesidad, la conveniencia y la legitimidad de figuras como el arbitraje internacional, el CIADI y el actual régimen de protección de las inversiones extranjeras” (emphasis added).

236. *Venezuelan Court Rules on Article 22*, GLOBAL ARB. REV., Nov. 3, 2008, http://canzola.com/images/uploads/Venezuelan_court_article22.pdf.

237. *Id.*

238. Decision 1541, *supra* note 222.

239. *Id.*

240. *See id.*

241. See Thomas Pate, *The Past, Present, and Future of the Foreign Arbitration Clause in Foreign Investment Legislation: In Pursuit of The Balance* at 76, available at <http://www.desolapate.com/publicaciones/The%20Past%20Present%20and%20Future%20of%20the%20Arbitral%20Caluse%20in%20Foreign%20Investment%20Legislation,%20In%20Pursuit%20of%20The%20Balance.pdf>.

tion that the state committed itself to arbitrate.”²⁴² Nonetheless, the appreciation of this author regarding the future of this topic (as expressed in a footnote) proved to be exactly correct:

In any event, in recent years Venezuela has been involved in several significant international arbitrations that have been distasteful for the government and as a result it may be expected that Venezuela will move to reduce its exposure to international arbitral jurisdiction as, indeed, it has done with respect to the new petroleum sector joint ventures signed in early 2006.²⁴³

Another, more recent study has also been prophetic about this particular issue and the potential effects of decision 1541:

Venezuela is nonetheless very likely to seek all possible injunctions in order to avoid international arbitration. . . . *Even if a plaintiff company is able to subject Venezuela to an international arbitration tribunal's jurisdiction and subsequently win on the merits*, unless there has been a separate waiver of immunity from enforcement of any successful arbitration award, a state or state enterprise may still claim sovereign immunity from enforcement of the award.²⁴⁴ (emphasis added).

A final aspect to highlight on the Decision 1541 is its reference to the country's consent contained in BITs. In one part of the decision, the Supreme Tribunal stated that depending on the language of a particular BIT, by subscribing to it a country may be pledging its consent to further arbitrations.²⁴⁵ But in the last part of the decision the Supreme Tribunal added an ambiguous paragraph, whose interpretation would define Venezuela's future approach to ICSID:

Finally we reiterate that the sole subscription of the ICSID Convention, by one, several, or all the States linked in the subject of investments by BITs, or MITs, *does not constitute an automatic submission of the respective disputes to the procedures contained in such Convention; being essential, at all times, the existence of a written unequivocal consent to arbitrate.*²⁴⁶ (emphasis added).

The polar question that remains open with Venezuela is whether it will further accept the Centre jurisdiction and potential adverse awards in cases where consent has arisen both from the LPPI, and a BIT in effect, or whether Venezuela will adopt more radical solutions, such as a withdrawal à la Bolivia, or an exclusion and withdrawal à la Ecuador, or an annulment request attitude towards enforcement of an ICSID award à la Argentina. In spite of explosive anti-ICSID declarations by representatives of the Venezuelan government, Venezuela has not yet adopted a

242. *Id.*

243. *Id.* at 77 n. 230.

244. Brandon Marsh, *Preventing the Inevitable: The Benefits of Contractual Risks Engineering in Light of Venezuela's Recent Oil Field Nationalization*, 13 STAN. J.L. BUS. & FIN. 453, 474 (2008).

245. Decision 1541, *supra* note 222.

246. *Id.*

drastic anti-ICSID measure.²⁴⁷

In order to answer those questions an element to consider would be the interlocutory decision of the Political and Administrative Chamber of the Venezuelan Supreme Tribunal, in the case *Autopista Concesionada de Venezuela (Aucoven)*.²⁴⁸ In this case the Supreme Tribunal dismissed a motion to dismiss for lack of subject matter jurisdiction, filed by the foreign investor, on the grounds that the Nation waived its right to sue in domestic courts by including an arbitral clause in the concession agreement with the foreign investor. Indeed, by the time this decision was rendered an ICSID arbitral tribunal had already asserted jurisdiction over the case. But in *Aucoven*, the Supreme Tribunal established that the Venezuelan tribunals had to have jurisdiction to hear the case, notwithstanding the existence of a concession agreement with an arbitration clause vesting the ICSID with exclusive jurisdiction over the subject matter.²⁴⁹ This should provide indication of the willingness of Venezuelan courts to recognize the jurisdiction of an arbitral tribunal in every case.

Another element, perhaps more shocking, to consider is the political agreement on the campaign launched by the transnational corporation ExxonMobil against PDVSA, enacted by the National Assembly on February 13, 2008 and published in the Official Gazette number 38.869. Section V of such agreement of the legislature exhorted the President of the Republic to denounce the Washington Convention and withdraw from ICSID. A withdrawal from ICSID would likely cause a massive outflow of the FDI existing in Venezuela. Such measure in conjunction with the anti-capitalistic speech of the government and the recent trend of nationalizations, expropriations, and de-privatizations, may send a clear signal to the markets that the country is no longer interested in receiving or providing assurances to foreign capital.

D. CONCLUSIONS-ICSID AND LATIN AMERICA: A GRAY AND UNCERTAIN FUTURE

A few decades ago it was argued that the Washington Convention filled

247. Venezuelan Court Rules on Article 22, *supra* note 236 (according to Alberto Ravell, attorney at King & Spalding in Houston, the Venezuelan government has strategically issued a favorable judicial interpretation of §22, but without resorting to drastic measures).

248. See Decision 1753 of the Political and Administrative Chamber of the Venezuelan Supreme Tribunal, (Nov. 18, 2003) *available at* <http://www.tsj.gob.ve>.

249. This case never reached a decision on the merits because on February 10, 2004 the Republic desisted on the claim by stating that: "after the ICSID award rendered on November 23, 2003, [. . .] it would be meaningless to maintain this claim when there is no object to decide" (free translation from the Spanish text). See Press Release, Venezuelan Supreme Tribunal, Aclaratoria de la Sala Político Administrativa en caso de la autopista Caracas-La Guaira (Feb. 2, 2006), *available at* <http://www.tsj.gob.ve>. Presumably, if the ICSID award would not have favored the Nation (by awarding \$12 million out of the \$311 million requested), the Republic would not have desisted on its counter-claim before Venezuelan courts.

the lacunae left by the famous *Barcelona Traction* case.²⁵⁰ In that case, the ICJ held that a State could make a claim when investments by its nationals abroad were prejudicially affected in violation of the right of the State itself to have nationals enjoy certain standards of treatment previously agreed in a treaty or special agreement.²⁵¹ Yet, the common situation when no such treaty or special agreement existed, thereby covering the particular conflict, was that investors would be left unprotected. Here, the Washington Convention and today's system of protection, as configured by the simultaneous existence of BITs and MITs, fits perfectly to cover this hole in the laws.

But such assertion would only make sense if the countries in question are interested in seeking the ultimate goal of the investor-State system of protection: that of facilitating the flows of capital. In fact, thirty years ago, Paul Szasz pointed out that one of the reasons why Latin American Nations initially rejected the Convention was that not every country was keen to attract foreign capital.²⁵² At the time, it seemed reasonable to suspect that an anti-capitalistic government would avoid FDI.

But today we live in a different world. Even when the resurgence of the left in the governments of Latin America have given momentum to a wide variety of anti-FDI measures, in today's world, the flow of capital between countries is a reality. Investors, whether from capitalistic, anti-capitalistic, or mixed economies, seek protection for their investments abroad. This reasoning may not apply, however, in cases where public and not private funds are at stake. By mentioning the new positioning of Venezuela as a capital-exporter country in Latin America,²⁵³ we may find an explanation to some of the anti-FDI measures commented. Yet this explanation comes with a caveat: first, even when the traditional forms of FDI protections are being rejected, new forms of protections will likely appear; and second, the flow of capital will be impacted by the fluctuations of the price of oil.

The fate of ICSID and the Washington Convention is still uncertain in Latin America. It is probably too early to predict what would be the ultimate consequences of Bolivia's withdrawal, Ecuador's exclusion, and Venezuela's growing reluctance to the Centre. In fact, in a Summit of UNASUR,²⁵⁴ Venezuela fiercely promoted the creation of an alternative—maybe regional—center of investor-State dispute resolution, as an al-

250. See *Barcelona Traction, Light & Power, Co. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5); see also Charles Vuytsteke, *Foreign Investment Protection and ICSID Arbitration*, 4 GA. J. INT'L & COMP. L. 343, 345 (1974).

251. See *Summary of the Barcelona Traction, Light & Power, Co. Judgment (Second Phase)*, Int'l Court of Justice, available at <http://www.icj-cij.org/docket/files/50/5389.pdf>.

252. See Szasz, *supra* note 46.

253. See UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *TRADE AND DEVELOPMENT REPORT 29* (2008), available at http://www.unctad.org/en/docs/tdr2008_en.pdf.

254. The Union of South American Nations is a regional multilateral effort, which tries to integrate the Andean Community Pact, and MERCOSUR.

ternative to ICSID.²⁵⁵ This proposal, if accepted and adopted by Latin American countries, could jeopardize the future of ICSID, especially if Brazil agrees to join it. At such an uncertain moment, one would expect the arising of a new wave of scholarly disagreement in the issue of the viability of an ICSID withdrawal in mass. If such a time actually comes, we will find ourselves discussing the issue of consent.

Meanwhile, the ICSID will continue to play a central role in the protection of FDI in the Latin American region. The extent of such role will be measure by the jurisdictional findings of the ICSID tribunals in the cases pending against Bolivia, Ecuador, and Venezuela. "Now more than ever," as was once stated, the effectiveness of ICSID arbitration "depends upon the power of the Convention to render agreements to arbitrate mutually binding."²⁵⁶

255. See Juan Francisco Alonso, *For the TSJ, All Cases are Relevant, We do not Discriminate*, EL UNIVERSAL ONLINE, Oct. 16, 2008, http://www.eluniversal.com/2008/10/16/en_pol_esp_for-the-tsj,-all-ca_16A2073343.shtml (last visited May 16, 2010).

256. See Schmidt, *supra* note 199.